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MISSISSIPPI DIGEST

ANNOTATED

A COMPLETE DIGEST OF ALL REPORTED
MISSISSIPPI DECISIONS FROM THE EARLIEST TIMES
TO SEPTEMBER 2, 1911

COMPILED BY THE PUBLISHERS' EDITORIAL STAFF

IN FOUR VOLUMES

Volume Four

TORTS TO YEAR'S SUPPORT

TABLE OF CASES DIGESTED
CONSTITUTIONS AND STATUTES CONSTRUED

INDIANAPOLIS
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LIST OF TOPICS DIGESTED IN THIS VOLUME

Torts.
Trade-Marks and Trade-Names.
Trade Unions.
Trespass.
Trial.
Trover and Conversion.
Trusts.
Turnpikes and Toll Roads.

United States.
United States Marshals.
Use and Occupation.
Usury.

Vagrancy.
Vendor and Purchaser.
Venue.

War.
Warehousemen.
Waste.
Waters and Water Courses.
Weapons.
Weights and Measures.
Wharves.
Wills.
Witnesses.
Woods and Forests.
Work and Labor.

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TABLE OF ABBREVIATIONS

Am. Dec.	American Decisions.
Am. Rep.	American Reports
Am. St.	American State Reports.
Freem. Ch	Freeman's Chancery.
H.	Howard.
H. C.	Hutchinson's Code.
H. & H.	Howard and Hutchinson's Code.
L. R. A.	Lawyers' Reports Annotated.
L. R. A. (N. S.)	Lawyers' Reports Annotated—New Series.
M.	Mississippi.
Miss. Dec.	Mississippi Decisions.
Mor. St. Cas.	Morris State Cases.
Poind.	Poindexter's Code.
S. & M.	Smedes and Marshall.
Sm. & M. Ch.	Smedes and Marshall Chancery.
So.	Southern Reporter.
W.	Walker.

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A DIGEST

OF

ALL THE REPORTED DECISIONS OF THE COURTS OF MISSISSIPPI

VOLUME 4

TORTS.

This topic INCLUDES injuries from breach of duty or obligation not founded on contract, as affecting only the persons injured, not the public; nature and extent of liability of the wrongdoers in general; and civil remedies for such injuries.

It EXCLUDES injuries committed by particular classes of persons (see INFANTS; INSANE PERSONS; and other specific heads), partners (see PARTNERSHIP), unincorporated associations and companies (see ASSOCIATIONS), and corporations (see CORPORATIONS); liabilities of persons in particular personal relations (see HUSBAND AND WIFE; PARENT AND CHILD; MASTER AND SERVANT; and other specific heads); injuries incident to particular occupations or transactions (see PHYSICIANS AND SURGEONS; WAREHOUSEMEN; CARRIERS; and other specific heads); injuries affecting particular kinds of property or estates or interests in property (see WATERS AND WATER COURSES; ANIMALS; LANDLORD AND TENANT; EASEMENTS; and other specific heads); particular forms of injury to person or property (see ASSAULT AND BATTERY; DEATH; NEGLIGENCE; FRAUD; and other specific heads); distinction between actions on contract and actions of tort (see ACTION), and election between them (see ELECTION OF REMEDIES); particular remedies for torts (see TRESPASS; ACTION ON THE CASE; TROVER AND CONVERSION; and other specific heads); measure of damages for torts (see DAMAGES; and titles of particular injuries); and wrongful acts as public injuries (see CRIMINAL LAW; and titles of particular offenses).

See cross-references for complete list of exclusions.

Analysis.

§ 2. What law governs.
§ 10. Interference with employment or occupation, or injury to business.
§ 15. Proximate cause of injury.
§ 22. Joint and several liability.
§ 23. Actions.
§ 27. —— Evidence.

Cross-References.

See FALSE IMPRISONMENT; TROVER AND CONVERSION.
Assignment of cause of action, see ASSIGNMENTS, § 24.
By slaves, see SLAVES, § 16.
Corporate liability, see CORPORATIONS, §§ 488–493.
Dismissal as to one or more co-defendants, see DISMISSAL AND NON-SUIT, § 26.
Effect of payment after assignment, see ASSIGNMENTS, § 93.

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Enforcement of laws of sister state, see COURTS, § 1.
Enticement of tenant, see LANDLORD AND TENANT, § 19.
Firm liability, see PARTNERSHIP, § 174.
Form of action whether on contract or tort, see ACTIONS, §§ 26-28.
Garnishment of liabilities for torts, see GARNISHMENT, § 39.
Jurisdiction of justices of the peace of actions for torts, see JUSTICES OF THE PEACE, § 38.
Liability for torts during coverture, see HUSBAND AND WIFE, § 102.
Liability for tort of child, see PARENT AND CHILD, § 13.
Liability of county, see COUNTIES, § 144.
Liability of county for wrongful acts of officers, see COUNTIES, § 146.
Liability of infants, see INFANTS, § 62.
Liability of principal for torts of agent, see PRINCIPAL AND AGENT, § 159.
Liability of separate estate for torts, see HUSBAND AND WIFE, § 174.
Liability of telegraph company for acts or omissions of employes, see TELEGRAPHS AND TELEPHONES, § 48.
Limitations applicable to personal injuries, see LIMITATION OF ACTIONS, § 31.
Lunatic, see INSANE PERSONS, § 80.
Maritime, see SHIPPING, § 78.
Municipal torts, see MUNICIPAL CORPORATIONS, §§ 733-845.
Of decedent as claim against estate, see EXECUTORS AND ADMINISTRATORS, § 211.
Right of action between husband and wife, see HUSBAND AND WIFE, § 209.
Splitting cause of action, see JUDGMENT, § 591.
Tort of partner, see PARTNERSHIP, § 153.
Unauthorized and wrongful acts of brokers, see BROKERS, § 100.
Waiver, see ACTIONS, § 28.
Waiver and suit in *assumpsit*, see ASSUMPSIT, ACTION OF, § 8.

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§ 2. What law governs.

(1897). Whether or not an *ex delicto* cause of action exists upon a state of facts, is to be determined by the law of the place where the occurrence complained of took place.—Pullman Palace Car Co. v. Lawrence, 74 M. 782, 22 So. 53.

§ 10. Interference with employment or occupation, or injury to business.

(1910). Although a person has the right to refuse to have business relations with any person whomsoever, whether his refusal is the result of caprice or malice, without laying himself liable to action therefor, yet he cannot from such motives influence others to the same course for the purpose of injuring the business of such other. There was an application of this principle in a case where a party notified his employes not to trade with another on pain of dismissal.—Wesley v. Native Lumber Co., — M. —, 53 So. 346.

§ 15. Proximate cause of injury.

(1909). A tort-feasor is liable for the natural consequences that will probably result from his wrongful act.—Brame v. Light &c. Co., 95 M. 26, 48 So. 728, 21 L. R. A. (N. S.) 468n.

§ 22. Joint and several liability.

(1905). Joint tort-feasors are both jointly and severally liable and may be proceeded against either singly, jointly, or individually, or all combined.—Bailey v. Delta Electric Light &c. Co., 86 M. 634, 38 So. 354.

(1910). Where two or more owe to another a common duty, and by a common neglect of that duty such other person is injured, then there is a joint tort with joint liability.—Nelson v. Illinois Cent. R. Co., — M. —, 53 So. 619.

(1910). When the negligence of two or more persons concurs in producing a single indivisible injury, then such persons are jointly and severally liable, though there was no common duty, common design, or concert of action.—Nelson v. Illinois Cent. R. Co., — M. —, 53 So. 619.

§ 23. Actions.

(1891). The rule that where the declaration contains no specifications of the nature and kind of damages claimed, only such as naturally and proximately arise out of the act complained of can be recovered, does not apply in actions in damages for a tort.—Alabama &c. R. Co. v. Hanes, 69 M. 160, 13 So. 246.

§ 27. —— Evidence.

(1856). The institution and subsequent dismissal by the defendant of a suit to recover a slave is no evidence that his prior tortious taking of the slave was malicious.—Williams v. Newberry, 32 M. 256.

TOWNSHIPS.

Ejectment for recovery of school lands by township trustees, see EJECTMENT, § 33.

TRACKS.

Compelling accused to compare tracks as violation of rule of self-incrimination, see WITNESSES, § 299.

TRACTION ENGINES.

Use of highways by, see HIGHWAYS, § 167.

TRADE.

See HAWKERS AND PEDDLERS.
Combinations in restraint of trade, see MONOPOLIES, §§ 8-31.

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Contracts in restraint of trade, see CONTRACTS, §§ 115–117.
Contracts relating to trade in general, see CONTRACTS, § 202.
Infants carrying on trade, see INFANTS, § 54.
Married women carrying on trade, see HUSBAND AND WIFE, § 91.

TRADE-MARKS AND TRADE-NAMES.

This topic INCLUDES marks, devices, and names, and other words used in trade to identify goods or business or place of business of a particular manufacturer or dealer as distinguished from those of others; registration and regulation of such marks, &c.; and the nature and incidents of rights to exclusive use of such marks, names &c., infringement of such rights, and remedies relating thereto.

Analysis.

§ 23. Nature and property.
§ 92. Actions for infringement—Pleading.
§ 97. Permanent injunction.

§ 23. Nature and property.

(1908). There is a common law property right in a trade-mark.—Wright v. Correro, 93 M. 306, 47 So. 379.

§ 92. Actions for infringement—Pleading.

(1908). A bill by the manufacturer of a bottled drink which alleged that the bottles which he used had the name C. E. Wright Ice & Coal Co., of which he was the sole proprietor, blown in the bottles with the words "this bottle never sold;" that he retained title in the bottles in which the drinks were sold and required their return by dealers; that the defendant had obtained some of these bottles and was putting up a similar drink and selling it on the market to the injury of the plaintiff's business, and that the plaintiff had a property right in these bottles and in his trade-mark, shows that proceeding is against the defendant individually and by the plaintiff as an individual and is not open to demurrer on the ground that it does not show the character of the parties as being individuals or corporations.—Correro v. Wright, 47 So. 379, not officially reported.

§ 97. Permanent injunction.

(1908). There is a common law property right in a trade-mark, and if it is used or imitated by others, such use may be restrained by injunction.—Correro v. Wright, 47 So. 379, not officially reported.

TRADER.

Effect of business sign as relieving firm, or imposing liability, see ATTACHMENT, § 63; EXECUTION, §§ 32, 50; PARTNERSHIP, §§ 43, 162; PRINCIPAL AND AGENT, § 145; REPLEVIN, § 91; SALES, § 222.

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TRADE UNIONS.

This topic INCLUDES bodies formed by the association of workmen of the same trade or of allied trades for the purpose of regulating conditions of work and relations between employers and employes.

It EXCLUDES matters relating to such unions as societies for mutual benefit or aid only (see BENEFICIAL ASSOCIATIONS), and to associations in general (see ASSOCIATIONS); boycotts and other conspiracies (see CONSPIRACY); and restrictions of employers as to membership of employes in unions (see MASTER AND SERVANT).

Analysis.

§ 9. Actions by or against unions.

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§ 9. Actions by or against unions.

(1905). Certain labor unions ordered a strike against the complainants herein and the latter sued for an injunction, praying that the defendants be enjoined from interfering with the complainants' property, labor or business, the suit being instituted against the defendants as individuals. All the members of the unions were not joined, nor was it alleged that the defendants jointly conspired or combined to commit the trespasses and injuries complained of. Under such circumstances the chancellor was justified in dealing with each defendant as an individual and in deciding upon the merits of the case against each defendant upon the testimony relating directly to him.—Curphey v. Terrell, 39 So. 477, not officially reported.

TRADING CARS.

Licenses, see LICENSES, § 8.

TRAIN SERVICE.

Regulation by railroad commission, see RAILROADS, § 227.

TRAIN WRECKING.

See RAILROADS, § 255.

TRANSCRIPTS.

As evidence, see EVIDENCE, §§ 340–348.
Authority of Supreme Court to determine papers constituting record on appeal, see APPEAL AND ERROR, § 597.
Diminution, see APPEAL AND ERROR, § 643.
Effect of errors in making transcript on appeal, see APPEAL AND ERROR, § 640.
Effect of failure to file on time in Supreme Court, see APPEAL AND ERROR, § 626.
Filing transcript of justice's judgment in clerk's office, see JUDGMENT, § 291.
From justices' courts, see JUSTICES OF THE PEACE, § 164.
Inclusion of process, see APPEAL AND ERROR, § 517.
Justice's judgment filed in superior court, see EXECUTION, § 10.
Necessity that appellant file transcript before return day, see APPEAL AND ERROR, § 619.
Necessity that final judgment be shown, see APPEAL AND ERROR, § 494.
Of judgment, see JUDGMENT, § 768.
Of record for purposes of review, see APPEAL AND ERROR, § 597.
On appeal from justice, see JUSTICES OF THE PEACE, § 164.

TRANSFERS.

See ASSIGNMENTS.
As preferences by debtor, see BANKRUPTCY, § 158.
As security, see FRAUDULENT CONVEYANCES, § 27.
Bill of lading, see CARRIERS, § 54.
Bonds, see BONDS, § 92.
By insolvent debtor, see BANKRUPTCY, § 158.
By purchasers of property subject to vendor's lien, see VENDOR AND PURCHASER, § 262.
Conveyances, see DEEDS.
Corporate charters or franchises, see CORPORATIONS, § 375.
Easements, see EASEMENTS, § 24.
Exempt property, see HOMESTEAD, §§ 110–133.
Franchises, see FRANCHISES, § 6.
Fraudulent transfer of bankrupt, see BANKRUPTCY, § 174.
Fraudulent transfer of personal property, see FRAUDULENT CONVEYANCES, § 46.
Good will, see GOOD WILL, § 4.
Insurance policies, see INSURANCE, §§ 202–219, 727.
Judges, see JUDGES, § 2.
Liabilities for wrongful transfer of stock, see CORPORATIONS, § 134.
Meaning of term as applied to note, see BILLS AND NOTES, § 144.
Mortgaged property by mortgagor, see CHATTEL MORTGAGES, §§ 223–229.

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Municipal bonds or other securities, see MUNICIPAL CORPORATIONS, §§ 940–945.
Of estate or interest of *cestui que trust*, see TRUSTS, § 146.
Of property pending or subject to attachment, see ATTACHMENT, § 182.
Of title as between parties to sale, see SALES, §§ 197–218½.
Personal property as security, see CHATTEL MORTGAGES.
Personalty, see SALES.
Property mortgaged or equity of redemption, see MORTGAGES, §§ 272–296.
Property or rights pending garnishment, see GARNISHMENT, § 109.
Property subject to judgment lien, see JUDGMENT, § 793.
Property subject to landlord's lien, see LANDLORD AND TENANT, § 252.
Powers, see POWERS, § 20.
Property pending or subject to execution, see EXECUTION, § 115.
Real property as security, see MORTGAGES.
Registration of transfers of stock, see CORPORATIONS, § 128.
Regulation by special or local law, see STATUTES, § 82.
Requisites of transfer of stock, see CORPORATIONS, § 114.
Rights in public lands, see PUBLIC LANDS, §§ 135, 139.
Right of easement, see EASEMENTS, § 24.
Slaves, see SLAVES, § 7.
Title to goods as between parties to contract of sale, see SALES, §§ 197–218.
Usurious transfers, see USURY, § 25.

TRANSFER OF CAUSES.

Change of venue, see CRIMINAL LAW, §§ 123–135; VENUE, §§ 36–77.
Criminal causes, see CRIMINAL LAW, § 101.
From one state court to another, see COURTS, §§ 482–488.

TRANSITORY ACTIONS.

See VENUE, § 4.
By or against foreign corporations, see CORPORATIONS, § 666.

TRANSMISSION.

Messages, see TELEGRAPHS AND TELEPHONES, § 36.

TRANSPORTATION.

Animals, see CARRIERS, §§ 204–230.
Baggage of passenger, see CARRIERS, §§ 391–408.
Carriers, see CARRIERS.
Charges, see CARRIERS, § 12.
Connecting carriers, see CARRIERS.
Contracts, see CARRIERS, § 61.
Delivery of goods to carrier, see CARRIERS, §§ 39–43.
Fees for transportation of prisoners, see SHERIFFS AND CONSTABLES, § 40.
Passengers, see CARRIERS, §§ 236–415.
Seizure of goods under legal process during transportation, see CARRIERS, § 75.

TRAVELERS.

Injuries from defects or obstructions in streets, see MUNICIPAL CORPORATIONS, §§ 755–822.
Meaning of term in statute relating to carrying concealed weapons, see WEAPONS, § 11.
On highways, see HIGHWAYS, §§ 167–183.

TRAVERSE.

Answer of garnishee, see GARNISHMENT, § 158.
Nature and office, see PLEADING, § 112.
Of attachment, see ATTACHMENT, § 253.
Special traverse, see PLEADING, § 118.

TRAVELING SALESMAN.

Implied authority, see PRINCIPAL AND AGENT, § 103.

TREASURER.

Accounting by county treasurer, see COUNTIES, § 94.
Actions against, see COUNTIES, § 101.
Authority of county treasurer to employ counsel to sue defaulting tax collector, see COUNTIES, § 83.
Compensation of county treasurers, see COUNTIES, § 68.
Liability on official bond, see COUNTIES, § 96.
Salary of city treasurer, see MUNICIPAL CORPORATIONS, § 162.
Term of office, see COUNTIES, § 65.

TREATIES.

Cession of Indian lands by treaties, see INDIANS, § 11.
Dancing Rabbit Creek treaty, see INDIANS.
With Indians, see INDIANS, § 3.

TREES.

See LOGS AND LOGGING; WOODS AND FOREST.
Conversion, see TROVER AND CONVERSION.
Cutting as trespass, see TRESPASS, § 9.
Damages for cutting and removing timber, see TRESPASS, § 52.
Penalties as damages for cutting and removing, see TRESPASS, § 63; WOODS AND FORESTS, § 11.
Power of city to trim or destroy obstructing trees, see MUNICIPAL CORPORATIONS, § 682.
Rights to as between vendor and vendee, see VENDOR AND PURCHASER, § 193.

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TRESPASS.

This topic INCLUDES injuries to person, property, or rights, committed with force, not constituting or not regarded as a tort or offense of any distinct class; justification or excuse for such acts; nature and extent of liability for such injuries; actions of trespass and like actions for damages for trespasses; and criminal responsibility for malicious or wanton trespass, and prosecution and punishment thereof as a public offense.

It EXCLUDES assault and battery (see ASSAULT AND BATTERY) and false imprisonment (see FALSE IMPRISONMENT); liabilities for trespass by animals (see ANIMALS); rights, powers, and liabilities of officers in execution of process (see SHERIFFS AND CONSTABLES); distinction between action of trespass and other forms of action (see ACTION); proceedings in actions of trespass on the case (see ACTION ON THE CASE), and of forcible entry and detainer (see FORCIBLE ENTRY AND DETAINER); and offense of malicious mischief (see MALICIOUS MISCHIEF).

See cross-references for complete list of exclusions.

Analysis.

I. Acts Constituting Trespass and Liability Therefor.

§ 1. Nature and elements of trespass in general.
§ 5. Trespass to personal property.
§ 9. Trespass to real property.
§ 12. —— Entry.

II. Actions.

(A) RIGHT OF ACTION AND DEFENSES.
§ 17. Particular forms of action of trespass.
§ 20. Possession or right of possession of plaintiff.
§ 21. Conditions precedent.
§ 22. Defenses.
§ 24. —— Exercise of authority or duty.
§ 25. —— Consent or license.
§ 27. —— Title or right of possession of defendant or third person.
§ 29. Persons entitled to sue.
§ 30. Persons liable.

(B) JURISDICTION, PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.
§ 32. Jurisdiction of subject matter.
§ 35. Time to sue.
§ 36. Parties plaintiff.
§ 40. Declaration, complaint, or petition.
§ 41. Plea or answer.
§ 42. Replication or reply and subsequent pleadings.
§ 43. Issues, proof, and variance.

(C) EVIDENCE.
§ 44. Presumptions and burden of proof.
§ 45. Admissibility.
§ 46. Weight and sufficiency.

(D) DAMAGES.
§ 47. Grounds and elements of compensatory damages in general.
§ 52. Cutting and removal of timber.
§ 55. Mitigation of damages.
§ 56. Exemplary damages.
§ 58. Inadequate and excessive damages.
§ 62. Penalties as damages.

(E) TRIAL, JUDGMENT, AND REVIEW.
§ 67. Questions for jury.

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§ 68. Instructions.
§ 71. Judgment.
§ 74. Appeal and error.

III. Criminal Responsibility.

§ 76. Nature and elements of offenses in general.
§ 79. Acts constituting criminal trespass in general.
§ 80. Malicious, wilful, or wanton trespass.
§ 84. Defenses.
§ 87. Indictment.

Cross-References.

See TROVER AND CONVERSION.
Care as to trespassers, see NEGLIGENCE, § 33.
Care of carrier in transportation of trespasser, see CARRIERS, § 282.
Cutting timber as waste, see WASTE, § 6.
Cutting trees by bridge contractors, see BRIDGES, § 20.
Distinction between trespass and case, see ACTIONS, § 30.
Ejection of trespassers from trains, see CARRIERS, § 361.
Homicide in resisting trespass, see HOMICIDE, §§ 53, 124.
Injunction against cutting or removal of timber, see INJUNCTION, § 52.
Injunction against trespass, see INJUNCTIONS, §§ 19, 45.
Injuries to trespassers on railroad track, see RAILROADS, §§ 273–282.
Levy of illegal taxes as trespass, see TRESPASS, § 562.
Liability of city for trespass committed by city officer, see MUNICIPAL CORPORATIONS, § 747.
Multiplicity of suits in separate actions, see EQUITY, § 51.
Possession against trespasser to sustain ejectment, see EJECTMENT, § 8.
Survival of action after death of party, see ABATEMENT AND REVIVAL, § 55.
Removal of trespassers from trains, see RAILROADS, § 277.
Title to fixtures as between owner of land and trespasser, see FIXTURES, § 25.
Trespassers on sleeping cars, see CARRIERS, § 411.
Venue, see VENUE, § 44.
Whether conveyance of land operates as assignment of right of action for trespass, see ASSIGNMENTS, § 75.

I. ACTS CONSTITUTING TRESPASS AND LIABILITY THEREFOR.

§ 1. Nature and elements of trespass in general.

(1896). The gist of trespass is the wrongful entry. Whatever is done after the wrongful entry is but aggravation of damages.—Agnew v. Jones, 74 M. 347, 23 So. 25.

§ 5. Trespass to personal property.

(1890). Where, before condition broken, personal property incumbered by trust deed is in possession of the grantor, its seizure under execution against him is not a trespass. The trustee, having no right to possession, cannot complain.—Vasser v. Stewart, 68 M. 180, 9 So. 829.

(1890). When property so situated is seized and advertised by the sheriff, who assumes to deal with the entire interest, but afterwards abandons this purpose and sells the property, subject expressly to the superior lien of the trust deed, the trustee not having demanded possession, there is no trespass, and the trustee cannot recover for this on an indemnifying bond.—Vasser v. Stewart, 68 M. 180, 9 So. 829.

§ 9. Trespass to real property.

(1839). If a person acting under lawful authority at first, abuse it he becomes a trespasser *ab initio*.—Dickson v. Parker, 3 H. 219, 34 Am. Dec. 78.

(1853). If a party intending to trespass on public land cut trees on the land of another, he would be liable to the statutory penalty; but the rule would probably be otherwise, if intending to cut on his own land, he by mistake as to the boundary, cut trees on the land of another. In the latter case, however, he would be liable to an action of trespass for the injury done.—Perkins v. Hackleman, 26 M. 41, 59 Am. Dec. 243.

(1866). A railroad company is liable for the statutory penalty for cutting trees outside of the right of way, which they may suppose may fall on their track, if they fail to have the trees condemned according to law.—Mississippi Cent. R. Co. v. Whitehead, 41 M. 225.

(1877). Fencing is a fixture and part of the freehold, and one removing the same is liable in damages to the owner of the land.—Emrich v. Ireland, 55 M. 390.

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(1884). A landlord cannot confer upon others a right over the leased premises he could not himself exercise. Hence, a railroad company entering and constructing its road upon a leased farm on authority from the landlord, but without that of the tenant, is liable to him as trespasser.—Crowell v. New Orleans &c. R. Co., 61 M. 631.

(1884). Although the tenant tacitly permits the company to construct its road on the farm, the building by him of a fence across the works is notice that he claims the right to protect his crop in that manner, and the destruction of the fence by the company makes it liable for consequent injuries to the crop.—Crowell v. New Orleans &c. R Co., 61 M. 631.

(1884). Where the owner of land has forbidden one entering upon it, he cannot by any mere acquiescence on the part of the owner obtain a right to do so.—Currie v. Natchez &c. R. Co., 61 M. 725.

(1889). An action is not an action of trespass on land, within the meaning of Code 1880, § 1498, unless there exist the elements of force and entry necessary to constitute the common law action of trespass *quare clausum fregit*.—Archibald v. Mississippi &c. R. Co., 66 M. 424, 6 So. 238.

(1891). One in possession of land under a written lease for a term of years, who has the right by the contract to cut timber, but who, for a valuable consideration, waives this right, is liable in damages for timber afterwards cut on the land, though the waiver is by parol. The statute of frauds is no answer to the action.—Lee v. Hawks, 68 M. 669, 9 So. 828, 13 L. R. A. 633n.

(1894). Where the tenants of the owner of land inclosed it for pasture and used the same in common with the owner for pasturing cattle, a person who, under the owner's direction, enters the inclosure and drives away the cattle belonging to the latter in spite of the objections of one of the tenants, is not guilty of trespassing upon the land of another within Code 1892, § 1320.—Bowles v. State, 14 So. 261, not officially reported.

(1897). Carrying away a tree already cut or fallen is as much within Code 1892, § 4412, imposing penalties for the unlawful cutting of trees, as cutting trees.—Keystone Lumber & Imp. Co. v. McGrath, 21 So. 301, not officially reported.

(1908). A telephone company which had maintained its wires along the side of a road and had cut out the undergrowth which interfered with the wires without objection of the owner for upward of seven years prior to plaintiff's ownership, is not rendered liable to the penalties imposed by Code 1906, § 4977, by continuing thereafter to cut away such small growth as interfered with the operation of the wires.—Cumberland Tel. &c. Co. v. Martin, 93 M. 505, 46 So. 247.

§ 12. —— Entry.

(1818). The overseer of a public road, illegally established, is guilty of a trespass, if he enter on the land thus illegally appropriated to the road.—Stockett v. Nicholson, W. 75.

(1896). Every entry upon the land of another without lawful authority is a trespass, though it only be trodden and whether the land be enclosed or not and no matter whether any damage be done or not.—Agnew v. Jones, 74 M. 347, 23 So. 25.

(1896). It is a trespass to enter the land of another, without his consent, to take one's own personal property.—Agnew v. Jones, 74 M. 347, 23 So. 25.

(1896). If a man's land be not enclosed, the law encircles it with an imaginary line, to pass which is to break and enter his close. The mere act of breaking through this imaginary boundary constitutes a cause of action, as being a violation of the right of property.—Agnew v. Jones, 74 M. 347, 23 So. 25.

II. ACTIONS.

(A) RIGHT OF ACTION AND DEFENSES.

§ 17. Particular forms of action of trespass.

(1843). Where profits have been received by injuries done to real property, the owner may waive the trespass and recover for money had and received.—O'Conley v. Natchez, 1 S. & M. 31, 40 Am. Dec. 87.

(1858). Counts in debt for the statutory penalty, and trespass *quare clausum fregit* cannot be joined.—Elder v. Hilzheim, 35 M. 231.

(1858). Debt and not trespass is the proper remedy to recover penalty for cutting and carrying away trees from the land of another.—Elder v. Hilzheim, 35 M. 231.

(1876). Where trees are cut in violation of the statute, the owner may waive the penalty and sue for the value of the trees. If the defendant has converted the same into money, the owner may recover the amount as money had and received.—Mhoon v. Greenfield, 52 M. 434.

(1880). *Assumpsit* for the use and occupation, where land is held adversely, is not maintainable; trespass for *mesne* profits is the proper remedy.—Dean v. Tucker, 58 M. 487.

(1880). Even prior to the enactment of Code 1880, § 1536, abolishing forms of action, *assumpsit* would lie to recover the value of trees cut and removed from the land of the owner, where the trespasser had parted with the trees for money or other property, or had mingled them with his own property, or consumed them in use or changed their form.—Evans v. Miller, 58 M. 120, 38 Am. Rep. 313n.

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(1881). The penalty provided by Code 1871, ch. 57, for cutting trees without the consent of the owner is recoverable in an action of debt; and the owner may unite with such demand one for the value of the trees.—Miller v. Wesson, 58 M. 831.

§ 20. Possession or right of possession of plaintiff.

(1824). Possession, either actual or constructive, is necessary to enable the plaintiff to maintain trespass. Hence, the owner of a slave cannot maintain trespass for an injury done to him by another during the term for which he was hired, but the hirer may. And the owner may maintain case for the injury done to his reversion.—McFarland v. Smith, W. 172.

(1841). Possession alone, or a mere qualified right, is sufficient to enable the plaintiff to maintain trespass or trover against all, except the true owner.—Harris v. Newman, 5 H. 654.

(1858). Possession of land by the plaintiff under color of title is *prima facie* sufficient evidence of ownership to enable him to maintain an action for the statutory penalty for cutting trees thereon. In such case, if the defendant relies on want of title in the plaintiff, he must show affirmatively that it is in himself, or some third person.—Ware v. Collins, 35 M. 223, 72 Am. Dec. 122.

(1856). A purchaser of land from the United States government is entitled to the improvements thereon at the time of his purchase, and if they be subsequently removed by the person who made them, he may maintain trespass, and recover their value, although he never had actual possession of the premises.—Wellborn v. Spears, 32 M. 38.

(1877). In the absence of record title or claim of ownership, possession alone of land is not sufficient to sustain a recovery of the statutory penalty for cutting trees thereon. —McCleary v. Anthony, 54 M. 708.

(1881). Possession of land under claim of title is not sufficient to enable one to recover damages for a trespass upon it, against the one who has the title.—Finch v. Tanner, 2 Miss. Dec. 209.

(1885). In trespass *quare clausum fregit* it is not necessary that plaintiff be in possession at the time the action is begun. It is sufficient if he was in possession when the trespass was committed.—Natchez &c. R. Co. v. Currie, 62 M. 506.

(1897). The owner of land, after a reentry thereon by him, may maintain trover or trespass d. b. a. for timber cut from the land by a disseisor or his grantee during the period of the owner's dispossession.—Alliance Trust Co. v. Nettleton Hardwood Co., 74 M. 584, 21 So. 396.

(1898). To support the action of trespass, a record or paper title, or else possession under claim of ownership, must be shown.—Gathings v. Miller, 76 M. 651, 24 So. 964.

(1901). Actual possession is sufficient evidence of title to support trespass.—Darrill v. Dodds, 78 M. 912, 30 So. 4.

(1903). The cutting of trees by a solvent person in good faith possession will not be enjoined at the suit of one asserting ownership where there is no pending suit to which the relief is ancillary.—North Lumber Co. v. Gary, 83 M. 640, 36 So. 302. See also Freemans v. Ammons, 91 M. 672, 46 So. 61.

(1907). One in the actual possession of land and having the right to extract turpentine from the pine trees thereon is an owner within the meaning of Code 1906, § 4983, which authorizes the recovery of a penalty by the owner from any unauthorized person who boxes for turpentine his pine trees thereon without his consent.—Harrison Naval Stores Co. v. Johnson, 91 M. 747, 45 So. 465.

(1908). An action for the statutory penalty for cutting trees on premises may be maintained by one in possession of such premises under color of title claiming as owner.—Carpenter v. Savage, 93 M. 233, 46 So. 537.

§ 21. Conditions precedent.

(1855). In this state, a party injured by the felonious conduct of another may maintain his action for the injury previous to, and without, a conviction of the felon in a criminal proceeding.—Newell v. Cowan, 30 M. 492.

§ 22. Defenses.

(1818). The judgment of a court without jurisdiction is void, and constitutes no defense to an action of trespass.—Stockett v. Nicholson, W. 75.

(1830). A plea alleging that the premises of the plaintiff were not enclosed by a sufficient fence, is not a defense to an action of trespass, alleging that the defendant broke and entered the close of the plaintiff, and with his oxen, &c., destroyed and carried off two hundred bushels of corn.—Miles v. Myers, W. 379.

(1876). Code 1857, art. 1, p. 191, giving a penalty for cutting trees on the land of another without the consent of the owner, fixes an arbitrary value. While an action for the penalty is of strict right, and must be established with reasonable certainty, the trespasser cannot escape on the plea that he did not know that the plaintiff was owner. He must be reasonably diligent to ascertain.—Mhoon v. Greenfield, 52 M. 434.

(1883). Where the beneficiary in a trust deed takes part of the mortgaged property from one who purchased from the grantor, and is sued by such person in trespass, he

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cannot interpose his equitable right to the proceeds if there is enough other property embraced in his trust deed available without delay or inconvenience to pay his debt. The defense, being equitable, is met by the equally strong equity of the purchaser. (Hunt v. Shackelford, 55 M. 94, distinguished.)—Black v. Robinson, 61 M. 54.

(1883). Recovery of the penalty may be defeated by showing that the trees were cut, either through inadvertence or mistake, provided reasonable care was taken to avoid the mistake; but the burden of proof is upon defendant as to this. What is such care is a question of fact. Where laborers, without knowledge of the boundaries, are sent to cut timber in a forest, a portion only of which is owned by the employer, and where there are no visible boundaries and no directions are given as to what part of the land is that of the employer, it is not enough for him merely to say to his employes that they must cut only from his land.—Keirn v. Warfield, 60 M. 799.

(1884). In trespass *quare clausum fregit* proof that the plaintiff, with full knowledge of all the facts, relinquished such damages growing out of the alleged trespass, is a complete defense, but the burden of proving the disclaimer and its extent is upon the defendant.—Currie v. Natchez &c. R. Co., 61 M. 725.

(1892). The telegraph company whose laborers unlawfully cut trees on the land of another will be liable as for cutting trees, although the evidence shows that those cut were small, in no case exceeding six or eight inches in diameter; and it is error, in instructions, to allude to them as shrubs or undergrowth.—Clay v. Postal Tel. &c. Co., 70 M. 406, 11 So. 658.

(1895). A defendant is not liable for statutory damages for wilful trespass in entering on land and cutting trees thereon, when it appears that he relied on the unauthorized decision of a *de facto* appellate tribunal, not previously called in question, which, by its terms, gives sanction to his conduct.—Lusby v. Kansas City &c. R. Co., 73 M. 360, 19 So. 239, 36 L. R. A. 510n.

(1901). It is not a defense that the property subject of the trespass was fragile or of doubtful usefulness.—Catchot v. Town of Ocean Springs, 78 M. 509, 29 So. 468.

§ 24. —— Exercise of authority or duty.

(1848). Persons summoned by an officer to aid in the execution of legal process are protected in their acts in so doing, unless they exceed their authority; but such summoning is no excuse for trespasses committed before or after the execution of the process.—Payne v. Green, 10 S. & M. 507.

§ 25. —— Consent or license.

(1859). A parol license to enter is no bar to an action of trespass by the true owner, if given by one having no title.—Alexander v. Eastland, 37 M. 554.

(1860). A parol license given by the owner to a railroad company to enter upon his land and construct thereon their road, is not within the statute of frauds, and is a good defense to an action of trespass against the company for an entry on the land.—New Orleans &c. R. Co. v. Moye, 39 M. 374.

(1884). One who by parol permits a railroad to be built upon his land may revoke the license at will, provided the railroad company has not so acted upon it that such revocation would operate as a fraud upon it. —Currie v. Natchez &c. R. Co., 61 M. 725.

(1884). A parol license, if acted upon, may be invoked to defeat an action of trespass, if essential to the rights of the parties. Hence, in trespass against a railroad company because of entry upon land for a right of way, evidence is admissible to show that plaintiff verbally promised to dedicate the right of way and to sign a writing to that effect whenever requested, and it is error to exclude such evidence because the only consideration for it was that the company should locate its depot at a certain place.—Currie v. Natchez &c. R. Co., 61 M. 725.

(1887). The purchaser under execution of land of the judgment debtor may recover the same in ejectment from a railroad company occupying and using it as a right of way under a parol license from such debtor. Such license will protect against damages for the trespass, but being revocable, will not affect the purchaser's right, as owner, to recover the land.—Beck v. Louisville &c. R. Co., 65 M. 172, 3 So. 252.

(1896). A parol license is insufficient to authorize one person to cut and remove timber from the land of another.—Walton v. Lowrey, 74 M. 484, 21 So. 243.

(1896). In an action of trespass against a defendant, who under a parol agreement had cut and removed timber from the land of the plaintiff, an instruction that if the jury believes from the evidence that the plaintiff was paid for the timber cut by the defendant, they should find for the defendant, is erroneous, as is also one which directs the jury to find for the defendant if they believe from the evidence that such defendant obtained leave and license to cut the timber and paid for the same.—Walton v. Lowrey, 74 M. 484, 21 So. 243.

(1896). To instruct in an action for removing a school building erected on plaintiff's land under license that if the ancestor of plaintiff agreed to convey the land on which the house was located, and it was agreed and understood that the house should never be his property, but was to be used for school or other purposes, they must find for defendant, is error as such instruction tends to license the entering on the land

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of another and removing property in his possession but not owned by him.—Agnew v. Jones, 74 M. 347, 23 So. 25.

(1909). A verbal license by the owner of land is a good defense to an action for trespass in entering upon the land and cutting timber.—Hicks v. Mississippi Lumber Co., 95 M. 353, 48 So. 624.

§ 27. —— Title or right of possession of defendant or third person.

(1881). To an action under Code 1857, ch. 57, for the penalty for cutting trees on the land of plaintiff, it is not a good plea that defendant was in adverse possession of the land upon which the trees were cut, under color and with claim of title.—Miller v. Wesson, 58 M. 831.

(1890). In an action of trespass against a railroad company for building its road on plaintiff's land, a plea averring that the land was, before entry, condemned and compensation tendered, is bad on demurrer if it appears that notice of the proceedings was not served on the owner, but on her husband, no reason being shown for the failure to notify her. Such proceedings are void, and merely standing by while the road was being built does not estop the owner from suing in trespass.—Canton &c. R. Co. v. French, 68 M. 22, 8 So. 512.

(1890). In an action of trespass the damages cannot be reduced by showing condemnation after the road is built and payment of the compensation fixed to the owner, for in such proceedings the original trespass is not involved and cannot be considered.—Canton &c. R. Co. v. French, 68 M. 22, 8 So. 512.

§ 29. Persons entitled to sue.

(1860). The right to recover damages for a trespass to realty, committed in the lifetime of the intestate, survives to the administrator.—New Orleans &c. R. Co. v. Moye, 39 M. 374.

(1877). While, as a general rule, only the party in possession can maintain the action of trespass *quare clausum fregit*, after the disseizee regains possession, he can maintain his action against the disseizor for acts intermediate the disseizin and re-entry.—Emrich v. Ireland, 55 M. 390.

(1881). A disseizee of land cannot maintain an action for the value of trees cut and removed therefrom after he has been disseized.—Miller v. Wesson, 58 M. 831.

(1895). Where the owner, after leasing land to one person leases it to another, who at the institgation of the owner, ejects the first lessee by unlawful detainer, such lessee may recover damages from the owner for his wrongful eviction. The judgment in the action of unlawful entry and detainer, under Code 1892, § 4475, not being *res judicata*, is not a bar to such recovery.—Richardson v. Callihan, 73 M. 4, 19 So. 95.

(1907). Under Code 1906, § 1959, a certificate from the register of the land office of the location of public land vests the full legal title to the land in the person to whom the certificate is granted, his heirs and assigns, so far as to enable him to maintain an action thereon against a trespasser, and a certificate is admissible as evidence of title, saving the paramount rights of other persons.—Johnson v. Davis, 91 M. 708, 45 So. 979.

§ 30. Persons liable.

(1883). In the case of cutting poles for the erection of a telephone line along the right of way of a railroad, which work is under the direction of a superintendent who instructs the laborers explicitly not to go beyond the right of way in cutting the poles, the laborers being the mere sentient tools of the corporation, authorized by the nature of the employment to exercise no discretion as representatives of the corporation, but charged simply with the performance of the physical labor, the railroad is not liable for the statutory penalty for trees negligently or wilfully cut by them on the land of another.—Fairchild v. New Orleans &c. R. Co., 60 M. 931, 45 Am. Rep. 427.

(1884). Whether a railroad company is responsible for the wrongful act of one in taking trees from the land of another for use in constructing the road, depends on whether such person was acting as its servant or as an independent contractor engaged in his own business under the contract and pursuing his own methods in procuring material. While the mode of payment is a circumstance of much weight in the determination of this question, it is not decisive.—New Orleans &c. R. Co. v. Reese, 61 M. 581.

(1892). A telegraph company is liable, if its laborers, clearing its right of way, cut trees on adjoining land of another, although done contrary to the positive orders of the superintendent, if it resulted from the negligence of the latter in absenting himself and intrusting the work to ordinary laborers without supervision.—Clay v. Postal Tel. &c. Co., 70 M. 406, 11 So. 658.

(1894). While an employer may not be liable for the negligence of an independent contractor, if a proper person, where the act contracted to be done is itself a wrong, the employer is liable, not upon the principle of *respondeat superior*, but as a co-trespasser.—Crisler v. Ott, 72 M. 166, 16 So. 416.

(1894). One negligently failing to acquaint himself with the real boundary line of his own land, who employs another, though an independent contractor, to cut trees near the line on land which he points out as his own, but which trees turn out to be beyond the line and on the land of a third person, is a negligent co-trespasser and liable for the statutory penalty for cutting such trees.—Crisler v. Ott, 72 M. 166, 16 So. 416. See (1883) Keirn v. Warfield, 60 M. 799.

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(B) JURISDICTION, PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

§ 32. Jurisdiction of subject matter.

(1881). An action under Code 1871, ch. 57, for cutting trees may involve the question whether the plaintiff is the owner of the trees or of the land upon which they were cut, and if so it may be tried and determined in such suit.—Miller v. Wesson, 58 M. 831.

§ 35. Time to sue.

Six years is the period fixed by the statute of limitations within which to bring an action for *mesne* profits on land held adversely. —(1880) Dean v. Tucker, 58 M. 487; (1893) Lindenmyer v. Gunst, 70 M. 693, 13 So. 252, 35 Am. St. 685.

§ 36. Parties plaintiff.

(1853). An action of trespass cannot be brought for a usee, and if so brought, it will be considered as brought by the nominal plaintiff alone; and in such case the nominal plaintiff is not a competent witness against the defendant.—Brown v. Thomas, 26 M. 335.

(1900). The right of tenants in common to sue for trespass to land is joint, and the quantum of damages which one of them may recover is the quantum to which each of the others will be limited.—Haley v. Taylor, 77 M. 867, 28 So. 752.

§ 40. Declaration, complaint, or petition.

(1848). Where the declaration alleges the trespass to have been committed on a certain day, "and on divers other days" between that day and another day named, it makes the time laid descriptive of the charge, and proof is admissible of any trespass within the time alleged, but of no other.—Payne v. Green, 10 S. & M. 507.

(1876). Though, in an action for wilful damages to property, it may seem that the plaintiff's claim is ludicrously or even maliciously excessive and disproportioned to the wrong complained of, the court has no power on this ground to dismiss the suit. It does not come within the maxim *de minimis non curat lex*, and plaintiff is entitled to trial and recovery.—Henry v. Shepherd, 52 M. 125.

(1892). Where, in an action for damages, the declaration alleged that defendants, in an attempt to collect a debt, forcibly, and against her remonstrance, entered plaintiff's house while she was disrobed, and seized a certain check and demanded of her to indorse it, and took it away, to the damage of plaintiff, &c., the gravamen of the action is the taking of the check, and the other matters are merely in aggravation of damages. —Bonelli v. Bowen, 70 M. 142, 11 So. 791.

§ 41. Plea or answer.

(1859). A special plea to an action of trespass, which justifies the entry under a license from another, who is alleged to have been in the actual adverse possession of the premises at the time the trespass was committed, is bad; first, because it denies the plaintiff's possession, and therefore only amounts to the general issue; and second, it does not aver title in the person from whom the license is claimed.—Alexander v. Eastland, 37 M. 554.

§ 42. Replication or reply and subsequent pleadings.

(1898). A replication that defendant had lost his easement by nonuser, and that plaintiff had acquired it by adverse possession, is a sufficient answer to a plea setting up an easement.—Wilmot v. Yazoo &c. R. Co., 76 M. 374, 24 So. 701.

(1898). Under Code 1892, § 703, which abolishes special demurrers, a replication setting up adverse possession against an easement relied on as a defense is not subject to demurrer.—Wilmot v. Yazoo &c. R. Co., 76 M. 374, 24 So. 701.

§ 43. Issues, proof, and variance.

(1848). There were several counts in the declaration, and a general plea of not guilty filed, with an agreement that any special matter might be given in evidence, that might be pleaded. *Held*, that the plea was as broad as the declaration, and must be considered as justifying the counts separately and collectively, and each trespass in each count.—Payne v. Green, 10 S. & M. 507.

(1877). Recovery cannot be had for an act which amounts of itself to an independent trespass not counted on, though connected with one sued for.—Memphis &c. R. Co. v. Chastine, 54 M. 503.

(1897). The general issue in trespass *quare clausum fregit* does not admit the possession or right of possession.—Alliance Trust Co. v. Nettleton Hardwood Co., 74 M. 584, 21 So. 396.

(1897). The general issue in trespass *de bonis asportatis* does not admit the plaintiff's property in the case.—Alliance Trust Co. v. Nettleton Hardwood Co., 74 M. 584, 21 So. 396.

(1906). In an action for trespass on land, evidence is inadmissible as to trespasses committed after the filing of the declaration. —Gulf &c. Ry. Co. v. Hartley, 88 M. 674, 41 So. 382.

(C) EVIDENCE.

§ 44. Presumptions and burden of proof.

(1852). The plaintiff, in an action of trespass, must either prove actual possession of the land, or show his title to it.—Dejarnett v. Haynes, 23 M. 600.

§ 45. Admissibility.

(1852). Where the plaintiff introduces no evidence of title, and his proof of possession is entirely circumstantial—the land being

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unenclosed—the defendant may, to rebut the evidence of possession, introduce a tax deed to himself for the land, without showing that the tax collector had complied with the law in making the sale.—Dejarnett v. Haynes, 23 M. 600.

(1856). Evidence to show that a trespass was wanton and malicious, may be introduced in order to increase the damages.—Williams v. Newberry, 32 M. 256.

(1871). In an action by a lessee of sixteenth section land to recover damages for cutting and removing timber therefrom, it is error to exclude a bond for title made to him by the judge of the probate court containing recitals that the law had been complied with in the lease. Whether the recitals raise a presumption of the performance of antecedent conditions or not, the bond is admissible as color of title to which to refer plaintiff's possession, in virtue of which he can maintain the action unless defendant shows title in himself or a third person.—Davany v. Koon, 45 M. 71.

(1883). In trespass for cutting trees, it is error to exclude testimony of a witness that he, knowing plaintiff's land, had, in company with another witness, counted the stumps thereon, plaintiff proposing to prove by other witness that he saw defendant's employes cutting trees thereon.—Keirn v. Warfield, 60 M. 799.

(1900). On an issue as to plaintiff's title to property trespassed upon by city officials by adverse possession, an affidavit that the signers recollected that the board of supervisors granted the use of the property to plaintiff's father for life was held not admissible.—Catchot v. Ocean Springs, 78 M. 509, 29 So. 468.

(1900). Evidence of a purchase by defendant of the timber from the occupant of land, and the latter's declaration at the time of his right to sell, are admissible on the question of good faith in a suit by the owner for the statutory penalty (Code 1892, § 4412) for cutting trees.—Haley v. Taylor, 77 M. 867, 28 So. 752, 78 Am. St. 549.

(1895). In trespass by a tenant against his landlord for an unlawful eviction, evidence of the rental value of the land is admissible as an aid in the measurement of the damages.—Richardson v. Callihan, 73 M. 4, 19 So. 95.

§ 46. Weight and sufficiency.

(1901). Title to support an action to recover the statutory penalty for cutting trees from the plaintiff's wild land is not shown by evidence of a chain of title from the state to the plaintiff and the payment of taxes by him. Possession must be shown.—Darrill v. Dodds, 78 M. 912, 30 So. 4.

(1903). In a suit for the statutory penalty for cutting trees on the land of another without the owner's consent there can be no liability unless it is shown: that trees were cut on plaintiff's land; that they were cut without plaintiff's consent; that they were cut within twelve months before the beginning of the suit; that they were cut by the defendant or his agents or employes acting within the scope of their employment or by the command or consent of their principal, and that the cutting was done wilfully, or recklessly without proper precaution to prevent a trespass.—Therrell v. Ellis, 83 M. 494, 35 So. 826.

(D) DAMAGES.

§ 47. Grounds and elements of compensatory damages in general.

(1883). In trespass for cutting trees, if there is a count for the actual value of the trees taken, plaintiff, on proving the trespass, is at least entitled to nominal damages, though no actual value is proved.—Keirn v. Warfield, 60 M. 799.

§ 52. Cutting and removal of timber.

(1880). Where one forbids an adjoining owner from cutting trees on his land and points out the supposed boundary, and the other party cuts trees, not going beyond the line pointed out, but afterwards, on a survey, it is found that he has gone beyond the true boundary, he is liable for the actual value of the trees so cut upon the land of the other, but the amount will be ascertained upon the basis most favorable to him, he being led into the mistake partly by the action of the plaintiff in pointing out the supposed line.—Evans v. Miller, 58 M. 120, 38 Am. Rep. 313n.

(1897). The amount of damages for cutting trees where the same have been severed from the land in good faith is the value of the logs where they have been put, less the cost and labor of hauling them there.—Bond v. Griffin, 74 M. 599, 22 So. 187.

§ 55. Mitigation of damages.

(1885). In trespass against a railroad company for having unlawfully entered upon plaintiff's land and constructed its railroad, the defendant cannot, in reduction of damages, show enhancement of the value of plaintiff's adjacent lands, caused by the construction of its road.—Natchez &c. R. Co. v. Currie, 62 M. 506.

§ 56. Exemplary damages.

See DAMAGES, §§ 87-94.

(1856). Damages in an action of trespass may be increased by proof that the trespass was done with malice.—Williams v. Newberry, 32 M. 256.

(1875). In trespass where wilfulness, fraud, malice, or oppression characterizes the wrongful act complained of, the jury is not limited to the mere value of the property or interest involved, but may consider the circumstances of aggravation and award punitive damages.—Storm v. Green, 51 M. 103.

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(1886). Whether or not punitive damages may be awarded where there is only nominal injury, it cannot be said that one in the orderly and lawful prosecution of his business suffers only nominal injury by the unwarranted and illegal seizure and detention of his property by another so as to interrupt the course of his business. And if, in such case, the seizure and detention are wilful or wanton, punitive damages are recoverable. —Robinson v. Goings, 63 M. 500.

(1897). Where plaintiff's timber land was unenclosed and unoccupied and surrounded on three sides by the timber land of defendant from which timber was being cut and removed, the fact that the defendant hauled across plaintiff's land, thereby filling it with ruts and ravines and destroying the timber, brush, and undergrowth, did not render him liable for exemplary damages.—Keystone Lumber &c. Co., v. McGrath, 21 So. 301, not officially reported.

(1900). The owner of a city lot may recover punitive damages from a telephone company for the needless mutilation of shade trees in front of his lot.—Cumberland Tel. &c. Co. v. Cassedy, 78 M. 666, 29 So. 762.

(1902). The act of a party having no interest in a building, but claiming an undivided interest in the same, in tearing it down and removing it to his own premises, amounts to a trespass of a character so aggravated as to justify the award of exemplary damages.—Avera v. Williams, 81 M. 714, 33 So. 501.

§ 58. Inadequate and excessive damages.

(1900). On the trial of an action for trespass for cutting out not more than eight feet from the tops of two ornamental shade trees by the defendant company because such tops were in the way of its telephone line, a verdict for §750, the actual damages being small, is excessive and the judgment will be reversed unless the excess over $500 be remitted.—Cumberland Tel. &c. Co. v. Cassedy, 78 M. 666, 29 So. 762.

§ 62. Penalties as damages.

(1877). The statutory penalty for cutting trees is recoverable only in case of wilful trespass or of inexcusable neglect to take proper precautions for avoiding the trespass. Where, for the purpose of showing the wilfulness, a witness for the plaintiff testifies that he informed the defendant of the location of plaintiff's land beforehand, it may be shown by the same witness that the defendant at the same time instructed his choppers not to cut on such land.—McCleary v. Anthony, 54 M. 708.

(1887). The defendant in an action against him for the value of trees cut on the land of the plaintiff, pleaded that he was at the time of cutting the trees in actual, peaceable possession of the land under a *bona fide* claim of title and that he had used the trees in improving and fencing the land on which they were grown. It was established that the defendant had purchased land adjoining the plaintiff's and that the land from which he cut the trees was included in his deed, and when he found he had no title to the latter portion, he quit the same. Under these circumstances, while a demurrer to the defendant's plea should have been sustained, the plaintiff could not recover the statutory penalty for the trespass, but only nominal damages therefor.—Clark v. Hart, 3 So. 33, not officially reported.

(1899). Where the defendant had felled timber growing on the plaintiff's land without his permission, it was not error to submit to the jury the question of the defendant's liability for the statutory penalty.—Cumberland Tel. &c. Co. v. Odeneal, 26 So. 966, not officially reported.

(1900). Where several tenants in common sued to recover the statutory penalty for cutting trees on their property and one of the plaintiffs testified that he wished only for a fair and just sum as damages and two of the plaintiffs had apparently acquiesced in the cutting, there was evidence to justify the jury in not affixing the full statutory penalty.—Haley v. Taylor, 77 M. 867, 28 So. 752, 78 Am. St. 549.

(1901). An owner of lands who has accepted pay for the timber cut at its market value cannot afterwards repudiate the settlement and sue for the statutory penalty.—Darrill v. Dodds, 78 M. 912, 30 So. 4.

(1906). A defendant was not liable for the penalty imposed by Rev. Code 1892, § 4412, for cutting down trees of another, where the trees were cut by an employe in the good faith belief that they were on his employer's land.—Smith v. Saucier, 40 So. 328, not officially reported.

(E) TRIAL JUDGMENT, AND REVIEW.

§ 67. Questions for jury.

(1900). In an action to recover the statutory penalty for cutting trees from plaintiff's land, the question as to whether or not defendant acted in good faith in purchasing such timber from the occupant of the land, who represented that he had authority to sell the trees, is for the jury.—Haley v. Taylor, 77 M. 867, 28 So. 752, 78 Am. St. 549.

§ 68. Instructions.

(1848). Where the declaration contained five counts on five distinct acts of trespass, each count, however, alleging the trespass in it to have been committed on a day named, and on divers other days between that day and another day (which days were the same in all the counts), and the proof showed that the defendants were summoned to aid in the execution of legal process, and that several trespasses were committed within the time laid, some when the officer was present, and the defendants aiding him, and some before the officer was present, it was held that the following instruction asked

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for by defendants, viz.: "that if the jury believe they were acting in aid of an officer, and did not exceed their authority, they were justified," was proper and pertinent, and should have been given, since they had the right to justify a part of the trespasses, if they could not justify all—the proof showing a justification when the officer was present.—Payne v. Green, 10 S. & M. 507.

(1883). One is liable for the penalty provided by Code 1880, § 961, for cutting trees if he commits the trespass either recklessly or carelessly. It is error to instruct that it is necessary to prove that the cutting was "wilfully, intentionally and knowingly" done. —Keirn v. Warfield, 60 M. 799.

(1908). An instruction for the defendant in a suit for the statutory penalty for cutting trees, stating that the burden of proof was on the plaintiff to show that the defendant cut the trees on the plaintiff's land wilfully, or with culpable negligence in failing to ascertain the boundaries of the respective tracts, is not inconsistent with an instruction for plaintiff to the effect that the burden of proof was on the defendant to show that he cut the trees by mistake, while in observance of reasonable care to prevent a trespass. In such a case the plaintiff must show by a preponderance of the whole evidence that the cutting was done without proper precaution.—Rector v. Shippey, 93 M. 254, 46 So. 408.

§ 71. Judgment.

(1880). In an action for the recovery of *mesne* profits where land is held adversely, plaintiff's recovery extends to the time of the trial.—Dean v. Tucker, 58 M. 487.

§ 74. Appeal and error.

(1877). In a suit for the statutory penalty for cutting trees, a bill of particulars filed in the justice court, may, on appeal by the plaintiff to the circuit court, be amended under Code 1871, § 621, by adding other trees. (Whether the sureties on the bond of a defendant who appeals could object to such an amendment not involved.)—McCleary v. Anthony, 54 M. 708.

(1897). Where exemplary damages for the cutting of trees have been erroneously awarded and the amount of such damages cannot be separated from the entire amount of the judgment, such judgment will on appeal be reversed.—Keystone Lumber &c. Co. v. McGrath, 21 So. 301, not officially reported.

(1906). In an action for trespass on land there was prejudicial error in allowing the plaintiff over objection to testify as to deterioration in the value of the land from trespasses committed after the filing of the declaration.—Gulf &c. Ry. Co. v. Hartley, 88 M. 674, 41 So. 382.

III. CRIMINAL RESPONSIBILITY.

§ 76. Nature and elements of offenses in general.

(1887). Code 1880, § 2980, which makes it a criminal offense to go on the inclosed land of another without his consent, after notification not to do so, is intended to protect persons in actual possession of inclosed land, whether they have title or not, and on the trial of one indicted thereunder neither the title nor the rightfulness of the possession can be inquired into.—Knight v. State, 64 M. 802, 2 So. 252.

(1903). A conviction may be had under Code 1892, § 1315, making it a crime for any person to commit a wilful and malicious trespass on the property of another "for which no other penalty is prescribed," although the trespass was the direct consequence of the defendant's violation of Code 1892, § 3902, making it a misdemeanor for the driver of the vehicle upon a highway not to turn to the right when met by another vehicle.—Porter v. State, 83 M. 23, 35 So. 218.

§ 79. Acts constituting criminal trespass in general.

(1903). Accused was properly convicted of a malicious trespass under Code 1892, § 1315, for running into and injuring the horse of the prosecuting witness where the evidence of his wantonness in running his horse from one side of the road to the other, without regard to the rights of others, was clearly established.—Porter v. State, 83 M. 23, 35 So. 218.

§ 80. Malicious, wilful, or wanton trespass.

(1903). Gross negligence may amount to both malice and wilfulness within the meaning of the Code 1892, § 1315, making it a crime for any person to commit a wilful or malicious trespass on the property of another.—Porter v. State, 83 M. 23, 35 So. 218.

§ 84. Defenses.

(1889). One charged under Code 1880, § 2980, with trespass upon inclosed land of another, cannot be convicted if the proof shows that the latter had no title to the land, and did not permanently reside on it, but had merely occupied it under verbal license from the owner, and at the time of the alleged trespass had abandoned it, although he may have purposed to return at some distant time.—Hester v. State, 67 M. 129, 6 So. 687.

(1889). Under this rule the good faith or honest belief of one indicted under Code 1880, § 2980, for going upon the inclosed land of another, after being notified not to do so, is held to be no defense.—Knight v. State, 64 M. 802, 2 So. 252.

(1905). In a prosecution under Code 1892, § 1320, making it a misdemeanor to go upon inclosed land in the possession of another,

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after notice not to do so, the title to the land is not involved.—Raiford v. State, 87 M. 359, 39 So. 897.

(1908). The trustee under a trust deed given to secure conditional sale of goods is not guilty of trespass in removing a portion of such goods where the contract of sale gives the vendor the right at any time after default to enter on the premises and remove a portion of such goods.—Guthrie v. State, 47 So. 639, not officially reported.

§ 87. Indictment.

(1887). An indictment of one for going upon the land of another, in violation of Code 1880, § 2980, may be amended on the trial by striking out the name of the owner of the land, as therein stated, and inserting that of the true owner, as shown by the proof. Code 1880, § 3081.—Knight v. State, 64 M. 802, 2 So. 252.

TRESPASSING ANIMALS.

See ANIMALS, § 89.
Injuring or killing, see ANIMALS, § 96.
Injury by operation of railroad, see RAILROADS, § 406.

TRESTLE.

As obstruction of water course, see WATERS AND WATER COURSES, § 52.

TRIAL.

This topic INCLUDES judicial examination and determination of issues in civil cases, more particularly of issues of fact by courts sitting with or without a jury; bringing cases to trial, notices of trial, notes of issue, and calendars and lists of causes for trial; course and order of proceedings at trials in general; reception of evidence, and objections thereto; arguments and conduct of counsel; relative functions of court and jury, and instructions to juries in general; custody and conduct of jury; verdicts or other findings of juries; and findings and decisions by courts on trials without a jury.

It EXCLUDES joinder of issues, and hearing of issues of law arising on demurrers (see PLEADING); place of trial (see VENUE); adjournment or postponement of trial (see CONTINUANCE); right to trial by jury, and selection, impaneling, and swearing jury for trial (see JURY); trials by referees (see REFERENCE); production of evidence, particularly documentary evidence (see EVIDENCE), and attendance and examination of witnesses (see WITNESSES); weight and sufficiency of evidence in civil cases in general (see EVIDENCE); correction of errors and review of decisions at trials (see EXCEPTIONS, BILL OF; NEW TRIAL; APPEAL AND ERROR; and other specific heads); trials of issues in particular forms of action or peculiar to particular causes of action or defenses or matters of fact (see specific heads); hearings on particular writs and civil proceedings other than actions (see HABEAS CORPUS; SCIRE FACIAS; and other specific heads); hearings in equity (see EQUITY) or admiralty (see ADMIRALTY), or in proceedings in probate courts (see COURTS; WILLS), or in proceedings under insolvent acts (see INSOLVENCY) or bankrupt acts (see BANKRUPTCY); trial in criminal cases (see CRIMINAL LAW; and titles of particular classes of crimes); trials by justices of the peace (see JUSTICES OF THE PEACE); and hearings by arbitrators, umpires, &c. (see ARBITRATION AND AWARD).

See cross-references for complete list of exclusions.

Analysis.

I. Notice of Trial and Preliminary Proceedings.

§ 4. Order of trial of separate issues.
§ 5. Time or term of court for trial.

II. Dockets, Lists, and Calendars.

§ 9. Trial dockets or calendars in general.

III. Course and Conduct of Trial in General.

§ 19. Presence of judge.
§ 25. Right to open and close.
§ 28. View and inspection.
§ 29. Remarks and conduct of judge.

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IV. Reception of Evidence.

(A) INTRODUCTION, OFFER, AND ADMISSION OF EVIDENCE IN GENERAL.

§ 32. Necessity and scope of proof.
§ 41. Separation and exclusion of witnesses.
§ 44. Offer of proof.
§ 46. —— Showing grounds or purpose of admission.
§ 47. —— Offer following objection and ruling thereon.
§ 50. Presence of jury during argument as to admission.
§ 51. Provisional or conditional admission.
§ 56. Cumulative evidence in general.
§ 58. Withdrawal of evidence.

(B) ORDER OF PROOF, REBUTTAL AND REOPENING CASE.

§ 59. Order of admission in general.
§ 60. Evidence dependent on preliminary proof.
§ 62. Evidence in rebuttal.
§ 63. Admission in rebuttal of evidence proper in chief.
§ 65. Reopening case for further evidence.
§ 67. —— After party offering evidence has rested.
§ 68. —— After close of evidence.
§ 69. —— After demurrer to evidence on motion for non-suit or verdict.
§ 70. —— After submission of case to jury.
§ 71. —— After verdict.

(C) OBJECTIONS, MOTIONS TO STRIKE OUT, AND EXCEPTIONS.

§ 76. Time for objection.
§ 77. Mode of making objection.
§ 80. Sufficiency and scope of objection.
§ 82. —— General or specific.
§ 85. —— Evidence admissible in part.
§ 105. Effect of failure to object or except.

V. Arguments and Conduct of Counsel.

§ 112. Limiting scope or time of argument.
§ 113. Statements as to facts, comments, and arguments.
§ 116. —— Exhibits and illustrations.
§ 120. —— Matters not sustained by evidence.
§ 126. —— Abusive language.
§ 131. Objections and exceptions.
§ 133. Action of court.

VI. Taking Case or Question from Jury.

(A) QUESTIONS OF LAW OR OF FACT IN GENERAL.

§ 135. Questions of law or of fact.
§ 139. —— Weight and sufficiency of evidence in general.
§ 140. —— Credibility of witnesses.
§ 141. —— Uncontroverted facts or evidence.
§ 143. —— Conflicting evidence.
§ 144. —— Amount of recovery.

(B) DEMURRER TO EVIDENCE.

§ 150. Nature and grounds in general.
§ 154. Form and requisites.
§ 156. Hearing and determination.
§ 158. Motion to strike out or exclude evidence.

(C) DISMISSAL OR NON-SUIT.

§ 160. Power of court.

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(D) Direction of Verdict.
§ 167. Nature and grounds.
§ 169. —— Verdict for defendant.
§ 170. —— Verdict for plaintiff.
§ 171. Power of court.
§ 178. Hearing and determination.

VII. Instructions to Jury.

(A) Province of Court and Jury in General.
§ 182. Authority to instruct jury in general.
§ 187. Credibility of witnesses.
§ 189. Hypothetical statements by judge.
§ 190. Assumptions by judge as to facts.
§ 192. —— Uncontroverted facts or evidence
§ 193. Opinion or belief of judge as to facts.
§ 194. Weight and sufficiency of evidence.
§ 194a. —— Admissions and declarations.
§ 194b. —— Opinion evidence.
§ 194c. —— Paper evidence.
§ 197. Determination of questions of law.

(B) Necessity and Subject Matter.
§ 203. Issues and theories of case in general.
§ 205. Presumptions and burden of proof.
§ 206. Determination of weight and sufficiency of evidence in general.
§ 208. Exclusion of evidence from consideration.
§ 210. Credibility of witnesses.
§ 213. Matters of law in general.
§ 214. Law applicable to particular issues or theories.
§ 217. Instructions as to duties of jury.
§ 219. Definition of explanation of terms.

(C) Form, Requisites, and Sufficiency.
§ 222. Written instructions.
§ 228. Form and language in general.
§ 230. Limiting number of instructions.
§ 231. Sufficiency as to subject matter.
§ 240. Argumentative instructions.
§ 242. Confused or misleading instructions.
§ 243. Inconsistent or contradictory instructions.
§ 244. Undue prominence of particular matters.

(D) Applicability to Pleadings and Evidence.
§ 248. Abstract instructions in general.
§ 249. Application of instructions to case.
§ 252. —— Facts and evidence.
§ 253. Instructions excluding or ignoring issues, defenses, or evidence.

(E) Requests or Prayers.
§ 255. Necessity in general.
§ 257. Time for asking instructions.
§ 260. Instructions already given.
§ 261. Erroneous requests.
§ 267. Modification or substitution by court.
§ 269. Noting disposition of requests.

(F) Objections and Exceptions.
§ 270. Right to object.
§ 273. Time for objection or exception.
§ 275. Taking and noting exception.

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(G) CONSTRUCTION AND OPERATION.
§ 285. Rules of construction in general.
§ 295. Construction and effect of charge as a whole.
§ 296. Error in instructions cured by withdrawal or giving other instructions.

VIII. Custody, Conduct, and Deliberations of Jury.
§ 303. Separation.
§ 304. Misconduct of jurors.
§ 305. Misconduct of others affecting jurors.
§ 307. Taking papers or articles to jury room.
§ 308. Reading minutes of or restating testimony.
§ 312. Instructions after submission of cause.
§ 314. Urging or coercing agreement.
§ 315. Manner of arriving at verdict.

IX. Verdict.
(A) GENERAL VERDICT.
§ 324. Sealed verdict.
§ 325. Polling jurors.
§ 326. Form and language in general.
§ 327. Designation of parties.
§ 328. Severance as to parties.
§ 329. Responsiveness to issues.
§ 330. Several counts or issues.
§ 331. Certainty in general.
§ 332. Amount of recovery.
§ 336. Surplusage.
§ 338. Amendment or correction.
§ 343. Construction and operation.
§ 344. Affidavit of jurors to sustain or impeach verdict.
(B) SPECIAL INTERROGATORIES AND FINDINGS.

X. Trial by Court.
(A) HEARING AND DETERMINATION OF CAUSE.
§ 376. Reception of evidence.
(B) FINDINGS OF FACT AND CONCLUSIONS OF LAW.
§ 395. Sufficiency in general.
§ 400. Amendment or correction.
§ 403. Filing and record.
§ 404. Construction and operation.
§ 405. Objections and exceptions.

XI. Waiver and Correction of Irregularities, and Errors.
§ 410. Rulings as to admissibility of evidence.
§ 421. Instructions to jury.

Cross-References.

Assignment of verdicts, see ASSIGNMENTS, § 28.
Conclusiveness of findings of court on appeal, see APPEAL AND ERROR, § 1007.
Conclusiveness of verdict on appeal, see APPEAL AND ERROR, §§ 998–1006.
Conduct by attorney, see ATTORNEY AND CLIENT, § 92.
Conformity of judgment to verdict and findings, see JUDGMENT, § 256.
Contempt not in presence of court, see CONTEMPT, § 53.
Customs and usages as questions for jury, see CUSTOMS AND USAGES, § 21.
Errors and irregularities in conduct of trial as ground for new trial, see NEW TRIAL, §§ 13–27.
Errors in rulings and instructions as ground for new trial, see NEW TRIAL, §§ 33–41.
Estoppel by claim or position in judicial proceedings, see ESTOPPEL, § 68.

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Estoppel to allege error in instructions, see APPEAL AND ERROR, § 881.
Exceptions to instructions and failure or refusal to give, see APPEAL AND ERROR, § 263.
Exceptions to rulings as to arguments and conduct of counsel, see APPEAL AND ERROR, § 261.
Exceptions to rulings and orders after trial or judgment, see APPEAL AND ERROR, § 270.
Exceptions to verdict or findings by jury, see APPEAL AND ERROR, § 264.
Failure of term as a continuance of causes, see CONTINUANCE, § 3.
Form and contents of affidavits, see AFFIDAVITS, § 9.
Harmless error in civil cases, see APPEAL AND ERROR, §§ 1025–1074.
Hearing and determination of application for continuance, see CONTINUANCE, § 48.
Hearing and determination of application to set aside judgment, see JUDGMENT, § 393.
Hearing and determination of question of setting aside default, see JUDGMENT, § 163.
Hearing on writ of certiorari, see CERTIORARI, § 62.
Incorporation of instructions in bill of exceptions, see EXCEPTIONS, BILL OF, § 18.
Instructions as part of record on appeal, see APPEAL AND ERROR, § 525.
Instructions as to release, see RELEASE, § 59.
Instruction on subject of payment, see PAYMENT, § 77.
Irregularities or defects in proceedings on default, see JUDGMENT, § 144.
Judgment on verdict or findings of jury, see JUDGMENT, § 198.
Misconduct of juror as ground for new trial, see NEW TRIAL, § 44.
Necessity and use of process, see PROCESS, § 3.
Necessity of objection in lower court for misconduct of juror, see APPEAL AND ERROR, § 217.
Necessity of objection in a lower court to verdicts and findings, see APPEAL AND ERROR, § 218.
Necessity that record on appeal should set forth excluded evidence, see APPEAL AND ERROR, § 692.
Objections to improper argument must be made in lower court, see APPEAL AND ERROR, § 201.
Order of dismissal, see DISMISSAL AND NONSUIT, § 79.
Order of examination of witnesses, see WITNESSES, § 224.
Parol evidence to contradict minutes of circuit court, see EVIDENCE, § 386.
Payment as question for jury, see PAYMENT, § 76.
Prejudicial error in arguments and conduct of counsel, see APPEAL AND ERROR, § 1060.
Prejudicial error in instructions to jury, see APPEAL AND ERROR, §§ 1063–1068.
Presumptions as to amount of recovery, see APPEAL AND ERROR, § 932.
Presumptions as to conduct of trial, see APPEAL AND ERROR, § 925.
Presumptions as to custody and conduct of jury, see APPEAL AND ERROR, § 929.
Presumptions as to findings of court or referee, see APPEAL AND ERROR, § 931.
Presumptions as to verdict, see APPEAL AND ERROR, § 930.
Proceedings after continuance or revival, see ABATEMENT AND REVIVAL, § 77.
Purpose of excluded evidence to be shown, see APPEAL AND ERROR, § 205.
Reception of evidence by referee, see REFERENCE, § 63.
Rehearing at subsequent term of probate court, see COURTS, § 202.
Reversal for error as to amount or extent of recovery, see APPEAL AND ERROR, § 1171.
Review as dependent on theory and grounds of decision of lower court, see APPEAL AND ERROR, § 851.
Review dependent on mode of trial in lower court, see APPEAL AND ERROR, § 844.
Review of discretion of court as to submission of issues to jury, see APPEAL AND ERROR, § 974.
Review of discretion of court in reception of evidence, see APPEAL AND ERROR, § 970.
Review of error in calculation of amount of recovery as dependent on record, see APPEAL AND ERROR, § 705.
Review of error in limitation of argument, see APPEAL AND ERROR, § 688.
Review of findings as dependent on record, see APPEAL AND ERROR, § 704.
Review of instructions as dependent on record, see APPEAL AND ERROR, § 698.
Review of peremptory instructions, see APPEAL AND ERROR, § 997.
Right to complain of errors favorable to party, see APPEAL AND ERROR, § 1033.
Sufficiency of evidence to support verdict, see EVIDENCE, § 597.
Time for hearing appeal, see APPEAL AND ERROR, § 817.
Time for objection to depositions, see DEPOSITIONS, § 105.
Use of depositions, see DEPOSITIONS, § 86.
Verdict as part of record on appeal, see APPEAL AND ERROR, § 527.

Trial of Particular Civil Actions or Proceedings.

Attachment, see ATTACHMENT, § 213.
Bastardy proceedings, see BASTARDS, § 68.
Calculation for verdict in action on bill or note, see BILLS AND NOTES, § 539.
Construction of mortgage as question for court, see CHATTEL MORTGAGES, § 107; MORTGAGES, § 110.
Contributory negligence of passenger as question for jury, see CARRIERS, § 347.
Delivery of gift *inter vivos* as question for jury, see GIFTS, § 50.
Direction of verdict in ejectment, see EJECTMENT, § 104.
Disputed claims in probate court, see EXECUTORS AND ADMINISTRATORS, § 251.
Election contests, see ELECTIONS, § 300.
Hearing and determination of application for discharge of bankrupt, see BANKRUPTCY, § 415.
Hearing and determination of grounds for injunction, see INJUNCTION, § 152.
Hearing and determination on motion to dissolve attachment, see ATTACHMENT, § 258.
Hearing and determination of motion to dissolve injunction, see INJUNCTION, § 175.

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Hearing of application to sell property to pay debts, see EXECUTORS AND ADMINISTRATORS, § 339.
Hearing on application for liquor license, see INTOXICATING LIQUORS, § 70.
Hearing on petition for *habeas corpus*, see HABEAS CORPUS, § 59.
Hearing on writ and return of *habeas corpus*, see HABEAS CORPUS, § 90.
Issues between plaintiff and garnishee, see GARNISHMENT, §§ 166–173.
Jurisdiction of anullment of marriage, see MARRIAGE, § 60.
Liens as question for jury, see MECHANICS' LIENS, § 288.
Mode and conduct of trial in ejectment, see EJECTMENT, § 105.
Negligence of carrier question for jury, see CARRIERS, § 277.
Of right of property, see ATTACHMENT, §§ 290–308; EXECUTION, §§ 178–194; GARNISHMENT, § 200–213.
On bills or notes, see BILLS AND NOTES, § 535.
Peremptory instruction in action of ejectment, see EJECTMENT, § 107.
Probate of will, see WILLS, §§ 308–333.
Proceedings preliminary to trial in ejectment, see EJECTMENT, § 104.
Reception of evidence on probate or contest of will, see WILLS, § 322.
Right to exhumation of body of insured, see INSURANCE, § 667.
Scope of inquiry in election contests, see ELECTIONS, § 297.
Submission of issues in ejectment, see EJECTMENT, § 107.
Submission of issues to jury on probate or contest of will, see WILLS, § 315.
To enforce liens, see MECHANICS' LIENS, §§ 286–290.
Verdict in actions for negligence, see NEGLIGENCE, § 142.
Verdict in attachment, see ATTACHMENT, § 216.
Verdict in detinue, see DETINUE, § 20.
Verdict in garnishment proceedings, see GARNISHMENT, § 173.
Verdict in suits for slander, see LIBEL AND SLANDER, § 125.
Verdict of jury in condemnation proceedings, see EMINENT DOMAIN, § 223.
Verdict on claimant's issue, see EXECUTION, § 198.
Verdicts in will contest, see WILLS, § 333.

Trial of Criminal Prosecutions.

See CRIMINAL LAW, §§ 246–260, 618–904.
Charge to grand jury, see GRAND JURY, § 23.
Conclusiveness of verdict on appeal, see CRIMINAL LAW, § 1159.
Conduct of proceedings by grand jury, see GRAND JURY, § 33.
Errors and irregularities in conduct of trial as ground for new trial, see CRIMINAL LAW, § 918.
Errors in rulings on evidence as ground for new trial, see CRIMINAL LAW, § 921.
Harmless error in criminal cases, see CRIMINAL LAW, §§ 1161–1177.
Method of proof of evidence given at former trial, see CRIMINAL LAW, § 547.
Misconduct of jury as ground for new trial, see CRIMINAL LAW, §§ 924–929.
Misconduct of officer in charge of jury as ground for new trial, see CRIMINAL LAW, § 929.
Mode and conduct of trial on criminal appeal from justice, see CRIMINAL LAW, § 260.
Necessity of objections to misconduct of jury, see CRIMINAL LAW, § 1039.
Prejudicial error in use of intoxicants by jurors, see CRIMINAL LAW, § 1174.
Reception of evidence in prosecution for homicide, see HOMICIDE, § 263.
Review of discretion of lower court as to conduct of trial in general, see CRIMINAL LAW, § 1152.
Review of discretion of lower court as to reception of evidence, see CRIMINAL LAW, § 1153.
Review of instructions in criminal cases, see CRIMINAL LAW, § 1056.
Review of proceedings at criminal trial, see CRIMINAL LAW, § 1053.
Right of accused to speedy trial, see CRIMINAL LAW, § 573.
Time for trial of criminal case, see CRIMINAL LAW, § 575.
Unauthorized separation of jury as ground for new trial, see CRIMINAL LAW, § 927.

I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.

§ 4. Order of trial of separate issues.

(1843). When an order in the circuit court, permitting one of several defendants to an action of *assumpsit* on a promissory note, to sever from the others in his defense and trial, is made without objection, it cannot be assigned as error, but the court say they are not satisfied with the correctness of the practice. Such an order, however, does not relieve the other defendants from liability for the costs of the separate trial—Commercial &c. Bank v. Lum, 7 H. 414.

§ 5. Time or term of court for trial.

Imparlance term, see CONTINUANCE, § 6; JUDGMENT, § 119; PLEADING, § 86.

(1844). Under the statute (H. & H. p. 619, § 27) it will be error for the court to call a case and try it on a day prior to the one for which it is set by the clerk.—Fall v. Commissioners of Sinking Fund, 3 S. & M. 127.

(1846). But this rule does not apply to actions of replevin, so as to prevent the court from resetting such a case, after the term has commenced, because, under the statute, they have a priority over all other business.—Tifft v. Virden, 7 S. & M. 91.

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(1848). If the term to which *mesne* process is returnable fail, so that no court be held at that term, such term will, nevertheless, constitute the appearance term of the case, and it will stand for trial at the next term, in the same way as though the appearance term had been regularly held.—Thornton v. Fitzhugh, 10 S. & M. 438.

(1870). Parties cited to appear at a term of the probate court, which fails, are bound to appear at the next term.—Hanks v. Neal, 44 M. 212.

(1873). Although an open account sued upon be sworn to, a plea, though unaccompanied by a counter affidavit, postpones the trial to the next term, and it is error to render judgment at the first term for want of a counter affidavit.—Reinhardt v. Carter, 49 M. 315. See also (1876) Bower v. Henshaw, 53 M. 345; (1877) Rose v. Watson, 54 M. 673.

(1885). The statute requires that defendant shall plead on or before the second day of the return term and that issue of fact shall be made up and joined at that term, and ready for trial at the next succeeding term; but a large discretion is vested in the circuit judge in the matter.—State v. Rials, 1 Miss. Dec. 302.

(1885). Where a cause was tried at the second term of court after suit was brought, but not until more than two weeks after pleas were filed, and not until several days after the motion to strike out the same was overruled, and the court after the motion to strike out was disposed of, offers to continue the case, the plaintiff cannot allege that he was prejudiced by, or that there was any abuse of discretion in, the action of the court.—State v. Rials, 1 Miss. Dec. 302.

(1890). Under the Act of 1888 (Laws, p. 82), relating to actions *ex contractu*, it is only where process has been served on defendant thirty days before court that the plaintiff is entitled to a trial at the return term; the fact that the declaration is sworn to, and the defendant's plea is not, does not change this.—Oglesby v. Stribling, 67 M. 666, 7 So. 463.

(1890). If the declaration is sworn to, and the defendant, having thirty days' notice, files an unsworn plea, on motion it will be stricken out and judgment entered for plaintiff at the return term.—Oglesby v. Stribling, 67 M. 666, 7 So. 463. That portion of Laws 1888, ch. 46, providing for trial at the first term where summons is personally served thirty days before, is brought forward into Code 1892 (§ 722), *aliter* as to that portion having to do with the effect of swearing to pleadings.

II. DOCKETS, LISTS, AND CALENDARS.

§ 9. Trial dockets or calendars in general.

(1887). By setting a cause down for hearing before the expiration of the period allowed by law for taking testimony after answer filed, plaintiffs admitted facts stated in the answer to be true, but they do not thereby admit the questions of law stated in the answer to be likewise true.—Clay County v. Chickasaw County, 64 M. 534, 1 So. 753.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

§ 19. Presence of judge.

(1879). The trial judge may, during the argument of counsel, give place to another by consent, and if he does so without objection in advance, consent will perhaps be presumed.—Turbeville v. State, 56 M. 793.

§ 25. Right to open and close.

(1855). When to a plea of the statute of limitations, the plaintiff replies that the defendant was out of the state when the cause of action accrued, and that suit was brought within the time limited after his return, the affirmative of the issue is on the plaintiff, and he is entitled to the opening and conclusion.—Thornton v. West Feliciana &c. R. Co., 29 M. 143.

(1877). The party holding the affirmative of an issue and upon whom is the burden of proof, has the right to open and conclude the argument to the jury, and this right will not be lost by the mere withdrawal by the opposite party of a plea after the evidence is closed. However, a judgment will not be reversed because of the denial of such rights, unless it resulted in wrong or injustice.—Perkins v. Guy, 55 M. 153, 30 Am. Rep. 510.

(1885). The party on whom the burden of proof lies is entitled to open and conclude the argument. If the record contains several issues, and the plaintiff holds the affirmative in either, or will be obliged to produce any evidence to establish his demand, it is error to deny him the right to open and close the argument.—Porter v. Still, 63 M. 357.

§ 28. View and inspection.

(1879). In an action on a life insurance policy the exhumation of the body of the deceased, though subject to plaintiff's control, should be ordered, if at all, only on a strong showing that without an examination fraud is likely to be accomplished, and that the defendant has exhausted every other method known to the law of exposing it.—Grangers' Life Ins. Co. v. Brown, 57 M. 308, 34 Am. Rep. 446n.

§ 29. Remarks and conduct of judge.

(1872). Remarks by the court, in the presence of the jury, in vindication of its assailed dignity and impartiality, are not ground for a new trial.—Harris v. State, 47 M. 318.

(1876). The judge cannot settle disputes as to the testimony of a witness, nor side with either party. When differences arise,

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the utmost of his power is to recall the witness before the jury, and even this power should be sparingly exercised.—Duff v. Snider, 54 M. 245.

(1910). Reversible error is predicable of the comment of a trial court on the admission of evidence to the effect that it did not amount to anything and had nothing to do with the issues, and this more particularly where the evidence was clearly admissible on the principal issue in the case.—Sivley v. Sivley, 96 M. 134, 51 So. 457.

IV. RECEPTION OF EVIDENCE.

(A) INTRODUCTION, OFFER, AND ADMISSION OF EVIDENCE IN GENERAL.

§ 32. Necessity and scope of proof.

(1855). All rules of evidence are adopted for practical purposes in the administration of justice, and they should be liberally construed for the advancement of justice.—Moye v. Herndon, 30 M. 110.

(1905). A defendant need not introduce testimony to support a plea which is fully sustained by plaintiff's evidence.—Bridges v. Jackson Electric &c. Co., 86 M. 584, 38 So. 788.

§ 41. Separation and exclusion of witnesses.

(1852). Where a witness, who has been directed to withdraw during the examination of the other witnesses, violates the order of the court and remains present during such examination, it is a matter in the discretion of the court below to allow him to be examined or not; and the high court will not interfere with its exercise, except where it has been manifestly abused.—Sartorius v. State, 24 M. 602, 1 Mor. St. Cas. 624.

(1884). It is wholly within the discretion of the court to allow a witness to be examined who remains in the court room while the others are under the rule. Action as to this is not assignable as error.—Smith v. State, 61 M. 754.

A party to a suit, although a witness, cannot be excluded on the hearing of the testimony, as this would violate Const. 1869, art. 1, § 30, providing that no person shall be debarred from prosecuting or defending any civil cause by himself or counsel, or both. But such party may be required to testify before his other witnesses are examined, and, if he refuses to do so, may be excluded while such witnesses are testifying.—(1885) French v. Sale, 63 M. 386; (1894) Smith v. Team, 16 So. 492, not officially reported.

In case of joint claimants, it is error to exclude one while the other is testifying. It is the right of both to be present during the entire trial.—(1885) French v. Sale, 63 M. 386; (1888) Bernheim v. Dibrell, 66 M. 199, 5 So. 693.

(1896). Following the placing of witnesses under the rule, the plaintiff's husband was the first person to testify, plaintiff remaining in the court room at the time. *Held*, that there having been no request that the plaintiff should be first examined, it was proper to permit her to be called as the next witness.—Kline v. Hazzlerigg, 21 So. 11, not officially reported.

(1897). Generally, the fact that a witness placed under the rule has violated it, goes to his credit, but does not exclude him.—Ferguson v. Brown, 75 M. 214, 21 So. 603.

(1898). A witness who has not heard the evidence may testify, though not placed under the rule with other witnesses.—Timberlake v. Thayer, 76 M. 76, 23 So. 767.

(1903). The act of a court in refusing to permit a witness to testify in rebuttal because of his disobedience of the rule for the exclusion and separation of witnesses, while permitting his testimony in chief to be contradicted, is erroneous.—Illinois Central R. Co. v. Ely, 83 M. 519, 35 So. 873.

§ 44. Offer of proof.

(1872). In considering the competency of evidence proposed to be introduced, it will be assumed that it is true.—McLemore v. Hawkins, 46 M. 715.

§ 46. —— Showing grounds or purpose of admission.

To constitute error in ruling out evidence, its relevancy must be shown.—(1841) Townsend v. Blewett, 5 H. 503; (1847) Cole v. Harman, 8 S. & M. 562; (1848) Torrey v. Fisk, 10 S. & M. 590; (1848) Heath v. Newman, 11 S. & M. 201; (1853) Dyson v. State, 26 M. 362, 1 Mor. St. Cas. 710.

(1853). If evidence be offered which of itself appears to be foreign to the issue on trial, it is necessary that its relevancy be then shown to the court, either by explanation as to its bearing on the case, or by introducing other evidence connecting it with the *res gestæ*, otherwise the most prejudicial evidence might go to the jury, the effect of which it might be impossible to destroy by instructions from the court to the jury to disregard it.—Dyson v. State, 26 M. 362, 1 Mor. St. Cas. 710.

§ 47. —— Offer following objection and ruling thereon.

(1848). If the defendant offer to show that he signed the note sued on in blank as to the name of the payee, and delivered it with a restriction that it was to be filled up with a particular name, and this evidence is excluded, and the defendant does not show during the trial that the person taking it knew of the restriction and its violation, there will be no error.—Torrey v. Fisk, 10 S. & M. 590.

§ 50. Presence of jury during argument as to admission.

(1883). The court may, and it is good practice to, direct the jury and retire until

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the testimony of a witness is heard by it and its competency determined.—Kraner v. State, 61 M. 158.

§ 51. Provisional or conditional admission.

(1845). It is not necessary that evidence, when offered to the jury, should *per se* be competent, if, in fact, it be capable of being made competent, and is so made by other evidence, before the case is closed.—Lake v. Munford, 4 S. & M. 312.

§ 56. Cumulative evidence in general.

(1841). It is not error to exclude competent evidence, which is merely cumulative, and when its admission would not add to the strength of the evidence already introduced on that point.—Townsend v. Blewett, 5 H. 503.

(1893). Where a defendant, as a witness, makes a certain denial, and, after plaintiff's testimony (which is contradictory of this) is closed, the defendant is again offered, not to explain or distinguish his denial, but merely to repeat it, there is no error in rejecting his further testimony.—Archer v. Helm, 70 M. 874, 12 So. 702.

§ 58. Withdrawal of evidence.

(1829). The plaintiff has a right, during the progress of the trial, to withdraw an account introduced by him, and if it be so withdrawn both the debits and credits in it are withdrawn.—King v. Cooper, W. 359.

(B) ORDER OF PROOF, REBUTTAL AND REOPENING CASE.

§ 59. Order of admission in general.

See *post*, § 60.

A party is not confined to any particular order in the introduction of his evidence, but may elect as to the order in which he will introduce it, unless a foundation must be first laid so as to introduce secondary evidence.—(1835) Baughan v. Graham, 1 H. 220; (1871) Davany v. Koon, 45 M. 71.

(1850). It is a well settled rule of practice that parties are not restricted as to the order in which they may choose to present their evidence. In an action, therefore, against a person alleged to be a partner of the maker of the note sued on, and who has denied under oath the partnership and the note, it is not necessary to precede the introduction in evidence of the note by proof of the existence of the partnership, or by proof that the note was made by the ostensible partner, on account of the firm, or for its benefit; but the plaintiff may introduce the note first, and if on the trial he fail to show these necessary facts, the note will be irrelevant evidence, and will be excluded from the jury on the motion of the defendant.—Lea v. Guice, 13 S. & M. 656. See (1840) Skinner v. Collier, 4 H. 396.

(1858). The rule allowing a party to introduce evidence in the order he may choose does not permit him to omit evidence in the opening of his case and bring it in afterwards in rebutter. Hence, where the plaintiff in an action on a bill of exchange omitted in the opening of his case to introduce evidence showing an excuse for non-presentment, he will only be allowed afterwards to introduce it in the discretion of the court.—Wood v. Gibbs, 35 M. 559.

(1876). The order of introducing testimony is within the discretion of the trial court. Error cannot be predicated of this unless the discretion is abused.—Myrick v. Wells, 52 M. 149.

(1891). While the defendant in an action for assault and battery, who claims justification, has the burden of proof as to this, the plaintiff, after proof merely of admission as to the fact of the assault and his damages, cannot, by withholding all evidence as to the circumstances of the injury, force the defendant first to disclose the circumstances. He cannot thus gain an advantage by holding his evidence in reserve to rebut the defense rather than establish his own case. —Jamison v. Mosely, 69 M. 478, 10 So. 582.

(1905). Special affirmative matter in avoidance of plaintiff's cause of action is properly rejected when it is sought to inject it into plaintiff's testimony before he has closed his case.—Yazoo &c. R. Co. v. Grant, 86 M. 565, 38 So. 502, 109 Am. St. 723.

§ 60. Evidence dependent on preliminary proof.

See *ante*, § 59.

(1847). Where the law required six weeks' notice to be given of a lease of school lands for ninety-nine years, but only thirty days' notice for a leasing for a shorter period, evidence offered by a lessee sued for the purchase money of the lease, and defending on the ground of the invalidity of the lease, caused by the notice being for only thirty days, may be rejected, unless evidence also be offered to show that the lease was for ninety-nine years.—Cole v. Harman, 8 S. & M. 562.

(1848). If a party offers evidence which is competent only when other evidence necessary to its relevancy is also introduced, and it is objected to, though for a wrong reason, and he except, it will not be error if during the progress of the trial the necessary suppletory evidence be not offered.—Torrey v. Fisk, 10 S. & M. 590.

(1856). Evidence, when relevant to the issue, should be received, though it is incomplete without the proof of a further fact, which it does not tend to prove.—Williams v. Newberry, 32 M. 256.

(1856). In trespass for the tortious taking of a slave, the plaintiff may prove the amount expended in retaking the slave, without previously showing that the expenditure was necessary or reasonable.—Williams v. Newberry, 32 M. 256.

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(1856). A deed containing a latent ambiguity, may be introduced before the ambiguity is explained, but on failure to explain it during the trial, the conveyance should be excluded.—Hanna v. Renfro, 32 M. 125.

(1859). In an action of ejectment a party may introduce in evidence a deed conveying the premises, without first showing title in the grantor.—Welborn v. Anderson, 37 M. 155.

§ 62. Evidence in rebuttal.

(1888). In a civil action for assault and battery, where the plaintiff has introduced evidence of his having been shot by defendant, and of the extent of his damages, and rests, and the defendant introduces evidence of the particulars of the shooting in his justification, the plaintiff in rebuttal may introduce evidence as to the beginning of the difficulty. Such evidence is clearly competent, and its exclusion is error for which a reversal will be awarded.—Mosely v. Jamison, 66 M. 52, 5 So. 524.

§ 63. Admission in rebuttal of evidence proper in chief.

(1896). Where, in an action for personal injuries, the testimony for the plaintiff has shown that he was guilty of contributory negligence, and instead of then applying for a peremptory charge, the defendant has established the same fact, it is not an abuse of discretion to refuse to allow the plaintiff, who has not previously testified, to explain why he did the act constituting the contributory negligence, such testimony not being in rebuttal.—Winterton v. Illinois Cent. R. Co., 73 M. 831, 20 So. 157.

§ 65. Reopening case for further evidence.

See *post*, § 167.

(1821). A witness cannot be allowed to repeat over to the jury in their retirement the testimony he gave in open court. Should they doubt, after their retirement, as to the testimony of a witness, they may hear him again, but it must be in open court.—Offit v. Vick, W. 99.

§ 67. —— After party offering evidence has rested.

(1884). In its discretion, the court may permit a plaintiff to reopen his case and prove the value of property, for the conversion of which he sues.—Natchez &c. R. Co. v. Bolls, 62 M. 50.

§ 68. —— After close of evidence.

(1854). Generally, additional witnesses should not be allowed, after the evidence is closed; but the court may admit them in furtherance of justice; but this is a matter of discretion, for which an appellate court would not reverse, except in an extreme case, where the injustice committed by a departure from the rule was manifest and great.—Hoover v. Pierce, 26 M. 627.

(1886). On motion made by the plaintiff, after the testimony is closed, to exclude evidence in regard to a certain written contract and the indorsement of promissory notes involved, it is discretionary with the court as to whether another witness shall be introduced to testify on these subjects, and to produce the notes.—Tant v. Smith, 1 Miss. Dec. 305.

(1900). It is bad practice for a plaintiff to call an important witness on the main facts of the case for the first time after the close of the defendant's testimony, and such action should never be permitted unless the failure to previously introduce the witness be caused by necessity or inadvertence.—Southern R. Co. v. Hays, 78 M. 319, 28 So. 939.

§ 69. —— After demurrer to evidence on motion for non-suit or verdict.

(1882). Where, on the trial of a claimant's issue, plaintiff in attachment closes without introducing the judgment against the defendant, and claimant moves for a peremptory instruction because of the omission, it is reversible error to refuse plaintiff leave then to introduce the judgment.—Meacham v. Moore, 59 M. 561.

(1909). Where the case of the defendant in an action for the price of goods depended solely upon the existence of a certain custom, error is predicable of the court's refusal to allow the plaintiff to reopen his case after a motion for a peremptory instruction for the defendant and prove, if possible, his claim that the custom did not exist.—Moreland v. Newberger Cotton Co., 94 M. 572, 48 So. 187.

§ 70. —— After submission of case to jury.

(1831). It is in the discretion of the court to allow or refuse a witness to be examined after the cause has been argued and the jury charged.—Witherspoon v. Cain, W. 407.

(1889). At the conclusion of the trial, as the jury retired, plaintiff excepted to a ruling of the court as to how much of defendant's affidavit for a continuance setting out the testimony of an absent witness was in evidence. Thereupon, the witness having arrived, the judge, of his own motion, recalled the jury and stated that he would allow the witness to testify and exclude the affidavit, and, in the interest of justice, would reopen the whole case for additional evidence, argument and instructions on either side. The affidavit was excluded and the witness testified on behalf of the defendant. This action of the court was proper, and is to be commended.—Royston v. Illinois Cent. R. Co., 67 M. 376, 7 So. 320.

§ 71. —— After verdict.

(1900). Error cannot be predicated of the overruling of a motion to remand a mortgage foreclosure suit for the taking of additional testimony after a decision has been rendered by the chancellor.—Atkinson v. Folder, 78 M. 83, 29 So. 767.

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(C) OBJECTIONS, MOTIONS TO STRIKE OUT, AND EXCEPTIONS.

§ 76. Time for objection.

If no objection be made to the admission of evidence when it is introduced, objections to it are considered as waived.—(1840) Skinner v. Collier, 4 H. 396; (1849) Union Bank v. Graves, 12 S. & M. 130.

(1850). Where parol evidence is allowed to go to the jury to establish a fact for which written evidence exists, it will be too late to object by charges to the jury that the parol evidence is insufficient.—Edge v. Keith, 13 S. & M. 295.

§ 77. Mode of making objection.

(1860). Where plaintiff offers in evidence a deed, as a distinct and sufficient ground of his title, the sufficiency of the deed to show the title may, upon objection to its admissibility as evidence, be then considered by the court; and if it be insufficient, may be excluded from the jury; though the more regular practice would be to admit it in evidence and for the court afterwards to judge of its sufficiency; and on this ground, when the plaintiff offers in evidence a deed which shows title out of him and in another, it may be excluded from the jury.—Davis v. Herndon, 39 M. 484.

(1902). If a principle be decided in the trial court against an objecting party, and exception to the ruling be duly taken by him, he will not lose the benefit thereof on appeal, or waive his exception by his failure to repeat his objection upon a recurrence of the same question in the progress of the case.—Herrin v. Daly, 80 M. 340, 31 So. 790.

§ 80. Sufficiency and scope of objection.

Objections to the introduction of evidence, which, from their nature, may be obviated by the party offering it, must be distinctly stated on the trial, otherwise they will not be noticed.—(1856) Wesling v. Noonan, 31 M. 599; (1859) Morris v. Henderson, 37 M. 492.

(1882). Where an objection to evidence is in its nature such as may be obviated, it must be specific, so as to allow opportunity to supply its place if the objection be sustained, otherwise the objection will not be noticed in this court.—Heard v. State, 59 M. 545.

§ 82. —— General or specific.

(1843). A general objection to the introduction in evidence of a writing will reach every objection apparent on its face, but not objections arising *dehors* the instrument. Hence, when the lower court admitted the record of a notary public to establish notice, in case the notary did not reside in the county where the evidence was offered, if the record show when it is offered, that the notary resided in that county, a general objection to its admissibility is sufficient.—Wood v. American Life Ins. Co., 7 H. 609.

Objections to the admission of evidence should specifically point out the ground on which they are based, so that if capable of being removed by other proof it may be introduced.—(1847) Helm v. Natchez Ins. Co., 8 S. & M. 197; (1849) Routh v. Agricultural Bank, 12 S. & M. 161; (1859) Morris v. Henderson, 37 M. 492; (1859) Monk v. Horne, 38 M. 101, 75 Am. Dec. 94.

(1859). Where an unrecorded deed, without further proof of its execution than the certificate of acknowledgment, was offered in evidence, and the objection to it was general, it was held that the objection would not avail, because the execution of the deed might have been otherwise proven.—Morris v. Henderson, 37 M. 492.

(1860). The objections must be so specific as to present distinctly to the court the precise point relied on by the objector; and hence, an objection to the introduction in evidence of a deed made by a Chickasaw Indian, "that it was not made and certified to, according to the requirements" of the treaty with the Chickasaw Indians, is bad. The objection should have pointed out distinctly and specifically in what respect the deed and certificate were not in accordance with the treaty.—New Orleans &c. R. Co. v. Moye, 39 M. 374.

(1891). Evidence competent for any purpose should not be excluded on a general objection.—Mississippi Mills v. Smith, 69 M. 299.

(1904). Objections to testimony must be seasonably interposed and made sufficiently specific to present and not to obscure the question involved.—Wagner v. Ellis, 85 M. 422, 37 So. 959.

§ 85. —— Evidence admissible in part.

(1894). Failure to exclude incompetent parts of the testimony of a witness will not be held erroneous where objection is not made until after he has finished testifying, and then only by a motion to exclude his entire testimony.—Brown v. State, 72 M. 95, 16 So. 202.

(1910). Where a part of the statement of a witness is admissible and part not, an objection to the entire statement should be overruled. A specific objection should be made to the inadmissible part of the testimony, so as to give the court an opportunity to rule on it separately.—Mississippi Cent. R. Co. v. Dacus, — M. —, 53 So. 398.

§ 105. Effect of failure to object or except.

(1848). The failure to object to illegal evidence is not only a waiver of all objections to its competency, but it is waiver of any right to object to other evidence which would be illegal, except when connected with and based on legal evidence of the character of that which was admitted without objection. Thus, where a record of the decree of the probate court, orderiug a sale of land, which shows on its face that the decree was illegal and void, is admitted in evi-

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dence without objection, the purchaser claiming under the sale has also the right to introduce in evidence the deed made to him in pursuance of the sale.—Commercial Bank v. Martin, 9 S. & M. 613.

(1849). Permitting evidence to go to the jury without objection is a waiver of objection to its competency, and a waiver of all proof which ought regularly to be made to render it competent. Thus, if on a plea of *non est factum*, the plaintiff prove the defendant's signature to the bond, and then read it in evidence, without objection, this will be a waiver of the necessity of proving the character in which the plaintiff sues.—Clanton v. Laird, 12 S. & M. 568.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

§ 112. Limiting scope or time of argument.

(1888). The power of the court to limit argument springs from its duty to protect other litigants and the public against the unnecessary use of the time of the courts. The power should be exercised so as not to abridge the right of any party to fully and freely present his case to the jury.—Senior v. Brogan, 66 M. 178, 6 So. 649.

(1888). Considerations of personal convenience on the part of the presiding judge should not influence him in placing a limit of time on the argument of counsel to the jury.—Senior v. Brogan, 66 M. 178, 6 So. 649.

(1888). In a case involving about sixteen hundred dollars, where the good faith of the sale of a stock of goods was the main inquiry, and where twelve witnesses were examined, and documentary evidence was introduced, a limitation of forty-five minutes to a side for argument before the jury necessitates a reversal.—Senior v. Brogan, 66 M. 178, 6 So. 649. See (1875) Lee v. State, 51 M. 566.

§ 113. Statements as to facts, comments, and arguments.

(1893). Where an affidavit made by counsel for the defendant at a previous term of court on an application for a continuance is not competent evidence of any fact involved in the issue between the parties, nor is introduced as evidence, counsel for the plaintiff has no right to read it to the jury, nor to comment upon the facts therein set forth as evidence, and when permitted thus to do, the injury to the defendant is aggravated by a statement of the presiding judge, when in reply to the objection of the defendant's counsel to the course being pursued by counsel for the plaintiff, he states that the affidavit was a part of the record, and that as such he permitted counsel for the plaintiff to use the same.—Louisville &c. R. Co. v. Van Eaton, 14 So. 267, not officially reported.

(1902). In an action for damages against a railway company by one of its employes for injuries alleged to have resulted from obstructions negligently placed near the track, the defendant's attorney may comment in argument on the absence of evidence of any previous accident at the same place.—Southern R. Co. v. McLellan, 80 M. 700, 32 So. 283.

§ 116. —— Exhibits and illustrations.

(1901). Counsel may properly exhibit in argument to the jury a diagram, not offered in evidence, of an object fully described by the witnesses.—Clisby v. Mobile &c. R. Co., 78 M. 937, 29 So. 913.

§ 120. —— Matters not sustained by evidence.

(1877). Counsel should not be permitted in argument to the jury to state or comment on facts not in evidence, and if this rule is violated, the court should, on its own motion, interpose and direct the jury to ignore the remarks. The verdict in the case at bar is not disturbed, notwithstanding improper comments, it appearing that the court at once interposed and informed the jury that the facts assumed were not in evidence.—Perkins v. Guy, 55 M. 153, 30 Am. Rep. 510.

§ 126. —— Abusive language.

(1908). Reversible error cannot be predicated of the statement in argument of counsel for the plaintiff, in an action for slander, to the effect that the defendant railroad had seen fit to employ time checkers who were no more than spies on honest men and who, if they did not report somebody, would lose their positions.—Yazoo &c. R. Co. v. Rivers, 93 M. 557, 46 So. 705.

§ 131. Objections and exceptions.

(1887). If a theory of law, propounded by plaintiff's counsel in his argument to the jury, is deemed unsound by the opposite party, it is not sufficient merely to interrupt counsel and appeal to the court to correct the statement. He should ask an instruction stating the law on the point, and, if he fails to do this, and there was no abuse of the privilege of counsel in the matter, this court will not interfere.—Louisville &c. R. Co. v. Thompson, 64 M. 584, 1 So. 840.

(1897). If improper remarks are made by the counsel, it is the duty of the court to interpose, but if the court fail to do so it devolves upon opposing counsel to call attention to the impropriety.—Pullman Palace Car Co. v. Lawrence, 74 M. 782, 22 So. 53.

§ 133. Action of court.

(1911). An instruction should have been given in a personal injury case that the jury have no right to presume that persons not present and testifying would give evidence to bring such persons than rested on the unfavorable to the defendant and that no greater obligation rested on the defendant

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plaintiff, and this more particularly where it was shown that the absent parties were equally accessible to the plaintiff and the defendant. The jury tries cases on evidence before them, and not on testimony that either they or counsel may imagine some absent person might give.—Illinois Cent. R. Co. v. Weinstein, — M. —, 55 So. 48.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) QUESTIONS OF LAW OR OF FACT IN GENERAL.

See *post*, §§ 167–178.

Question for jury as to dedication, see DEDICATION, § 45.
Questions for jury in actions for injuries to animals in transit, see CARRIERS, § 230.
Questions for jury in actions for injuries to passengers, see CARRIERS, § 320.
Questions for jury in actions for injuries to persons on tracks, see RAILROADS, § 400.
Questions for jury in actions for killing stock, see RAILROADS, § 446.
Questions for jury in actions for loss or injury to goods, see CARRIERS, § 136.
Questions for jury in actions for wrongful discharge, see MASTER AND SERVANT, § 43.
Questions for jury in actions involving adverse possession, see ADVERSE POSSESSION, § 115.
Questions for jury in actions involving alteration of instruments, see ALTERATION OF INSTRUMENTS, § 30.
Questions for jury in actions on notes, see BILLS AND NOTES, § 537.
Questions for jury in actions on policies, see INSURANCE, § 668.
Questions for jury in actions to set aside fraudulent conveyances, see FRAUDULENT CONVEYANCES, § 308.
Questions for jury in construction of contracts, see CONTRACTS, § 176.
Questions for jury in ejectment, see EJECTMENT, § 106.
Questions for jury in negligence cases, see NEGLIGENCE, § 136.
Questions for jury in replevin, see REPLEVIN, § 88.
Questions for jury in actions between bailor and bailee, see BAILMENT, § 33.
Reception of evidence in arbitration proceedings, see ARBITRATION AND AWARD, § 34.

§ 135. Questions of law or of fact.

See *post*, § 197.

(1840). Whether representations made in a printed advertisement of the sale of land amount to a warranty, is not a question of law to be determined by the court, but a question of fact for the determination of the jury.—Anderson v. Burnett, 5 H. 165, 35 Am. Dec. 425.

(1848). It is the peculiar province of the jury to pass upon questions of fraud in fact.—Gilliam v. Moore, 10 S. & M. 130.

A writing must be construed by the court, and not by the jury.—(1850) Randolph v. Govan, 14 S. & M. 9; (1852) Benson v. Benson, 24 M. 625; (1858) Beasly v. Evans, 35 M. 192; (1859) Fairly v. Fairly, 38 M. 280.

Where a question of title is involved, the validity of the title is a question of law for the court when the facts are ascertained by the jury.—(1856) Greenwade v. Mills, 31 M. 464; (1867) Baldwin v. McKay, 41 M. 358.

(1879). Where, in an action on a sheriff's bond to recover damages for failure to return executions, the defense is that the executions were void, it is the duty of the court to determine their validity, admitting in evidence those that are merely irregular and excluding such as are void. This duty should not be devolved upon the jury.—Dailey v. State, 56 M. 475.

(1888). Whether a note sued on was obtained by fraud or duress, and was without valuable consideration, are questions of fact for the jury.—Smokey v. Johnson, 4 So. 787, not officially reported.

(1896). While to interpret the meaning of a writing unaffected by parol testimony is, doubtless, the province of the court, the effect of such writing as evidence of a collateral fact—e. g., waiver—is for the jury.—Powell v. Smith, 74 M. 142, 20 So. 872.

§ 139. —— Weight and sufficiency of evidence in general.

See *post*, §§ 194, 206.

(1841). It is in the province of the court to determine whether the evidence introduced by the plaintiff conduces to establish his demand, and if it does not, the court may instruct the jury to find for the defendant.—Perry v. Clark, 5 H. 495.

(1849). Evidence to establish a material fact should not be excluded from the jury because, in the opinion of the court, there is not enough of it to establish the *factum probandum;* the jury are the judges of that.—Simmons v. Cutreer, 12 S. & M. 584.

(1876). The test of admissibility of evidence is its relevancy and not conclusiveness. It is for the jury, not the court, to decide as to its weight.—Everman v. Robb, 52 M. 653, 24 Am. Rep. 682.

(1882). The competency of books of account is for the court, their weight is for the jury. That it is not shown that they were correctly kept and that the entries do not correspond with the account sued on, relate only to their weight.—Bookout v. Shannon, 59 M. 378.

It is the province of the jury to decide upon the weight of evidence.—(1898) Coleman v. Adair, 75 M. 660, 23 So. 669; (1908) Mobile &c. R. Co. v. Jackson, 92 M. 517, 46 So. 142.

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A peremptory instruction is proper only where there is no testimony tending to make out the opposite party's case.—(1898) Strauss v. National Parlor Furniture Co., 76 M. 343, 24 So. 703; (1910) Bolling v. Red Snapper &c. Co., — M. —, 53 So. 394.

(1900). Plaintiff and defendant lived on and cultivated crops on adjacent plantations, fenced in by a common enclosure. Cattle belonging to, or in charge of, the defendant were turned into or allowed to enter the common enclosure and destroy some of the plaintiff's cotton. On the trial of an action for damages, witnesses for the plaintiff testified that on several occasions the cattle were driven out of the plaintiff's field; that the cattle were the same that the defendant kept in his pasture until he finished gathering his crops; that the animals were claimed by the defendant, and that they were on several occasions driven home by him. One of the plaintiff's witnesses testified that the defendant turned the cattle into the common enclosure. The defendant denied that he owned any cattle and that he turned the cattle into the enclosure. This evidence was sufficient to support a verdict for the plaintiff, should have gone to the jury, and a peremptory instruction for the defendant was error.—Knott v. Brewster, 27 So. 758, not officially reported.

(1909). Error is predicable of a peremptory instruction for the plaintiff, in an action on account, to the full amount of his demand, where it appears that the defendant was entitled to a credit thereon.—Bryant v. Enochs Lumber & Mfg. Co., 94 M. 454, 49 So. 113.

§ 140. —— Credibility of witnesses.

(1873). Though the provision of the statute (Code 1857, art. 190, p. 510), that "the jury shall give such weight to the testimony of parties and interested witnesses as in view of their situation and of all the circumstances they shall be fairly entitled to," is not brought forward in the Code of 1871; it embodies a just rule, and one that still prevails.—Lockhart v. Camfield, 48 M. 470.

The jury are the judges of the credibility of witnesses.—(1874) Prince v. Crawford, 50 M. 344; (1893) Terry v. State, 12 So. 544, not officially reported; (1908) Mobile &c. R. Co. v. Jackson, 92 M. 517, 46 So. 142.

(1893). The jury is the judge of the testimony and of the credibility of witnesses, but it cannot arbitrarily discredit positive and reasonable testimony, which is uncontradicted, and which the adverse party, having the opportunity and knowledge, refuses, as a witness, to deny.—Harvey v. Covel, 12 So. 462, not officially reported.

§ 141. —— Uncontroverted facts or evidence.

(1842). Where there is no contest or dispute about the facts of the protest of a bill and notice, if the evidence on these points be sufficient in law to charge the indorsers, it will not be error for the court so to charge the jury.—Fleming v. Fulton, 6 H. 473.

§ 143. —— Conflicting evidence.

Where there is conflict in the evidence touching the material facts of the case, the latter should be submitted to the jury under proper instructions; a peremptory instruction will be error and a verdict returned in consequence thereof will be reversed.—(1876) Thrasher v. Gillespie, 52 M. 840; (1891) Cantrell v. Kansas City &c. R. Co., 69 M. 435, 10 So. 580; (1892) Scott v. Bonner, 11 So. 791, not officially reported; (1892) Illinois Cent. R. Co. v. Boehms, 70 M. 11, 12 So. 23; (1892) Avent v. Maroney, 12 So. 209, not officially reported; (1893) Tribette v. Illinois Cent. R. Co., 71 M. 212, 13 So. 899; (1893) Holmes v. Simon, 71 M. 245, 15 So. 70; (1894) Richardson v. Toliver, 71 M. 966, 16 So. 213; (1894) Timberlake v. Shippers' Compress Co., 72 M. 323, 16 So. 530; (1895) Harmon v. Goodbar Shoe Co., 18 So. 118, not officially reported; (1899) Moore v. Mobile &c. R. Co., 24 So. 964, not officially reported; (1899) Harris v. Perkins, 25 So. 154, not officially reported; (1899) Biloxi Canning Co. v. Stillwell &c. Co., 25 So. 366, not officially reported; (1901) Patterson v. Illinois Cent. R. Co., 29 So. 93, not officially reported; (1903) Williams v. Southern R. Co., 33 So. 972, not officially reported; (1903) Griffin v. Brock, 33 So. 968, not officially reported; (1906) Romano v. Vicksburg &c. R. Co., 39 So. 781, not officially reported; (1906) Elledge v. Gray, 41 So. 2, not officially reported; (1909) Bell v. Southern R. Co., 94 M. 440, 49 So. 120; (1909) Skipworth v. Mobile &c. R. Co., 95 M. 50, 48 So. 964; (1911) Byers v. McDonald, — M. —, 54 So. 664.

(1891). In an action of damages for negligence, where the defendant's freedom from culpability is not so clear as to leave no room for differences of opinion, the question of negligence is for the jury, and it is error to instruct for defendant.—Nesbitt v. Greenville, 69 M. 22, 10 So. 452, 30 Am. St. 521n.

(1894). Where in an action against a railroad company for damages for injuring and killing stock, the evidence regarding a material fact is conflicting, a peremptory instruction for the defendant will be erroneous.—Robertson v. Illinois Cent. R. Co., 17 So. 235, not officially reported.

(1898). On conflicting evidence as to whether a constable has removed from the state, thus creating a vacancy, the question should be left with the jury, and it is error to instruct peremptorily.—Gardner v. Smart, 23 So. 356, not officially reported.

(1898). Where the testimony of the only witness for the defendant on one material point is conflicting with that of other of the same party's witnesses on other questions, a directed verdict for the defendant will be reversed.—Rucks v. Great Southern &c. Tel. Co., 23 So. 454, not officially reported.

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(1903). Where the evidence regarding the alleged negligence of a railroad company in an action against such company for the killing by one of its trains of animals belonging to the plaintiff is conflicting, a peremptory instruction for the defendant will be error.—Bowen v. Mobile &c. R. Co., 33 So. 441, not officially reported.

(1906). Where in an action against a railroad company for damages caused by the destruction by fire of the plaintiff's turpentine still, which fire was alleged to have been caused by sparks thrown from the engine of the defendant railroad company, there is a conflict in the evidence as to the attendant circumstances of the fire and consequent loss, a peremptory instruction for the defendant will be error.—Bonner Co. v. New Orleans &c. R. Co., 40 So. 65, not officially reported.

§ 144. —— Amount of recovery.

(1892). Although, in an action for damages, a circuit court has set aside two former verdicts as excessive, it cannot refuse, on the third trial, to instruct the jury that it is the sole judge of the amount of damages to be assessed under the evidence. The court has no power by instructions to limit the jury to the amount of the former verdicts, or to an amount it may deem adequate.—Illinois Cent. R. Co. v. Minor, 69 M. 710, 11 So. 101, 16 L. R. A. 627n.

(B) DEMURRER TO EVIDENCE.

§ 150. Nature and grounds in general.

See *post*, § 158.

(1852). A demurrer is allowable only to the evidence of the adverse party holding the affirmative of the issue; when the plaintiff has offered evidence in support of his declaration, it is not allowable for him to demur to the negative evidence of the defendant, introduced to overturn plaintiff's evidence. To allow this would involve a comparison by the court of the evidence offered by the respective parties. The court, on a demurrer to evidence, can only determine upon the legal effect of the facts which the evidence demurred to conduces to prove, these facts being admitted on the demurrer. And if negative evidence be demurred to, and the court decide against the demurrant, he may insist on the irregularity of the proceeding, because, though the court acted at his instance, yet it did what was beyond its power and constitution to do.—Goodman v. Ford, 23 M. 592.

(1869). When plaintiff's evidence is wholly insufficient to prove the material allegations of his declaration, the defendant should demur to the evidence.—New Orleans &c. R. Co. v. Enochs, 42 M. 603.

(1877). A demurrer to evidence is allowed in case of any kind of evidence, whether parol or otherwise. In case of parol evidence, if certain and direct in support of the issue, where it is entered on the record with an admission that it is true, the opposing party is obliged to join in the demurrer.—Ware v. McQuillan, 54 M. 703.

(1877). Objection to pleadings cannot be raised by demurrer to the evidence.—Stiles v. Inman, 55 M. 469.

(1879). A demurrer to evidence may be resorted to on the trial of an issue *devisavit vel non*.—Broach v. Sing, 57 M. 115.

§ 154. Form and requisites.

A demurrer to the evidence should not detail the evidence as presented to the jury, but should distinctly admit whatever a jury might reasonably infer from the evidence, leaving the court nothing to do but to apply the law to the facts admitted.—(1873) Hicks v. Stiegleman, 49 M. 377; (1887) Western Assurance Co. v. Mayer, 64 M. 795, 2 So. 173.

(1877). A demurrer to evidence raises the question as to the sufficiency of facts proved. It should set out, not the evidence, but the proof supporting the matter relied upon. In the absence of a direct statement in the record of the facts proved, the court will not entertain the demurrer.—Ware v. McQuillan, 54 M. 703.

(1877). A demurrer to evidence may be taken by either party holding the affirmative; it should be reduced to writing and recite the organization of the jury, a statement of the facts shown in evidence, with the allegation that the matters set out are not sufficient to maintain the issue for the opposite party, concluding with a prayer for judgment. The whole should be transcribed on the minutes and thus made a part of the record. It is irregular to incorporate it in a bill of exceptions.—Stiles v. Inman, 55 M. 469. (In this case the court appends a form for a demurrer to evidence.)

§ 156. Hearing and determination.

(1839). A demurrer to evidence with joinder therein presents an issue in law to the court, and if it be overruled, it will be error then to submit the cause to a jury; the adverse party to the demurrant is entitled to judgment on overruling the demurrer.—Hall v. Browder, 4 H. 224.

(1841). Where there is a demurrer to evidence, the court will infer such facts as a jury might have reasonably found from the evidence; and hence, if the evidence state a demand of payment of a note at the proper time and place, and personal notice given to the indorser, the court will infer that both the demand and notice were regular in all respects.—Chewning v. Gatewood, 5 H. 552.

(1847). If, after issue joined, and the cause has been submitted to a jury, the defendant demurs to evidence in a matter of writing, it is necessary that the plaintiff should join in it; and if the court, without the defendant's joining in the demurrer, withdraw the case from the jury and render

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judgment on the demurrer, it will be error, for which the judgment will be reversed. And a recital in the record that a joinder exists, will not be sufficient; the joinder itself must appear.—Dozier v. Anstill, 8 S. & M. 528.

(1854). The plaintiff should not be compelled to join in the defendant's demurrer to his evidence, when it is entirely circumstantial, unless the demurrer admit the facts which the evidence is offered to prove.—Waul v. Kirkman, 27 M. 823.

(1854). It is not assignable as error that the court refused to compel the plaintiff to join in a demurrer to his evidence.—Waul v. Kirkman, 27 M. 823.

It is the peculiar office of the jury to find the truth of facts, and to determine the credibility of witnesses, and it would, therefore, be a misapplication of a demurrer to evidence for it to refer questions of fact to the court. The demurrer admits all the facts which the evidence tends to prove, and which the jury might infer from it.—(1870) Mobile &c. R. Co. v. McArthur, 43 M. 180; (1873) Jordon v. Foxworth, 48 M. 607.

(1870). If the evidence be vague, loose, uncertain, and existing in parol, it is an improper case for a demurrer to evidence, and the adverse party ought not to be compelled to join in it; and the demurrer ought not to be permitted, unless the demurrant state the evidence in the form of facts proven by it, so as to limit the court to a mere application of the law to those facts.—Mobile &c. R. Co. v. McArthur, 43 M. 180. See also (1873) Jordon v. Foxworth, 48 M. 607.

(1870). Where a writ of inquiry would be necessary, in case a judgment by default is taken for want of a plea, a writ of inquiry will also be necessary on overruling a demurrer to the evidence; when the judgment by default would be final, then the judgment on the demurrer may also be final.—Mobile &c. R. Co. v. McArthur, 43 M. 180.

(1881). A defendant can only be compelled to join in demurrer to evidence when he unmistakably holds the affirmative of the issue on the whole case—that is, where upon every issue presented by the pleadings, the burden of proof is upon him.—Aberdeen v. Sykes, 59 M. 236.

(1881). Hence, in an action on its bonds where a municipality pleads *nil debet*, *non est factum*, and notice of the illegality of issuance, it cannot be compelled to join in a demurrer to its evidence in support of the last plea, although it admits the official signature and seal attached to the bonds. Such admission is not equivalent to a withdrawal of the negative pleas.—Aberdeen v. Sykes, 59 M. 236.

(1892). The substantial rights of litigants should not be lost by the mere indiscretion of counsel, when discovered during the progress of the trial, and application to avoid its effect is promptly made, which, if granted, will result in no delay or injustice to the opposite party. Where, because of failure to make certain proof, a demurrer to evidence is interposed, and plaintiff seasonably applies for leave to make the further proof, it is error to refuse the application and compel a joinder in the demurrer.—Holmes v. Preston, 70 M. 152, 12 So. 202.

§ 158. Moton to strike out or exclude evidence.

See *ante*, §§ 150–156.

(1876). A motion by defendant to exclude particular testimony as incompetent is not too late if made as soon as such testimony is finished, though this be simultaneously with the closing of plaintiff's case. Objection should be made as soon as practicable after its incompetency is developed. Within this limit much is left to the discretion of the court.—Dyson v. Baker, 54 M. 24.

(1885). Where the evidence of a party, accepted as true, is wholly insufficient to maintain the issue, a motion to exclude it should be sustained. While the power to exclude should be cautiously exercised, the practice is commendable, as it saves time and the useless intervention of a jury.—Mississippi &c. Packet Co. v. Edwards, 62 M. 534.

(1889). A court may exclude all the evidence introduced by a defendant on the same grounds on which it would exclude the evidence of a plaintiff.—Gibson v. Berry, 66 M. 515, 6 So. 325.

(1889). A motion to exclude all the evidence of a party should be sustained only where it is so plainly and unmistakably insufficient to maintain the issue that if a verdict in favor of such party were rendered thereon, it would be set aside as unwarranted by the evidence.—Richter v. Beaumont, 67 M. 285, 7 So. 357.

(1895). When, in an action on a note, certain evidence is admissible under a count for money had and received, but not under a count on the note, and the plaintiff fails to maintain the count for money had and received, the admission of the evidence will not be reviewed on appeal, if the defendant, on the failure of plaintiff to maintain said count, took no steps to have the evidence excluded.—Richardson v. Foster, 73 M. 12, 18 So. 573, 55 Am. St. 483.

(1901). Where, in an action for breach of contract, the plaintiff offers competent evidence tending to sustain his allegations, it will be error, when such plaintiff has rested his case, to sustain a motion to exclude evidence introduced, and direct a verdict for the defendant.—Herring v. Edwards, 29 So. 787, not officially reported.

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(1904). Upon a motion to exclude all the testimony, not only the facts expressly testified to, but all inferences necessarily and logically to be deduced therefrom are to be taken as true in favor of the party against whom such motion is interposed.—Alexander v. Zeigler, 84 M. 560, 36 So. 536.

(1905). A motion to exclude the evidence should never be allowed unless the same is plainly and unmistakably insufficient to maintain the issue, nor except in cases where the court would feel constrained to set aside a verdict for the opposite party as unwarranted by the evidence.—Anderson v. Cumberland Tel. &c. Co., 86 M. 341, 38 So. 786.

(1905). A motion to exclude the evidence and instruct for defendant is analogous to a demurrer to the evidence, and in the main is governed by the same rules.—Anderson v. Cumberland Tel. &c. Co., 86 M. 341, 38 So. 786.

(C) DISMISSAL OR NON-SUIT.

See generally, DISMISSAL AND NONSUIT.

§ 160. Power of court.

(1873). The court has no power to enter a compulsory non-suit. Hence, where a motion to set aside a verdict and grant a new trial is taken under advisement until a succeeding term, and the court then grants a new trial and dismisses the suit for illegality of the contract sued on, this is error. Plaintiff in such case has the right to the verdict of a jury under proper instructions.—Hudson v. Strickland, 49 M. 591.

(D) DIRECTION OF VERDICT.

§ 167. Nature and grounds.

See *ante*, §§ 135–144.

A peremptory instruction is proper only where all the facts in evidence taken as true, with every just inference from them, fail to maintain the issue.—(1876) Whitney v. Cook, 53 M. 551; (1905) Farmer v. Cumberland Tel. &c. Co., 86 M. 55, 38 So. 775.

Peremptory instruction to find a certain way is improper unless the court, on the evidence, would set aside a contrary verdict.—(1888) Bernheim v. Dibrell, 66 M. 199, 5 So. 693; (1893) Holmes v. Simon, 71 M. 245, 15 So. 70.

(1896). A peremptory instruction for the defendant should not be given at the close of the evidence, because of the omission by plaintiff to establish material averments of the declaration where the plaintiff contends that such facts were proven and offers, if mistaken in the contention, to reintroduce a witness who will testify to them.—French v. Canton &c. R. Co., 74 M. 542, 21 So. 299.

(1905). A peremptory instruction will be error unless the evidence, conceding it to be absolutely true, discloses no legal right in the party against whom the instruction is given.—Fore v. Alabama &c. R. Co., 87 M. 211, 39 So. 493, 690.

The court may properly give a peremptory instruction where no other verdict could reasonably have been allowed to stand.—(1906) Wooten v. Mobile &c. R. Co., 89 M. 322, 42 So. 131; (1909) Clark v. Moyse, 48 So. 721, not officially reported.

§ 169. —— Verdict for defendant.

(1876). Where the plaintiff's evidence does not conduce to prove the cause of action, the court may instruct for the defendant. Such power should not be exercised except in cases where there is no room for doubt. As in case of a demurrer to evidence, such instruction should not be given if the evidence taken as wholly true, proves or fairly tends to prove the case.—Swan v. Liverpool &c. Ins. Co., 52 M. 704.

(1883). It is only in cases free from doubt that the court will withdraw a case from the jury; but where it is plain that a verdict for plaintiff would not be permitted to stand on the facts proved, assuming the truth of the testimony and giving full effect to every just inference from it, the court should exclude the evidence or instruct for the defendant.—Chicago &c. R. Co. v. Doyle, 60 M. 977.

(1884). Where plaintiff's evidence shows that certain crossties, for the value of which he sues, were taken by the defendant, but plaintiff cannot show the exact number, and the defendant, though able to do so, fails to show the number, it is proper to refuse to instruct that, because of uncertainty in the proof, the jury must find for defendant, plaintiff's evidence furnishing data for an approximate estimate of the number.—Natchez &c. R. Co. v. Bolls, 62 M. 50.

(1885). Where there is no conflict in the evidence and the evidence for defendant, shows a perfect defense, is uncontradicted and unexplained, it is proper to give a peremptory instruction for defendant.—Johnson v. Hunt, 1 Miss. Dec. 111.

(1890). If there is any evidence supporting or tending to support the grounds of an attachment and upon which the jury might find for the plaintiff, it is error to give a peremptory instruction for defendant.—Lowenstein v. Powell, 68 M. 73, 8 So. 269.

A peremptory instruction should not be given for the defendant, where the state of the evidence is such that the court would not vacate a verdict predicated thereof in favor of the plaintiff.—(1891) Watley v. Mobile &c. R. Co., 9 So. 445, not officially reported; (1904) Rhymes v. Jackson Electric &c. Co., 85 M. 140, 37 So. 708.

(1896). The defendant is not entitled to a peremptory instruction when the evidence adduced, with the legitimate conclusion drawn therefrom, would uphold a verdict for the plaintiff.—State v. Spengler, 74 M. 129, 21 So. 4.

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(1907). A defendant is entitled to a peremptory instruction where the court, on the testimony, would have been compelled to set aside a verdict returned for the plaintiff.—Flora v. American Express Co., 92 M. 66, 45 So. 149.

§ 170. —— Verdict for plaintiff.

(1910). Where the evidence on one of the items of a claim entitled the plaintiff to recover as a matter of law, the court should have granted the motion of plaintiff for a peremptory instruction as to that item, where it would have been his duty to set aside a verdict if it had been found to the contrary.—McFadden v. Buckley, — M. —, 53 So. 351.

(1911). There was error in the direction of a verdict for the defendant where there was evidence offered on behalf of the plaintiff to establish a plea in recoupment.—Hayes v. Slidell Liquor Co., — M. —, 55 So. 356.

§ 171. Power of court.

(1877). Though the court erroneously refuses to instruct, as in the case of non-suit, if the defendant afterwards introduces testimony and takes his chances before the jury, and the defects in plaintiff's case are supplied by further testimony, either on his own part or that of the defendant, and the right result is reached by a judgment for plaintiff, it will not be reversed because of the refusal to grant the peremptory instruction.—Maclin v. Bloom, 54 M. 365.

§ 178. Hearing and determination.

(1880). If there is any conflict in the evidence, the view which is most favorable to the party against whom a peremptory instruction is asked must be taken as true.—Carson v. Leathers, 57 M. 650.

(1892). In granting a peremptory instruction, the court assumes as true all testimony tending to establish the issue in favor of the losing party.—Illinois Cent. R. Co. v. Boehms, 70 M. 11, 12 So. 23.

VII. INSTRUCTIONS TO JURY.

Instructions as to exemplary damages, see DAMAGES, § 215.
Instructions as to use and occupation, see USE AND OCCUPATION, § 11.
Instructions in action for assault, see ASSAULT AND BATTERY, § 43.
Instructions in action for breach of contract, see CONTRACTS, § 351.
Instructions in action for broker's commissions, see BROKERS, § 88.
Instructions in action for delay by carrier, see CARRIERS, § 106.
Instructions in action for injuries at crossings, see RAILROADS, § 351.
Instructions in action for injuries to passengers, see CARRIERS, § 321.
Instructions in action for injury to goods, see CARRIERS, § 137.
Instructions in action for injury to servant, see MASTER AND SERVANT, §§ 290, 293.
Instructions in action for price of goods, see SALES, § 364.
Instructions in action for wrongful attachment, see ATTACHMENT, § 380.
Instructions in action for wrongful death, see DEATH, § 104.
Instructions in action for wrongful discharge, see MASTER AND SERVANT, § 44.
Instructions in action for wrongful ejection of passengers, see CARRIERS, § 384.
Instructions in actions for killing stock, see RAILROADS, § 447.
Instructions in action for libel or slander, see LIBEL AND SLANDER, § 124.
Instructions in actions involving agency, see PRINCIPAL AND AGENT, § 191.
Instructions in actions of trespass, see TRESPASS, § 68.
Instructions in actions on bills or notes, see BILLS AND NOTES, § 538.
Instructions in actions on policies, see INSURANCE, § 669.
Instructions in actions to set aside fraudulent conveyances, see FRAUDULENT CONVEYANCES, § 309.
Instructions in bastardy proceedings, see BASTARDS, § 71.
Instructions in ejectment, see EJECTMENT, § 110.
Instructions in replevin, see REPLEVIN, § 91.
Instructions in suit against carrier for failure to stop train, see CARRIERS, § 278.
Instructions in suit for malicious prosecution, see MALICIOUS PROSECUTION, § 72.
Instructions in will contest, see WILLS, § 328.
Instructions on usury, see USURY, § 120.

(A) PROVINCE OF COURT AND JURY IN GENERAL.

§ 182. Authority to instruct jury in general.

It is a violation of the statute for the court to instruct the jury, except at the request of one of the parties.—(1831) Montgomery v. Griffin, W. 453; (1838) Davis v. Tiernan, 2 H. 786; (1846) Taylor v. Manley, 6 S. & M. 305; (1856) Williams v. State, 32 M. 389, 1 Mor. St. Cas. 933, 66 Am. Dec. 615.

§ 187. Credibility of witnesses.

(1866). It is illegal to charge the jury that they should rely on the testimony of a party to the suit, unless it be disproved by other evidence.—Southern Express Co. v. Wolfe, 41 M. 79.

It is proper to refuse an instruction that if a witness has sworn falsely to any material fact, his testimony is to be disregarded entirely. In the first place the swearing must be wilful, and even then it only goes to the credibility of the testimony; it is not for the court to say that it must be disregarded. The maxim *falsus in uno*, &c., is only an advisory suggestion to the jury.—(1876) White v. State, 52 M. 216; (1878) Finley v. Hunt, 56 M. 221.

Where the testimony of the only witness for defendant is uncontradicted, and not improbable or unreasonable, it is error to give an instruction, at the instance of plaintiff,

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that if any witness has knowingly testified falsely in a material matter, the jury may disbelieve him.—(1892) Louisville &c. R. Co. v. Tate, 70 M. 348, 12 So. 333; (1893) Louisville &c. R. Co. v. Whitehead, 71 M. 451, 15 So. 890; (1893) Levy v. Holberg, 71 M. 66, 14 So. 537.

(1893). Although a party is a witness in his own behalf, testimony having been offered to impeach his character, it is error to refuse, as aimed at him, an instruction to the effect that the jury is the judge of the credibility of witnesses, and may, if the evidence justifies it, disregard the testimony of a witness, and may also consider the interest of a witness and his character for truth, if shown, in determining the weight to be given his testimony.—Norwood v. Andrews, 71 M. 641, 16 So. 262.

(1904). An instruction which advises the jury that they may reject the entire testimony of a witness who has sworn falsely in any particular, is erroneous unless it also embodies the limitation that such false swearing must have been done wilfully, knowingly and corruptly.—Sardis &c. R. Co. v. McCoy, 85 M. 391, 37 So. 706.

§ 189. Hypothetical statements by judge.

Where a hypothetical case is stated in, and made the basis of an instruction to the jury, it should be stated fully and without omission of material facts, as the evidence tends to establish it in relation to the particular point involved in the instruction, and the rule of law should be correctly expounded, in reference to the case thus stated; and hence, in an action of detinue for a slave, if the evidence tend to show that the slave was purchased by the defendant in his own name, but with the funds, and for the use of the plaintiff, and that the defendant afterwards, as plaintiff's agent, managed and controlled the slave, it will be error to instruct the jury, "that if the defendant purchased the slave and took the legal title to himself, and afterwards held possession, they must find for him," without stating also, that it was necessary that the possession of defendant should have been accompanied by claim of title in himself, and for a period sufficient to bar plaintiff's title by the statute of limitations.—(1859) Fairly v. Fairly, 38 M. 280; (1869) New Orleans &c. R. Co. v. Statham, 42 M. 607, 97 Am. Dec. 478n.

An instruction given with reference to facts, hypothetically stated and unsupported by any evidence, is calculated to mislead the jury, and therefore erroneous.—(1855) McIntyre v. Kline, 30 M. 361; (1856) Greenwade v. Mills, 31 M. 464; (1856) Heirn v. McCaughan, 32 M. 17; (1857) Garnett v. Kirkman, 33 M. 389; (1866) Barker v. Justice, 41 M. 240; (1866) Dix v. Brown, 41 M. 131; (1867) Burns v. Kelley, 41 M. 339; (1870) Clarke v. Edwards, 44 M. 778.

(1880). Where an instruction embraces a hypothetical statement of facts, and the jury is informed that if it believes the same it is authorized to find a certain way, the statement should embrace all the material facts of the case, or of the particular issue which the evidence tends to prove.—Dean v. Tucker, 58 M. 487. To the same effect (1893) Collins v. State, 71 M. 691, 15 So. 42.

§ 190. Assumptions by judge as to facts.

The court in charging the jury cannot assume as proven any material fact controverted in the evidence. Hence, where the question was whether the delivery of personalty was under a gift or a loan, it will be error for the court to charge "that if the plaintiff's evidence, that the property in dispute was a mere loan, is not successfully contradicted, the jury must find for him."—(1858) Dougherty v. Vanderpool, 35 M. 165; (1859) Dunlap v. Hearne, 35 M. 471.

(1866). Where the defense to a note was, that it was given for the purchase of a chattel which was warranted sound and was in fact unsound, the instructions should not assume that the note was given for the chattel, but should submit that question to the jury.—Baker v. Justice, 41 M. 240.

(1874). In an action involving the testimony of witnesses as to handwriting, an instruction "that the opinion of experts is intrinsically weak and ought to be received and weighed by the jury with great caution," is objectionable where no experts testify.—Patrick v. Carr, 50 M. 199.

(1874). Under a plea of *non est factum*, an instruction for the defendant is erroneous which states that it was not incumbent on him "to show who forged his name; on his plea and affidavit it was incumbent on the plaintiff to prove his plea and affidavit are false." This erroneously assumes as a fact that the signature was forged; and, besides, it is not incumbent on the plaintiff to prove that the plea is false, but only to show the genuineness of the signature.—Patrick v. Carr, 50 M. 199.

(1876). In giving instructions the court should not assume as conclusions of law anything which should be submitted to the jury as a question of fact; nor should it assume as true any issuable fact. The law applicable to the facts should be given, leaving it to the jury to say whether the propositions of fact have been established.—Myrick v. Wells, 52 M. 149.

(1885). On the trial of a claimant's issue, where the inquiry is whether property seized in possession of defendant was held for himself, or as agent for the claimant, an instruction for plaintiff that the jury is "authorized to take into consideration the statement of the claimant that the property in controversy belonged to defendant and the consequent assumption and exercise of acts of ownership over the property by defendant, and his silence as to any claim of plaintiff thereto when notified of the levy of the writ of attachment thereon, as evidence tending to show that the property did, in fact, belong to defendant," is erroneous as assum-

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ing that the apparent ownership was not in reality as agent, and because it invades the province of the jury.—French v. Sale, 63 M. 386.

An instruction assuming the existence of facts at issue is erroneous.—(1889) McKee v. Munn, 5 So. 616, not officially reported; (1892) Beall v. Bullock, 11 So. 720, not officially reported; (1893) Stigler v. Anderson, 12 So. 831, not officially reported; (1894) Smith v. Team, 16 So. 492, not officially reported; (1895) Lyle v. McInnis, 17 So. 510, not officially reported; (1895) Gillespie v. Planters' &c. Mfg. Co., 18 So. 120, not officially reported; (1898) Coleman v. Adair, 75 M. 660, 23 So. 369.

An instruction which assumes as proven an element of the case concerning which there is absolutely no evidence whatever, is erroneous.—(1892) Brown v. Walker, 11 So. 724, not officially reported; (1893) Harvey v. Covel, 12 So. 462, not officially reported; (1908) Kneale v. Lopez, 93 M. 201, 46 So. 715.

(1902). In a civil action for assault and battery where the testimony is conflicting as to whether or not the defendant's conduct was such as to justify the imposition of punitive damages, it is error to instruct the jury that should they find for plaintiff, they may consider the financial condition of the defendant in estimating the damages.—Lopez v. Jackson, 80 M. 684, 32 So. 117.

(1905). Where the plaintiff sent the piston rod from a cotton gin to a machinist for repairs, and the rod, with other parts added by the machinist, was shipped to the plaintiff C. O. D., it would be error, in an action by him against the carrier for loss of the rod, &c., to instruct the jury "to find for the plaintiff the value of the property consigned to him that belonged to him and was never delivered," this, by reason of the fact that such instruction assumes that the entire shipment did actually belong to such plaintiff.—American Exp. Co. v. Jennings, 86 M. 329, 38 So. 374, 109 Am. St. 708.

(1908). Where the plaintiff in replevin claims the property under a sale, an instruction which assumes that the sale under which the plaintiff claimed was not *bona fide*, is erroneous, and this, more particularly where the case was a close one on the facts.—Griffin v. Griffin, 93 M. 651, 46 So. 945.

(1908). Error is predicable of an instruction in an action for personal injuries to a passenger which assumes on conflicting evidence that the place where the plaintiff was riding at the time of the collision causing his injuries was dangerous and that it was the proximate cause of the danger.—Reid v. Yazoo &c. R. Co., 94 M. 639, 47 So. 670.

§ 192. —— Uncontroverted facts or evidence.

It will not make an instruction bad, which is otherwise unobjectionable, that a fact is assumed in it to exist which is fully established by the proof, and about which there is no contradiction in the evidence.—(1856) Heirn v. McCaughan, 32 M. 17; (1860) Lamar v. Williams, 39 M. 342.

(1867). It will not be error for an instruction to assume the evistence of a fact which is conceded on the trial by both parties.—Cook v. Whitfield, 41 M. 841.

Though the court may not charge upon the weight of evidence, it is not error to assume as true a fact which is fully established, and as to which there is no controversy.—(1891) Carberry v. Burns, 68 M. 573, 9 So. 290; (1892) Alabama &c. R. Co. v. Phillips, 70 M. 14, 11 So. 602.

§ 193. Opinion or belief of judge as to facts.

(1866). The court instructed the jury that if they believe the testimony of the plaintiff (setting out what that testimony was), they might find vindictive damages. *Held*, that this was erroneous, in stating to the jury what that testimony was, that being a matter to be determined entirely by their judgment.—Southern R. Co. v. Kendrick, 40 M. 374, 90 Am. Dec. 332.

§ 194. Weight and sufficiency of evidence.

(1849). In a case where the legitimacy of the plaintiff was involved, and there was proof that there was cohabitation between plaintiff's parents, and also direct rebutting proof tending to show they were not married, it would be error and a charge on the weight of the evidence for the court to instruct the jury "that cohabitation of a man and woman, and the acknowledgment on their part that they are husband and wife, and the raising and providing for their children, and the acknowledgment of them as such, is legal evidence of marriage; and if the evidence establish such cohabitation and acknowledgment, they must find for plaintiffs."—Stephenson v. McReary, 12 S. & M. 9, 51 Am. Dec. 102.

(1859). It will be error to charge "that the direct and positive knowledge of one witness is of more force and value than the doubtful recollection of ten witnesses about the same matter."—Dunlap v. Hearn, 37 M. 471.

(1866). An instruction which states to the jury "that a fact proven (if they believe it established), is a circumstance which they may consider in determining the main question before them," is not liable to the objection of being a charge on the weight of evidence. And when a fact proven legitimately establishes the main fact in issue, the court may instruct the jury that if that (minor) fact be proven to their satisfaction, they may infer from it the main fact.—Southern Express Co. v. Thornton, 41 M. 216.

(1876). It is error to give to the jury any instruction which will withdraw from them substantially all discretion in passing upon the facts in the case.—Thrasher v. Gillespie, 52 M. 840.

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(1877). In a case where a party to the suit testifies in respect to a conversation as to a material matter with one since deceased, it is not error to instruct the jury that while it is the sole judge of the weight of evidence, it should be circumspect in considering testimony given by either side, which, in the nature of things, cannot be disproved, as conversations or transactions with one deceased, and to give it the weight to which, in view of the interest of the witness and all the circumstances, the jury may deem it fairly entitled to.—Meyer v. Blakemore, 54 M. 570.

(1884). Where plaintiff's evidence shows that certain crossties, for the value of which he sues, were taken by the defendant, but plaintiff cannot show the exact number, and the defendant, though able to do so, fails to show the number, it is proper to refuse to instruct that because of uncertainty in the proof the jury must find for defendant, plaintiff's evidence furnishing data for an approximate estimate of the number.—Natchez &c. R. Co. v. Bolls, 62 M. 50.

(1884). In a suit on a note where defendant files a set-off and there is a conflict in the evidence as to whether the defendant has not already had credit for the items claimed, it is error for the court to instruct the jury to allow the defendant credit for same without qualifying the direction by requiring the jury to determine between the witnesses as to whether in fact the same had not already been accounted for, the instruction unaided by such qualifications being a charge on the weight of the evidence.—Turley v. Ingram, 1 Miss. Dec. 542.

(1885). On the trial of a claimant's issue and instruction which enumerates certain facts and announces that they are to be taken into consideration by the jury "as tending to show that the property did belong to defendant," is erroneous, because on the weight of evidence.—French v. Sale, 63 M. 386.

(1888). At the instance of the plaintiff the court separated and grouped the circumstances relied upon by the defendants to establish their case and gave several instructions by which the jury was told that one fact and another and another, considered separately or together, were insufficient to defeat the action, and then that another fact and another and another were equally ineffectual. By this course of instructing, the successive groups of facts were enfeebled, and presented to the jury by instructions each of which was upon the weight of the evidence.—Daniel v. Daniel, 4 So. 95, not officially reported.

(1888). By an instruction given for the plaintiff in an action for wages the jury was, in effect, told that the testimony of the plaintiff must be accepted by the jury as true, and that unless such testimony was disproved by a preponderance of the evidence, the plaintiff should have a verdict for the "full amount testified by him to be due and unpaid;" and it concluded by informing the jury that if the evidence left it doubtful whether the plaintiff's testimony had been successfully opposed, the law was for the plaintiff. This instruction was not only objectionable as being upon the weight of the evidence, but as being a direct and specific support of the credibility of a single witness.—Daniel v. Daniel, 4 So. 95, not officially reported.

(1886). An instruction that certain facts stated in the instruction are circumstances "indicating" a fraudulent intent, is erroneous, as being on the weight of the evidence.—Ladnier v. Ladnier, 64 M. 368, 1 So. 492.

Instructions that single out and emphasize parts of the testimony, are erroneous, as being on the weight of the evidence.—(1893) Levy v. Holberg, 71 M. 66, 14 So. 537; (1896) Prine v. State, 73 M. 838, 19 So. 711.

(1893). An instruction that requires a jury to act on a preponderance of the evidence, without regard to whether it satisfies the mind, is objectionable.—Tribette v. Illinois Cent. R. Co., 71 M. 212, 13 So. 899.

(1894). On the trial of an issue, joined by a plaintiff in attachment and a claimant of the goods seized, an instruction which makes insolvency the sole test of bad faith in the attached debtor, is erroneous, as being a charge upon the weight of the evidence.—Alexander v. Dulaney, 16 So. 355, not officially reported.

(1894). Although there is evidence that defendant's car inspectors invariably did their duty and rejected cars unfit for use, it is proper to refuse, as being on the weight of evidence, an instruction for defendant that such testimony is competent to prove that the cars were safe.—Alabama &c. R. Co. v. Searles, 71 M. 744, 16 So. 255.

(1898). An instruction on the weight of the evidence is erroneous.—Coleman v. Adair, 75 M. 660, 23 So. 369.

(1909). Error, on the ground of its being a charge on the weight of the evidence, is predicable of an instruction in an action for injuries to a child under twelve years of age caused by his coming in contact with an electric light wire, to the effect that the jury in determining the question of contributory negligence, must "consider the fact that the plaintiff has lived all his life in a city where they had electric lights and electric wires and the fact that the plaintiff thus had opportunities to learn and appreciate the dangers of such agencies."—Potera v. Brookhaven, 95 M. 774, 49 So. 617.

§ 194a. —— Admissions and declarations.

(1840). The court was asked to instruct the jury that the declarations of the defendant, who was sued as indorser, "that T (one of the indorsers on the same bill) considered that they were exonerated; that he himself thought differently; that there was no use in resisting; that the bill must be

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provided for; that T was between him and danger, was not an absolute promise, and a waiver in law of notice of protest." *Held*, that the instruction was properly refused, as it was a charge on the weight of evidence.—Carmichael v. Bank, 4 H. 567, 35 Am. Dec. 408.

(1868). A charge "that the declarations and admissions of a party are legal and sufficient evidence against him," is error.—Baker v. Kelly, 41 M. 696, 93 Am. Dec. 274n.

(1892). The jury, not the court, must determine the relative value of admissions. Accordingly, an instruction which declares that admissions, if fully and deliberately made to a disinterested person, are of weight, but that casual declarations, made in idle conversation, do not deserve much consideration, is erroneous as being on the weight of evidence.—Johnson v. Stone, 69 M. 826, 13 So. 858.

§ 194b. —— Opinion evidence.

(1874). In an action involving the testimony of witnesses as to handwriting, an instruction "that the opinion of experts is intrinsically weak, and ought to be received and weighed by the jury with great caution," is erroneous as being upon the weight of evidence.—Patrick v. Carr, 50 M. 199.

(1893). It is error to instruct that the testimony of experts is to be "received with caution, as the opinions of such witnesses, however honestly entertained, may be erroneous." Thus to single out witnesses, and unfavorably contrast their testimony with that of others, is in violation of the statute forbidding instructions on the weight of evidence.—Louisville &c. R. Co. v. Whitehead, 71 M. 451, 15 So. 890. To the same effect (1892) Louisville &c. R. Co. v. Tate, 70 M. 348, 12 So. 333. But see (1894) Norwood v. Andrews, 71 M. 641, 16 So. 262.

(1898). The evidence of expert witnesses is, as a matter of law, neither intrinsically weak nor strong; of its weight and worth the jury must judge, free from the influence of instructions thereon.—Coleman v. Adair, 75 M. 660, 23 So. 369.

§ 194c. —— Paper evidence.

(1848). It is a charge on the weight of evidence, and therefore erroneous, to instruct the jury in a trial of the right of property levied on under execution, and claimed by a third person under a mortgage executed to indemnify him as surety for the defendant in execution, "that the mortgage was not of itself evidence of the suretyship of the claimant, but they must look to the other evidence in the case for the establishment of that fact."—Gilliam v. Moore, 10 S. & M. 130.

(1859). The recording by the vendee of a bill of sale to a slave is a circumstance which the jury may consider with all the other evidence in the case, in determining the *bona fides* of the vendee's title; but it is not a matter which the court is authorized to charge to the jury is evidence of fraud, or is not evidence of fraud.—Fairly v. Fairly, 38 M. 280.

(1873). Though a certificate of acknowledgment of a deed is *prima facie* true, whether it is overcome by other evidence or not is a question for the jury, and it is instructing upon the weight of evidence to charge that such a certificate is entitled to equal credit with a disinterested witness.—Lockhart v. Camfield, 48 M. 470.

(1892). Where there is a controversy as to whether goods were sold to defendant or another, plaintiff's books showing that they were charged to such other for defendant, it is error to instruct that the manner of keeping the account was merely a matter of convenience for plaintiffs, "and does not change defendant's obligation to pay the debt sued on, if he owes the same." Such an instruction is on the weight of evidence. It is for the jury to say what effect, if any, is to be given to the manner of keeping the account.—Kimbrough v. Ragsdale, 69 M. 674, 13 So. 830.

(1893). An instruction which tells the jury that if it believes that the reported testimony of deceased witnesses on a former trial of the accused has been correctly proved, it should be given the same consideration as if the witnesses had testified before the jury, is objectionable.—Mabry v. State, 71 M. 716, 14 So. 267.

(1898). A jury should not disregard all other evidence, and pronounce a disputed signature genuine, from a comparison of the same with other signatures proven or admitted to be genuine, because the one in dispute is thought by them, from such comparison, to be similar to the proved or admitted ones, and an instruction authorizing them so to do is erroneous.—Coleman v. Adair, 75 M. 660, 23 So. 369.

§ 197. Determination of questions of law.

See *ante*, § 135.

(1879). It is the duty of the court by instructions to construe a writing, and not refer its meaning to the jury.—Alabama &c. Life Ins. Co. v. Herron, 56 M. 643. See also (1876) Selma &c. R. Co. v. Anderson, 51 M. 829.

(1880). And in an action based upon a trust deed its construction is for the court, and an instruction submitting it to be construed by the jury is erroneous.—Bowman v. Roberts, 58 M. 126. See also (1876) Whitney v. Cook, 53 M. 551.

(B) NECESSITY AND SUBJECT-MATTER.

§ 203. Issues and theories of case in general.

(1905). The defendant herein had two distinct defenses, each of which was supported by evidence sufficient, if believed by

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the jury, to have entitled him to a verdict. Under such circumstances, he was entitled to have each of his theories fairly presented, and submitted, under proper instructions, to the consideration of the jury.—Crow v. Burgin, 38 So. 625, not officially reported.

§ 205. Presumptions and burden of proof.

(1843). Presumptions of fact merely should be left to the exclusive consideration of the jury; the court cannot charge the jury that such a fact is to be presumed by them from the proof made of another fact. But if the court so erroneously charge the jury, and at the same time should tell the jury that they must weigh the whole evidence, and form their own conclusions from that, whether the fact so presumed be so or not, it will cure the error. Thus, where in an action for work and labor, under a written contract, the contract was proven, and also that the work was done according to that contract, but there was no direct proof that plaintiff did the work; the court charged the jury "that proof being made of the contract in writing to do the work, and proof that the work was done according to the contract, the presumption arises that the work was done by the contractor; absolute proof that the work was done is not necessary; the jury must weigh the testimony, and form from that their own conclusions whether it was done by plaintiff or not;" it was held that the first branch of the instruction was erroneous, and that the better course would, perhaps, have been to refuse the whole on that account; but that the latter clause sufficiently qualified the first, and that the whole taken together was correct.—Dickson v. Moody, 2 S. & M. 17.

(1877). Instruction as to where the burden of proof lies, and directing a verdict according to the preponderance of the evidence, is proper.—Meyer v. Blakemore, 54 M. 570. See also (1873) Lockhart v. Camfield, 48 M. 470.

(1889). An instruction which announces that the party on whom rests the burden of proving that a conveyance is fraudulent must establish that fact by a clear preponderance of the evidence, is not erroneous because of the use of the adjective "clear."—Chambers v. Meaut, 66 M. 625, 6 So. 465.

(1895). An instruction for plaintiff placing on defendant the burden of proof of an affirmative defense, and directing a verdict for plaintiff, unless on the evidence the minds of the jury are not satisfied to a reasonable degree of certainty, presents no reversible error.—Globe Ins. Co. v. Farnsworth, 72 M. 555, 17 So. 445.

§ 206. Determination of weight and sufficiency of evidence in general.

See *ante*, §§ 139, 194.

The court has no power to charge on the weight of evidence; yet it has the power to judge of, and charge upon, the tendency of evidence, and the exercise of this power is essential to the administration of justice. It is a power to be exercised with the greatest caution, and only where there can be no room for doubt. But when the evidence wholly fails to make out the plaintiff's case, and does not tend in any justly legal view to establish it, it is the duty of the court to so instruct the jury.—(1841) Perry v. Clark, 5 H. 495; (1854) Frizell v. White, 27 M. 198; (1857) Garnett v. Kirkman, 33 M. 389.

§ 208. Exclusion of evidence from consideration.

(1868). It is error to charge, without qualification or exception, that the declarations of a party are not admissible in evidence in a case where, by law, such declarations are competent.—Baker v. Kelly, 41 M. 696, 93 Am. Dec. 274n.

§ 210. Credibility of witnesses.

See *ante*, § 140.

(1859). The jury have a right to consider the interest of a witness, in determining his credibility; and it will therefore be error for the court to instruct, even since the Act of 1857, that they cannot disregard the evidence of an interested witness, unless his manner and conduct in giving in his testimony, and the testimony of the other witnesses in the cause, satisfy them that he has sworn falsely.—New Orleans &c. R. Co. v. Allbritton, 38 M. 242, 75 Am. Dec. 98.

§ 213. Matters of law in general.

See *ante*, § 135.

The court should not by instructions refer the construction of a writing to the jury, but should state to the jury the proper meaning and effect of it.—(1850) Randolph v. Govan, 14 S. & M. 9; (1852) Benson v. Benson, 24 M. 625.

§ 214. Law applicable to particular issues or theories.

The validity of the title involved being a question of law for the court when the facts are ascertained by the jury, the court should not, in charging the jury, leave the general question of title to their determination, without explaining to them the rules of law determining that question when applied to the facts.—(1856) Greenwade v. Mills, 31 M. 464; (1867) Baldwin v. McKay, 41 M. 358.

§ 217. Instructions as to duties of jury.

(1848). It will be erroneous for the court to give instructions to the jury, based upon the existence of fraud in fact, without informing the jury that they are to judge whether the fraud exists or not.—Gilliam v. Moore, 10 S. & M. 130.

§ 219. Definition of explanation of terms.

(1858). Where the possession of a slave by the defendant commenced under a loan from the plaintiff, it will be error for the court to instruct the jury "that three years

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adverse possession confers title," without explaining to the jury what is necessary to constitute adverse posession.—Lockhart v. Luker, 36 M. 68.

(1866). On the trial of an issue *devistavit vel non*, involving the sanity of the testator, the court instructed the jury as follows: "If they believe from the evidence that the contestant had always been an obedient, dutiful and good child, but that under the influence of an insane delusion, her father (the testator) considered and believed that she had become disobedient and utterly unworthy of his regard, and he utterly cast her off as a child, and that the paper in controversy was the direct offspring of such insane delusion, they should find against the will." *Held*, that the instruction was correct as a legal proposition, and to minds versed in legal science and acquainted with legal terms, would be unobjectionable. But as a rule to be practically applied by a jury unskilled in the use of legal terms, it was objectionable in not explaining the legal meaning of the term delusion, and what degree of it should appear to justify a verdict against the will.—Mullins v. Cottrell, 41 M. 291.

(1871). Technical terms used in charges must be explained.—Jarnigan v. Fleming, 43 M. 710, 5 Am. Rep. 514.

(C) FORM, REQUISITES, AND SUFFICIENCY.

§ 222. Written instructions.

(1854). The parties may consent to oral charges, or an oral modification of a written instruction.—Lavenburg v. Harper, 27 M. 299.

(1874). It is a violation of Code 1871, § 643, and the well settled law, for the circuit court, of its own motion, to give verbal instructions to the jury.—Stewart v. State, 50 M. 587.

§ 228. Form and language in general.

(1844). The court, in charging a general rule of law to which there are exceptions applicable to the evidence, should explain the exceptions. Hence, where the evidence tended to show that the answer of a cashier of a bank (to whom a note had been presented for payment after banking hours) was "that no funds were there, nor had been that day, in bank to pay the note," it will be error for the court to charge the jury "that demand should be made within banking hours," without explaining to them that it would be good if made afterwards, in case payment was refused, because no funds had been provided on that day to meet the note.—Cohea v. Hunt, 2 S. & M. 227, 41 Am. Dec. 589.

(1848). The law applicable to a case should be laid down in the charges to the jury plainly and explicitly; and the refusal of a proper instruction will not be justified because another instruction has been given which, by inference, lays down the same rule.—Payne v. Green, 10 S. & M. 507.

(1860). An instruction must not only be correct when considered as an abstract proposition of law, but it must express the law correctly as applicable to the evidence in the cause, without danger of misleading the jury.—Lombard v. Martin, 39 M. 147.

Although one has obtained a correct abstract statement of the law on a material question, he has the right, by instruction, to a concrete application thereof to the facts in evidence, accompanied by a declaration that these facts, if established, call for the application of the principle. It is the better practice to embrace both propositions in one charge.—(1881) Aldridge v. State, 59 M. 250; (1886) Lamar v. State, 64 M. 428, 1 So. 354.

§ 230. Limiting number of instructions.

(1870). Instructions given in great numbers are not only injurious, but objectionable in practice.—Clarke v. Edwards, 44 M. 778.

§ 231. Sufficiency as to subject matter.

(1854). The court instructed the jury that if they believe that any of the witnesses corruptly swore falsely, they had a right to disregard the evidence of such witness entirely. *Held*, that the instruction was illegal, because it did not confine the jury in their estimate of the falsity of a witness to the evidence adduced on the trial, nor to the manner and demeanor of the witness while testifying, nor to any circumstance apparent upon the examination, and a legitimate subject for their consideration, but permitted them to indulge their suspicions, and even to act upon their own private information, and to condemn a witness unheard and undefended.—Lavenburg v. Harper, 27 M. 299.

(1894). The fact that a party produces the best evidence he has, or could be expected to have, does not exempt him from the rule which requires evidence sufficient to satisfy the jury. Hence, an instruction in such case that the jury should find for the defendant, if satisfied "by evidence such as could reasonably be expected to be produced by the defendant" that the cars were safe, is properly modified by striking out the words quoted.—Alabama &c. R. Co. v. Searles, 71 M. 744, 16 So. 255.

(1894). In a suit against a railroad company, after instructing under Code 1892, § 1808, that proof of injury by the running of cars is *prima facie* evidence of defendant's negligence, if the facts connected with the injury are in evidence, it is proper to instruct, further, that the jury will determine the case upon the facts, and not upon the presumption.—Hamlin v. Yazoo &c. R. Co., 72 M. 39, 16 So. 877.

(1911). An objection that an instruction reciting "if the plaintiff has shown by the evidence" should read "if the jury believe from the evidence," is too technical for consideration. The criticism does not go to

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the substance of the instruction, but rather to its form.--Southern R. Co. v. Floyd, — M. —, 55 So. 287.

(1911). An instruction in a personal injury case was misleading which told the jury to find for the plaintiff if she was injured "in the manner set out in the declaration." The jury was entitled to have the law of the case as given by the court written out in full in the instructions.—Southern R. Co. v. Ganong, — M. —, 55 So. 355.

§ 240. Argumentative instructions.

(1909). An instruction was erroneous as argumentative which told the jury in an action for injuries to a child under twelve years of age that in determining the question of his contributory negligence in coming in contact with electric light wires that the jury must "consider the fact that the plaintiff in this case has lived all his life in a city where they had electric lights and electric wires, and the fact that the plaintiff thus had opportunities to learn and appreciate the dangers of such agencies."—Potera v. Brookhaven, 95 M. 774, 49 So. 617.

§ 242. Confused or misleading instructions.

(1866). The proof showed that a debtor by open account prepared his note therefor and offered it to the creditor, who said: "I intend you to have the money, unless I get in circumstances to need it, and you can burn the note." The court instructed the jury in reference to this state of facts, "that a delivery of the note by the creditor to the debtor, either actual, constructive, or symbolical, and the parting with all diminion over the debt, of which questions they were the judges, was a release of the debt." *Held*, erroneous, because the court did not explain to the jury the rules of law applicable to the question whether the creditor accepted the note or not, and whether he made a delivery of it to the debtor; for the rules of law applicable to these questions should have been explained to the jury, and not left to their determination.—Young v. Powers, 41 M. 197.

(1866). In an action against a railway company, to recover damages for their failure to give the plaintiff, who was a passenger on their cars, an opportunity to get off at a station to which he was ticketed, the plaintiff claimed exemplary damages, and the court instructed the jury that "special damage need not be proven." *Held*, that whilst this was true as a proposition of law, yet the instruction was too indefinite, and was calculated to mislead the jury.—Southern R. Co. v. Kendrick, 40 M. 374, 90 Am. Dec. 332.

(1868). In a case where the evidence approximates an equipoise and is conflicting, the court should expound the rules of law applicable to it with the utmost caution, precision and clearness, avoiding as far as practicable any and all allusions to matters not involved in the issue; and if in such a case an erroneous instruction be given, or one which, though abstractly correct, is irrelevant to the issue, it will be presumed to have had its effect in procuring the verdict, which will for that reason be set aside. The cases in which courts have refused to disturb verdicts for erroneous or irrelevant instructions are such only where the verdict was clearly right on the evidence, and would not probably be different if a new trial were granted.—Norfleet v. Sigman, 41 M. 631.

(1893). Vague and misleading instructions are bad and should not be given.—Malone v. Robinson, 12 So. 709, not officially reported.

(1896). An instruction that the jury are "the exclusive judges of the evidence, its weight and effect, and of the credibility of the witnesses" is ambiguous. If the word "effect" embraces legal effect, the instruction is erroneous.—Tucker v. Tucker, 74 M. 93, 19 So. 955.

§ 243. Inconsistent or contradictory instructions.

(1848). In a trial of the right of property in slaves, the claimant relied upon a mortgage with power of sale given by the debtor to him, to indemnify him as his surety; the court below, after having instructed the jury that the mortgage was *prima facie* good and valid, also instructed them that it rested with the claimant to prove the consideration of the mortgage to be fair and *bona fide*, and to show clearly that he was liable for the debt named in the mortgage as surety for the defendant in the execution. *Held*, that the latter instruction was erroneous, because it implied that the plaintiff in execution had made out a *prima facie* case of fraud with reference to the mortgage.—Gilliam v. Moore, 10 S. & M. 130.

When an eroneous instruction is given, the error is not corrected by the giving of another, setting out a rule in direct conflict with the rule stated in the erroneous instruction; the contradiction between the two leaves the jury without any safe guide, and is of itself improper.—(1849) House v. Fultz, 13 S. & M. 39; (1866) Southern R. Co. v. Kendrick, 40 M. 374, 90 Am. Dec. 332; (1868) Herndon v. Henderson, 41 M. 584.

It is improper to give contradictory charges to the jury.—(1866) Mississippi Cent. R. Co. v. Miller, 40 M. 45; (1908) Illinois Cent. R. Co. v. McGowan, 92 M. 603, 46 So. 55.

(1877). Where the evidence is conflicting, it is essentially important that there should be no conflict in the instructions.—Chapman v. Copeland, 55 M. 476.

§ 244. Undue prominence of particular matters.

(1886). Where an instruction for plaintiff authorizing a verdict for him in a certain state of case is modified by adding "unless the jury believe from the evidence the facts stated in the instructions for the defendant." while this unnecessarily attracts

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the attention of the jury to the defendant's instructions, it is not of itself sufficient error to cause a reversal.—Moyers v. Columbus Banking &c. Co., 64 M. 48, 8 So. 205.

(1892). Where defendant, having previously expressed dissatisfaction with plaintiff as manager of his dairy farm, wrote him a letter discharging him, assigning some reasons, but also expressing generally his dissatisfaction, and refusing to go into details, and when sued, produced evidence to justify the discharge on other grounds, an instruction is improper which tells the jury that the reasons stated in the letter do not justify the discharge. Thus to single out and pronounce upon the evidence disconnected from other facts, is erroneous, as being calculated to mislead the jury.—Odeneal v. Henry, 70 M. 172, 12 So. 154.

(1897). Where the attention of the jury is not directed to the particular matters which they may consider without evidence to support the same, error is predicable of an instruction to the effect merely that matters within the common knowledge of mankind need not be proved.—Illinois Cent. R. Co. v. Greaves, 75 M. 360, 22 So. 804.

(1909). An instruction was open to the objection that it singled out and gave undue prominence to a part of the evidence to the exclusion of the other, when by it the jury, in an action for injuries to a child under twelve years of age, were told that, in determining the question of contributory negligence on the part of the child in coming in contact with electric light wires, they must "consider the fact that the plaintiff in this case has lived all his life in a city where they had electric lights and electric wires, and the fact that the plaintiff thus had opportunities to learn and appreciate the dangers of such agencies."—Potera v. Brookhaven, 95 M. 774, 49 So. 617.

(D) APPLICABILITY TO PLEADINGS AND EVIDENCE.

§ 248. Abstract instructions in general.

See *post*, §§ 249, 252.

(1849). It is not error to refuse an immaterial instruction to the jury, even if it be abstractly correct. Hence, if the court, in an action of ejectment by the heirs of a decedent to recover land sold by his administrator, refused to charge "that the reservation, in the order of sale of his widow's dower, was evidence that the deceased left a widow," it will not be error, as it was immaterial whether he left a widow or not.—Stephenson v. McReary, 12 S. & M. 9, 51 Am. Dec. 102.

The court should not charge the jury upon abstract principles of law, not applicable to the evidence.—(1841) Myers v. Oglesby, 6 H. 46; (1859) Powell v. Mills, 37 M. 691; (1870) Evans v. State, 44 M. 762; (1871) Jarnigan v. Fleming, 43 M. 710, 5 Am. Rep. 514.

§ 249. Application of instructions to case.

See *ante*, § 248.

(1891). An instruction making the right of the parties determinable upon issues not presented by the pleadings is erroneous.—Solomon v. City Compress Co., 69 M. 319, 10 So. 446, 12 So. 339.

(1892). An instruction not applicable to any issue joined is erroneous.—Brown v. Walker, 11 So. 724, not officially reported.

(1893). A requested instruction inapplicable to any issue in the case is properly refused.—Stadder v. Jacobs, 12 So. 444, not officially reported.

(1897). It is not error, in replevin for goods fraudulently purchased by defendant, to refuse him an instruction to the effect that if only a certain number of the articles were so purchased and the jury could not determine how many of these, if any, were seized by the officer under the writ, they should find for the defendant. This instruction would deny the plaintiff a recovery for such articles seized as were conceded to have been so purchased.—Gulledge v. Slayden-Kirksey Woolen Mills, 75 M. 297, 22 So. 952.

(1909). In an action against a carrier for refusing a passenger admission to a train, it was erroneous to instruct that the passenger offering to travel on a coupon book could not recover without showing that the book presented contained undetached coupons where that issue was not raised by the pleadings or the proof, and the plea of the defendant was that admission was denied because of a lack of room.—Fairfield v. Louisville &c. R. Co., 94 M. 887, 48 So. 513.

§ 252. —— Facts and evidence.

See *ante*, § 248.

The court may refuse instructions when there is no evidence applicable to them; and it is not error to refuse a charge, correct in principle, unless the party asking it show the evidence to which it is applicable.—(1830) Miles v. Myers, W. 379; (1839) Newman v. Foster, 3 H. 383, 34 Am. Dec. 98n; (1840) Loring v. Willis, 4 H. 383.

Instructions must be applicable to the evidence and pertinent to the questions raised by it, and if not, they should be refused, however correct they may be as abstract propositions of law; and if inapplicable and impertinent the giving of them will be error.—(1844) O'Reilly v. Hendricks, 2 S. & M. 388; (1848) Payne v. Greene, 10 S. & M. 507; (1850) Wiggins v. McGimpsey, 13 S. & M. 532; (1853) Hyde v. Finley, 26 M. 468; (1856) Dennis v. McLaurin, 31 M. 606; (1857) Wright v. Clarke, 34 M. 16; (1859) Fairly v. Fairly, 38 M. 280; (1860) Herndon v. Bryant, 39 M. 335; (1860) Lombard v. Martin, 39 M. 147; (1869) New Orleans &c. R. Co. v. Statham, 42 M. 607, 97 Am. Dec. 478n.

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(1860). When there is nothing in the plaintiff's evidence tending to prove an affirmative defense relied on by the defendant, it is not improper for the court to charge the jury that it is incumbent on the defendant to prove his defense to their satisfaction.—Lamar v. Williams, 39 M. 342.

(1860). In a controversy between the wife and a creditor of the husband, respecting the validity of her claim to property, as of her separate estate, if there be evidence tending to show that the property was purchased through the agency of the husband, and for his benefit, and with his means, it will be error to charge the jury "that the burden of proof is on the creditor to show that the money used in the purchase came from the husband, and that the law presumes that it came from the wife, until the accompanying circumstance or other proof show the contrary." For such an instruction would, in a great measure, prevent the jury from considering the whole evidence, and determining from that whether the wife's claim is fraudulent or not.—Mangum v. Finucane, 38 M. 354.

It is error to give instructions when there is no evidence on which to base them.—(1872) Hogan v. State, 46 M. 274; (1876) Co-Operative Life Assn. v. McConnico, 53 M. 233; (1878) Kinnare v. Gregory, 55 M. 612. Or where they are inapplicable to the facts.—(1873) Adams v. Power, 48 M. 450; (1874) Phillips v. Cooper, 50 M. 722. And this although they are correct in the abstract.—(1877) Parker v. State, 55 M. 414; (1880) Bowman v. Roberts, 58 M. 126; (1892) Illinois Cent. R. Co. v. Minor, 69 M. 710, 11 So. 101, 16 L. R. A. 627n.

The rule that instructions must be based on the evidence is the same in civil and criminal cases.—(1877) Fortenberry v. State, 55 M. 403; (1879) Layton v. State, 56 M. 791; (1893) Collins v. State, 71 M. 691, 15 So. 42.

(1886). It is error to refuse instructions that embody uncontradicted facts proven at the trial.—Moody v. Galigher, 1 Miss. Dec. 435.

(1886). It is error to refuse to give instructions conditioned upon the facts adduced from the evidence.—Noel v. Hooker, 1 Miss. Dec. 444.

(1889). It is error for an instruction or argument in a case to be predicated upon matters contained in hearsay statements by one who has become a witness, where such statements have been proven merely to impeach the witness.—Allen v. State, 66 M. 385, 6 So. 242.

(1891). In an action for the loss by fire of certain cotton claimed to have been "delivered" to a common carrier for shipment, an instruction to the effect that if the plaintiff contracted with the agent of the defendant that a car should be furnished him for the shipment of said cotton and the company failed to comply with its contract so made, and by reason of such failure the cotton was damaged by fire, the verdict should be for the plaintiff, should be refused, unless there is evidence connecting the alleged breach of contract to supply the car with the fact of the fire from which the damage to the cotton resulted.—Kansas City &c. R. Co. v. Lilly, 8 So. 644, not officially reported.

It will be error to give an instruction not predicative of evidence.—(1891) Mobile &c. R. Co. v. Francis, 9 So. 508, not officially reported; (1892) King v. Levy, 13 So. 282, not officially reported.—(1893) King v. Levy, 13 So. 283, not officially reported; (1893) Orrick v. Stewart, 12 So. 824, not officially reported; (1893) Malone v. Robinson, 12 So. 709, not officially reported; (1895) Trager v. Shepherd, 18 So. 122, not officially reported; (1895) Carraway v. Wallace, 17 So. 930, not officially reported; (1897) Robinson v. Spears, 21 So. 554, not officially reported; (1898) Alabama &c. R. Co. v. Hayne, 76 M. 538, 24 So. 907; (1904) Alabama &c. R. Co. v. Overstreet, 85 M. 78, 37 So. 819; (1905) Southern R. Co. v. Vaughn, 86 M. 367, 38 So. 500; (1905) Burnley v. Mullins, 86 M. 441, 38 So. 635; (1906) American Cent. Ins. Co. v. Antrim, 88 M. 518, 41 So. 257; (1908) Mobile &c. R. Co. v. Jackson, 92 M. 517, 46 So. 142; (1909) Bank of Newton v. Simmons, 96 M. 17, 49 So. 616; (1910) Alabama &c. R. Co. v. Baldwin, — M. —, 52 So. 358; (1910) New Orleans &c. Co. v. Williams, 96 M. 373, 53 So. 619.

(1893). In an action against the defendant for the alleged killing of an animal belonging to the plaintiff, it is error to charge the jury that the defendant company is liable if the conductor of the train inflicting the injuries made no effort to stop the same and did not sound the whistle, when there is no evidence that the animal involved was killed by the train.—Richmond &c. R. Co. v. Chandler, 13 So. 267, not officially reported.

(1901). In a suit upon a promissory note, to which the only plea is *non est factum*, in the absence of all evidence of fraud in procuring defendant's signature, it is error to instruct the jury that the defendant is not liable, although he signed the note, if his signature was obtained by fraud.—Davis v. Searcy, 79 M. 292, 30 So. 823.

(1903). In an action for injuries to a passenger an instruction authorizing the jury if they find for plaintiff to award such damages as they "shall see fit to assess" is erroneous; verdicts should be based on the facts of the case and not upon the whims or wishes, likes or dislikes of the jurors.—Yazoo &c. R. Co. v. Smith, 82 M. 656, 35 So. 168.

(1904). In an action for the death of an employe by the falling of a bridge timber on him while at work under the bridge, the court charged that if the foreman of the defendant directed another servant to go on the bridge and first take off the nuts on bolts in timbers in the bridge used to hold such timbers safely and to knock the bolts

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out of the timbers, "and then put ropes around the timbers and lower them, and that the doing of such acts were negligent," and the foreman was present when such negligent work was performed and the deceased lost his life by being struck by the timber when it was so removed, the defendant was liable. *Held*, that in the absence of evidence fixing any order in which the taking off of nuts, the knocking out of the bolts and the lowering of the timbers should be done, the instruction was prejudicially erroneous in the use of the words "first" and "then."—Alabama &c. R. Co. v. Overstreet, 85 M. 78, 37 So. 819.

(1908). Error is predicable of an instruction which submits as a doubtful question a matter on which there is no conflicting evidence.—Mobile &c. R. Co. v. Jackson, 92 M. 517, 46 So. 142.

(1908). In an action by the alleged wife of an insured to recover as beneficiary under a policy on his life, the defense was that before the plaintiff's marriage to the deceased she had been married to another who was still alive and from whom she had not been divorced, thus rendering the second marriage invalid. *Held*, that an instruction which told the jury that unless it was conclusively proved that no divorce had been granted dissolving the first marriage before the second marriage, the jury were bound to presume the divorce had been granted required too high a degree of proof.—Colored Knights of Pythias v. Tucker, 92 M. 501, 46 So. 51.

(1909). In an action of trespass for entering upon land and cutting timber, an instruction that there could be no recovery if plaintiff's agent consented to the entry and the cutting, was not open to the objection that it would prevent a recovery of the contract price of the timber in case there had been a contract, since there was no evidence showing the contract and the jury must have understood the true purport and apprehended the real meaning of the instruction.—Hicks v. Mississippi Lumber Co., 95 M. 353, 48 So. 624.

(1909). An instruction, in an action for injuries to a passenger, that he would be guilty of contributory negligence in leaning out of the car window or holding his arm out so far as to be struck by an object outside the track, was held erroneous, where there was entire absence of evidence that the plaintiff was either leaning out of the window or holding his arm out of the same.—Easley v. Alabama &c. R. Co., 96 M. 36, 50 So. 491.

§ 253. Instructions excluding or ignoring issues, defenses, or evidence.

Where there is evidence tending to establish a material fact, it is error to refuse instructions as to its effect, although the weight of evidence may tend to disprove it.—(1871) Hursey v. Hassam, 45 M. 133; (1872) Nichols v. State, 46 M. 284; (1879) Levy v. Gray, 56 M. 318.

(1892). An instruction in a civil case is erroneous which tells the jury to find for plaintiff if it believes certain uncontroverted facts, and ignores the real contention, the same being, in this case, the rescission of a trade, is erroneous.—Johnson v. Stone, 69 M. 826, 13 So. 858.

(1908). An instruction in an action for injuries to a passenger which disregards evidence tending to show that the plaintiff's injury was not due to the place he occupied in the train at the time of the collision, is erroneous.—Reid v. Yazoo &c. R. Co., 94 M. 639, 47 So. 670.

(1911). In an action against a railroad company for personal injuries where the defense was that the injured person was negligent and the railroad company was not, and evidence supporting these defenses was introduced, an instruction was fatally erroneous which told the jury that the only defense presented was contributory negligence, since this instruction withdrew from the jury the defense of due care on the part of the defendant.—Yazoo &c. R. Co. v. Bruce, — M. —, 54 So. 241.

(E) REQUESTS OR PRAYERS.

§ 255. Necessity in general.

(1898). It is the duty of counsel to present to the court for its action all instructions desired, and see to it that the court acts on the requests.—Bacon v. Bacon, 76 M. 458, 24 So. 968.

§ 257. Time for asking instructions.

(1903). Where a jury after retiring to consider of their verdict request additional instructions, either party may thereupon present to the court proper additional written instructions and ask that they be given, and it will be error to refuse them on the ground that they were too late.—Clarke v. Pierce, 82 M. 462, 34 So. 4.

§ 260. Instructions already given.

(1843). A correct instruction given at the instance of one party, fully explaining the point embraced in it, is a good reason why an instruction on the same point, ambiguous in its terms, asked for by the other party, should be refused.—Ellis v. Commercial Bank, 7 H. 294, 40 Am. Dec. 60.

It is not error for the court to refuse an instruction, which is pertinent and proper, if it has already been substantially given.—(1843) Ellis v. Commercial Bank, 7 H. 294; (1855) Moye v. Herndon, 30 M. 110; (1870) Head v. State, 44 M. 731, 2 Mor. St. Cas. 1700.

(1856). A judgment will not be reversed for the refusal to give a correct charge, when by other charges, the law applicable to the case has been fully explained to the jury.—Dennis v. McLaurin, 31 M. 606.

(1876). Where a defendant's instruction gives him the benefit of every principle of law he is entitled to invoke, the refusal to

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grant other instructions is not an error of which he can complain.—Germania Fire Ins. Co. v. Francis, 52 M. 457, 24 Am. Rep. 674.

(1886). Where a great number of instructions are asked by a party, with shades of difference in the rules announced, and one instruction, though slightly different and more favorable to him than another already granted, is refused, it should at least appear probable that injury may have been done, to warrant a reversal.—Moyers v. Columbus Banking &c. Co., 64 M. 48, 8 So. 205.

A requested instruction may be properly refused when the point of law contained therein has been fully announced in instructions already given.—(1894) Alexander v. Dulaney, 16 So. 355, not officially reported; (1898) Bacon v. Bacon, 76 M. 458, 24 So. 968; (1906) Mississippi Cent. R. Co. v. Hardy, 88 M. 732, 41 So. 505; (1908) Reid v. Yazoo &c. R. Co., 94 M. 639, 47 So. 670.

§ 261. Erroneous requests.

If an instruction be asked which is partly correct and partly erroneous, the court may refuse it; the judge is not bound to separate the good from the bad, and give the one and refuse the other.—(1839) Martin v. King, 3 H. 125; (1843) Dickson v. Moody, 2 S. & M. 17.

(1889). If the court is asked to instruct the jury that the burden of proof as to a certain point is on the opposite side, and the evidence in support of such point is so conclusive as not to leave the question debatable, it is proper to refuse the instruction.—Peterson v. Polk, 67 M. 163, 6 So. 615.

§ 267. Modification or substitution by court.

(1840). The statute forbidding judges to charge the jury, except when requested, should receive a liberal construction in favor of the judge's power, and he is not bound by it to give the identical charge asked, or refuse it; but when asked to charge on a certain point, may give an instruction differing materially from the one asked.—Carprew v. Canavan, 4 H. 370.

(1840). The court may add to an instruction what is necessary to make it applicable to the evidence.—Vick v. Peck, 4 H. 407.

(1840). It is within the power of the court to modify instructions asked, and in the exercise of this power, the court may refuse to give a charge, that in an action of slander "the plea of justification is evidence that the words were spoken, though the general issue be also pleaded," and may charge in lieu thereof, that such "plea is evidence of malice, and may be considered by the jury, by way of aggravation of damages."—Doss v. Jones, 5 H. 158.

It is the right and duty of the court to modify instructions so as to make them conform to the law. (1872) Wilson v. Kohlheim, 46 M. 346; (1876) White v. State, 52 M. 216; (1879) Scott v. State, 56 M. 287. And it is not error for the circuit court, of its own motion, to give an instruction in modification or explanation of those prepared by counsel. (Watkins v. State, 60 M. 323, distinguished.)—(1882) Warden v. State, 60 M. 638.

(1873). The court cannot instruct *sua sponte*. If charges asked are correct, the safe practice is to give them as propounded, but the court may modify them or may reduce to writing its own conception of the law upon the points embraced in the charges asked and which are pertinent. He should not permit the jury to be confounded or misled by the language of instructions.—Archer v. Sinclair, 49 M. 343.

(1875). Instructions based upon a state of facts should not be modified unless the facts likewise sustain the modifications.—Shelby v. Offutt, 51 M. 128.

(1892). One who has asked an erroneous instruction cannot assign for error its modification, for, if not content with it as modified, he should decline to read it to the jury.—Louisville &c. R. Co. v. Sudduth, 70 M. 265, 12 So. 205.

(1907). The erroneous modification of an instruction, correct as requested, may be assigned as error on appeal.—Coleman v. Yazoo &c. R. Co., 90 M. 629, 43 So. 473. But see (1906) Mississippi Cent. R. Co. v. Hardy, 88 M. 732, 41 So. 505.

§ 269. Noting disposition of requests.

(1866). Where the marking of an instruction is relied on, the word "given" appearing on such instruction, without anything to show it was put there by the clerk, will not make the charge a part of the record.—Swann v. West, 41 M. 104.

(1898). After verdict, the court has no power to mark an instruction "Given" or "Refused."—Bacon v. Bacon, 76 M. 458, 24 So. 968.

(F) OBJECTIONS AND EXCEPTIONS.

§ 270. Right to object.

One cannot assign for error the action for the trial court in giving an instruction for the opposite side, when he asked and obtained, as announcing the law of the case, an instruction to the same effect.—(1886) Liverpool &c. Ins. Co. v. Van Os, 63 M. 431, 56 Am. Rep. 810; (1892) Wilson v. Zook, 69 M. 694, 13 So. 351.

§ 273. Time for objection or exception.

(1856). After verdict, and when the finding is sustained by the evidence, it is too late to object to an instruction, that it did not expressly confine the jury, in determining the question in issue to the evidence before them, but left them to act on their own belief from any cause; in such a case the presumption is, that the verdict was founded on the evidence, because the evidence warranted the finding.—Heirn v. McCaughan, 32 M. 17, 66 Am. Dec. 588n.

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(1889). Where instructions applicable to the evidence are objected to because not applicable to the issue made by the pleadings, this objection should be made when the instructions are presented, for then an immediate amendment of the pleadings can be had.—Georgia Pac. Ry. Co. v. West, 66 M. 310, 6 So. 207.

§ 275. Taking and noting exception.

(1858). If instructions asked and given or refused are not so marked by the clerk, they cannot be objected to for the first time on a motion for a new trial.—Drake v. Surgett, 36 M. 458.

(1866). Whenever the instructions are marked "given" or "refused," they may be objected to by assigning the action of the court in giving or refusing them as a ground for a new trial.—Barney v. Scherling, 40 M. 320.

(G) CONSTRUCTION AND OPERATION.

§ 285. Rules of construction in general.

(1905). The court in passing upon a single instruction should give the words used therein their usual and customary significance.—Yazoo &c. R. Co. v. Williams, 87 M. 344, 39 So. 489.

§ 295. Construction and effect of charge as a whole.

(1848). In a case involving the question —whether a sale was fraudulent as to the creditors of the vendor—the court instructed the jury "that if the sale was intended wholly or in part to hinder, delay, or defraud the creditors of the vendor, it is void;" and also instructed the jury, "that however fraudulent it might be on the part of the vendor, the rights of the vendee were not affected thereby, unless he participated in the fraud;" it was held that the two must be construed together, and if the former was too broad, it was properly qualified and explained by the latter.—Childress v. Ford, 10 S. & M. 25.

(1872). Error in refusing an instruction will not cause a reversal if the verdict is supported by the testimony, and the instructions as given sufficiently state the law to enable the jury to apply the same to the facts.—New Orleans &c. R. Co. v. Field, 46 M. 573.

(1887). An instruction for the state, erroneous when taken alone, because ignoring a defense relied on by accused, will not necessitate a reversal if defendant's instructions give him the full benefit of the defense, and all the instructions, if considered as a whole, correctly announce the law.—Skates v. State, 64 M. 644, 1 So. 843, 60 Am. Rep. 70n. See also (1883) Nelson v. State, 61 M. 212.

(1901). Although some of the instructions submitted, when taken separately, do not cover all the questions involved, error is not predicable of the giving of the same when, taken as a whole, they state the law on all the points in issue.—Clisby v. Mobile &c. R. Co., 78 M. 937, 29 So. 913.

(1903). The instructions for plaintiff and defendant should always be construed together, and when so considered, should correctly announce the law and constitute one harmonious whole.—Yazoo &c. R. Co. v. Smith, 82 M. 656, 35 So. 168.

The instructions in a case must be construed together and if when considered as a whole the law is fairly given, a verdict should not be vacated because one of them, when considered alone, may be subject to criticism.—(1905) Yazoo &c. R. Co. v. Williams, 87 M. 344, 39 So. 489; (1906) Mississippi Cent. R. Co. v. Hardy, 88 M. 732, 41 So. 505.

(1906). Error is not predicable of an instruction that private property cannot be damaged for public use except on "due compensation" being first made to the owner thereof, where the charge, construed as a whole, properly stated the law.—Warren County v. Rand, 88 M. 395, 40 So. 481.

(1908). The instructions on any point must be taken as a whole, and the law deduced from all instructions on the same point so construed, taken as a unit.—Hitt v. Terry, 92 M. 671, 46 So. 829.

(1909). All the instructions given in any case must be construed together, so as to harmonize them, if reasonably it can be done.—Cumberland Telephone &c. Co. v. Jackson, 95 M. 79, 48 So. 614.

§ 296. Error in instructions cured by withdrawal or giving other instructions.

(1860). An improper qualification made by the court to an instruction asked, is no ground for reversal, if the benefit of the rule of law claimed in the instruction be secured to the party asking it, by another instruction which is given, and which fully and fairly presents the rule to the consideration of the jury.—Lamar v. Williams, 39 M. 342.

(1906). Error in the modification of an instruction as to fraud in the issuance of an insurance policy was cured by another instruction which set out the correct rule.—American Cent. Ins. Co. v. Antrim, 88 M. 518, 41 So. 257.

(1908). On the contest of a will, a slight error in the statement of the law in an instruction for contestants will not be fatal, when there is also a correct and emphatic instruction for proponent on the same subject.—Hitt v. Terry, 92 M. 671, 46 So. 829.

(1908). Under the rule requiring the construing of a charge as a whole, the error in an instruction for contestants of a will that the testator must have been "wholly influenced" in making the will is rendered non-effective by other instructions that in order to set aside the instrument, the testator must have been "unduly influenced."—Hitt v. Terry, 92 M. 671, 46 So. 829.

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(1908). Error in an action for overflowing land in authorizing recovery of whatever amount the jury might think plaintiff was entitled to cannot be complained of, when there was also an instruction that the recovery must be warranted by the evidence. —Mississippi Cent. R. Co. v. Magee, 93 M. 196, 46 So. 716.

(1909). Whatever error was present in an instruction, in an action against a telephone company for the failure to answer a telephone call for a physician, which authorized the jury to allow damages that would compensate the plaintiff for the necessary inconvenience, anxiety and worry caused by the defendant's negligence, by reason of the use of the word "anxiety," was cured by another instruction which limited the recovery to the actual damages sustained.—Cumberland Telephone &c. Co. v. Jackson, 95 M. 79, 48 So. 614.

(1910). An instruction in an action for negligence which omitted the necessary element of negligence and authorized a verdict for the plaintiff for a mere accidental injury, may be cured by another instruction in the charge that the defendant was not liable for mere accident or casualty, where there was no negligence on his part or that of his agents.—Yazoo &c. R. Co. v. Kelly, — M. —, 53 So. 779.

(1910). The error in one instruction in not limiting to specific acts of negligence charged, the burden of meeting a *prima facie* case made by proof of the accident, is not fatal, when by another instruction the jury are told that evidence must not be considered on the subject of any alleged negligence except the negligence specifically charged in the declaration.—Alabama &c. R. Co. v. Groome, — M. —, 52 So. 703.

(1911). Where the facts stated in a charge are insufficient in law to sustain the verdict directed, the error is a reversible one, and cannot be cured by other instructions.—Mahaffey Co. v. Russell, — M. —, 54 So. 945.

(1911). The error in an instruction in referring the jury to the declaration to ascertain conditions upon which the plaintiff could recover was harmless where in other portions of the instruction the facts necessary for the jury to believe in order to render a verdict for the plaintiff were sufficiently set out and the facts on which the cause of action was grounded were so set out in the declaration that the jury could readily refer to it and ascertain what the court meant by the instructions.—Southern R. Co. v. Ganong, — M. —, 55 So. 355.

VIII. CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

§ 303. Separation.

Sealed verdict, see *post*, § 324.

(1821). If a juror, without permission of the court, separate from his fellows before the verdict is returned, it is good ground for a new trial, though he were attended by a sworn bailiff.—Offit v. Vick, W. 99.

(1877). Where, in a civil case, during a recess without consent of parties, the jury returned its verdict to the clerk and dispersed for thirty minutes and discussed the verdict with many persons, and on being recalled, in answer to an inquiry of the court, stated that a verdict had been agreed upon and handed it to the court, the irregularity will not invalidate the verdict.—James v. State, 55 M. 57, 30 Am. Rep. 496n.

(1877). Where in a civil case, by consent, the jury is directed to return the verdict to the clerk, if agreed upon during the recess of the court, and this is done and the jury is permitted by the clerk to separate, on the reassembling of the court, it being discovered that the verdict fails to specify any amount, it is not error to resubmit the case to the jury and have a proper verdict returned.—Maclin v. Bloom, 54 M. 365.

(1888). On the trial of a misdemeanor it is within the discretion of the court, under instructions, to permit the jury to disperse before a verdict.—Prewitt v. State, 65 M. 437, 4 So. 346.

§ 304. Misconduct of jurors.

(1890). While the administration of justice must be kept above suspicion, mere irregularities of behavior in this day of greater freedom of jurors, at least in civil cases, will not vitiate a verdict. Bribery and embracery, and misconduct of jurors purposely brought about by a successful litigant, will require the arbitrary setting aside of a verdict; but, where only irregularities have occurred that do not necessarily or naturally involve suspicion of improper influence, the trial court should hear testimony and examine the matter with a view to ascertaining whether any improper influences have been exerted, and whether upon the whole case a new trial should be granted.—Brookhaven &c. Co. v. Illinois Cent. R. Co., 68 M. 432, 10 So. 66.

§ 305. Misconduct of others affecting jurors.

(1885) Where it appears that the bailiff of the jury was present during its deliberations, and some of the jurors testify that he discussed the case, one of them saying that he argued as a partisan, the verdict should be set aside. So held in a civil case.—Barnett v. Eaton, 62 M. 768. See (1879) Benwood Iron Works Co. v. Tappan, 56 M. 659.

§ 307. Taking papers or articles to jury room.

(1821). At common law, the jury could not take out with them evidence submitted in the cause, unless with the approbation of the court, and even then only letters patent and under seal; and the exemplification of the testimony of witnesses in chancery, if they be dead, but not writings without seal, unless by consent of parties. But our statutes allow the jury to carry out any papers read in evidence to them on the trial; and

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because they took out a paper not read in evidence by either party, a new trial was granted.—Offit v. Vick, W. 99.

(1821). It is an evident mistake in point of law for the jury to take out with them on their retirement to deliberate on the verdict, a deposition not read on the trial, and the same constitutes a strong reason for granting a new trial.—Taylor v. Sorsby, W. 97.

§ 308. Reading minutes of or restating testimony.

(1821). If the jury, on their retirement, doubt as to the testimony of a witness, he may be recalled and examined as to his testimony in open court, but the jury are not allowed to have the witness before them to repeat his evidence, not in the presence of the court.—Offit v. Vick, W. 99.

§ 312. Instructions after submission of cause.

(1846). If the judge after the jury retire, in the absence of the parties and without their consent, at the request of the jury, give them a charge on a point of law about which they state they differ, it will be error. The judge has no right to charge the jury except in the mode pointed out in the statute, viz.: in writing, and at the request of one or both of the parties.—Taylor v. Manley, 6 S. & M. 305.

§ 314. Urging or coercing agreement.

(1888). Where, pending a trial on Saturday and after the conclusion of the evidence, an announcement is made by the judge fixing the hour for adjournment for the week, which indicates to the jury, when they retire, the necessity for an almost instantaneous decision to avoid remaining over during the recess from Saturday until Monday, such announcement is improper, as tending to influence the jury to undue haste in reaching a decision, and will vitiate the verdict so rendered.—Senior v. Brogan, 66 M. 178, 6 So. 649. For a case in which it was held that a similar message from the judge did not affect the verdict, see (1885) Vicksburg Bank v. Moss, 63 M. 74.

§ 315. Manner of arriving at verdict.

(1846). If the jury (even in a case sounding in damages, where there is no certain rule to fix the amount of the verdict), without consultation or deliberation, immediately upon their retirement, make a verdict, by each juror setting down the amount of damages he is willing to find, and then adding these amounts together, and then dividing that sum by twelve, it will not be permitted to stand. This mode substitutes the uncertain hazard of a lottery, for the deliberate conclusion of the jury.—Parham v. Harney, 6 S. & M. 55.

IX. VERDICT.

(A) GENERAL VERDICT.

§ 324. Sealed verdict.

See *ante*, § 303.

(1877). Where, in a civil case, by consent, the jury is directed to return the verdict to the clerk, if agreed upon during the recess of the court, and this is done, and the jury permitted by the clerk to separate, on the reassembling of the court, it being discovered that the verdict fails to specify any amount, it is not error to resubmit the case to the jury and have a proper verdict returned.—Maclin v. Bloom, 54 M. 365.

(1901). Where counsel agree to the return of a sealed verdict to the clerk of the court and to the separation of the jury thereupon, such a return of the verdict is substantially the same thing as its return into open court.—Till v. Redus, 79 M. 125, 29 So. 822.

§ 325. Polling jurors.

(1877). Refusal to poll the jury upon request in either a civil or criminal case, is reversible error.—James v. State, 55 M. 57, 30 Am. Rep. 496n.

§ 326. Form and language in general.

(1871). Tautology and the unskillful use of language in a judgment in replevin, where there is a substantial compliance with the statute, will not render the judgment erroneous.—Butler v. Benton, 46 M. 118.

(1901). Irregularities of expression and technical inaccuracies will not vitiate a verdict, when from the latter, viewed in the light of the evidence the intention of the jury is clearly apparent.—Thornton v. Lucas, 29 So. 400, not officially reported.

§ 327. Designation of parties.

(1845). If there be two plaintiffs, and the verdict be for the plaintiff in the singular number, it will be a mere technical error, and good.—Henry v. Halsey, 5 S. & M. 573.

§ 328. Severance as to parties.

(1834). A verdict in an action *ex contractu*, in favor of a part of the defendants, and against a part, on the general issue, will be erroneous.—Jones v. McGahey, 1 H. 128.

(1857). Though partnership contracts are joint and several, and each partner therefore liable to be sued on them, as if it were his individual contract, yet, if two or more partners be sued in a joint action on a partnership contract, the verdict cannot be against one, and in favor of the other, on the ground that the latter was never liable. The contract must be proven as alleged; nor does it make any difference in such a case that the plaintiff has dismissed as to one; he must, on the trial, show that he, with the other, made the contract.—Miller v. Northern Bank, 34 M. 412.

§ 329. Responsiveness to issues.

(1844). A verdict is bad if it vary from the issue in a substantial matter, or if it find only a part of that which is in issue; and if it find matter outside of the issue, it will be void as to that. Hence, when the issue was as to the right and title to two

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slaves, Charles and Fanny, and the verdict was a finding as to Charles and Lucy, it is bad, and no judgment can be rendered on it. In this case, there was a levy on Charles and Fanny, on 18th November, 1840, and claim by a third party was made for them. The verdict on the trial of the claim was: "We, the jury, find the following described property, levied by said Rives, under his execution on 18th November, 1840, and claimed by McCoy, was not at the time of said levy, and is not now, the property of said McCoy, in manner and form as he has claimed them, but then was, and now is, subject to said Rives' execution thereon levied; and that said property is of the value below carried out, and set after each article, viz.; Slave Charles, value $400; slave Lucy, value $300; and that said claim of McCoy is fraudulent." —McCoy v. Rives, 1 S. & M. 592.

§ 330. Several counts or issues.

(1834). If upon *non assumpsit* and payment pleaded the verdict be, "that the defendant did promise," &c., and then proceed to assess the plaintiff's damages, it will be good, though there be no express finding on the plea of payment, which, however, is necessarily included in the finding for the plaintiff.—Chewning v. Cox, 1 H. 130.

(1844). By the common law, where there are several counts in the declaration, and one or more be bad, and one be good, a judgment entered generally on the declaration will be bad; but this rule is changed by the statute (H. & H. 591), which provides, that where there are several counts and one be bad, and entire damages are given, the verdict shall be good.—Scott v. Peebles, 2 S. & M. 546.

(1901). The finding of a jury as to a specific matter over which they had no control whatever, will not vitiate their actual verdict, valid in all other respects.—Thornton v. Lucas, 29 So. 400, not officially reported.

§ 331. Certainty in general.

(1839). The following verdict is good: "We, the jury, find for the plaintiff the debt in the declaration mentioned, to be discharged by the payment of the sum of," &c. —Maulding v. Rigby, 4 H. 222.

§ 332. Amount of recovery.

(1838). If the verdict in an action of *assumpsit*, exceed the damages laid in the declaration, it is bad.—Potter v. Prescott, 2 H. 686.

(1847). It is error in an action of *assumpsit* to render judgment for a greater amount than the sum at which the damages are laid in the declaration, but the court should allow the plaintiff to amend so as to make the averment of damages sufficient.—Geren v. Wright, 8 S. & M. 366.

(1848). It is no objection that the verdict exceed the amount demanded in the writ, if it correspond with the declaration.—Williams v. Williams, 11 S. & M. 393.

(1871). Under the act of congress, United States treasury notes are a legal tender, and a verdict cannot, therefore, be rendered payable in gold.—Jamison v. Moon, 43 M. 598.

(1894). The facts that a plaintiff has amended by joining his partner and the suit is prosecuted as by the partnership will not justify a verdict for more than the partnership claim, and this although the excess be due the original plaintiff as an individual.—Camp v. Davis, 14 So. 438, not officially reported.

§ 336. Surplusage.

(1854). Where the verdict contains all the law requires, it will be good, although the jury may have found as to a matter not submitted to them. The illegal finding will be surplusage, and will not vitiate that which was well found.—Wintham v. Williams, 27 M. 313.

§ 338. Amendment or correction.

Where a verdict is substantially good, it may be put in proper form by the court.—(1835) Montgomery v. Tillotson, 1 H. 215; (1842) Hoggatt v. Montgomery, 6 H. 93.

(1839). In a trespass case against several defendants, the jury found a verdict against all, and separated; most of them had left the courtroom, one, however, was present, and the counsel for the plaintiffs arose and stated to the court, that he had learned from one of the jury that there was a mistake in the verdict, and that the jury had not intended to find against Allen, who was dead, nor against McDonald. This suggestion was immediately sanctioned by the juror, who was present, and the court then directed the verdict to be changed according to this statement. Immediately after this, the whole panel came into court and confirmed the statement of the juror. *Held*, that the correction of the verdict was proper.—Prussel v. Knowles, 4 H. 90.

(1843). The court, as a general rule, may correct its proceedings at the term at which they take place, and if there be anything to amend by, it may amend a verdict as to matter of form, but not as to matter of substance, after the discharge of the jury, or at least without their consent given after being recalled. Hence, if in an action of detinue for several specific articles the verdict assess the value of the whole in gross the court cannot amend the verdict, assessing a separate value to each article, without the consent of the jury, though the aggregate be less than the amount assessed in the verdict.—Walker v. Commissioners of Sinking Fund, 1 S. & M. 372.

(1852). Where the verdict is for too small an amount, the court cannot correct it, by adding thereto what was omitted. The damages on a protested bill are to be included in the verdict, and are not to be added by the court.—Buck v. Little, 24 M. 463.

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(1860). If there be any doubt or uncertainty in the language employed by a jury in returning their verdict, the judge may make such inquiry of them as will enable him to understand their will and intention, and may direct the verdict thus ascertained to be recovered.—Gipson v. State, 38 M. 295, 2 Mor. St. Cas. 1345.

(1871). The power to interrogate a jury on returning its verdict and to correct or change it, should be exercised with the greatest caution, and only where no question of propriety or regularity can be raised; where there is such question, it is best to have the jury retire.—Herron v. Bondurant, 45 M. 683. See further on this subject (1874) Patrick v. Carr, 50 M. 199; (1877) Maclin v. Bloom, 54 M. 365; (1877) James v. State, 55 M. 57, 30 Am. Rep. 496n; (1878) Traube v. State, 56 M. 153.

(1874). In an action against two as makers of a note, the verdict was in these words: "We, the jury, find for the defendant, F. Carr, and against Wm. Carr, the amount of the note and interest." On motion of the defendant, the court, presumably in the presence of the jury, directed the clerk to calculate the interest and enter the verdict in form, which was done. No complaint being made of errors in calculation or as to the amount, it is held, on appeal by plaintiff, that there was no error, though the practice is disapproved.—Patrick v. Carr, 50 M. 199.

§ 343. Construction and operation.

(1858). A verdict, though no judgment be rendered on it, is competent evidence of the plaintiff's demand, unless it be stayed or set aside; and the plaintiff is entitled to judgment on it at any time before it is barred by the statute of limitations.—Person v. Barlow, 35 M. 174, 72 Am. Dec. 121.

(1898). An inconsistent compromise verdict will not be allowed to stand.—Adams v. Yazoo &c. R. Co., 77 M. 194, 24 So. 200, 60 L. R. A. 33n.

(1901). A verdict should be unconditional and one in the words, "We, the jury, find for the defendant and assess the costs of court equally between the plaintiff and defendant; it is our wish that if this verdict will not stand to enter a mistrial," is invalid and will not support a judgment for the defendant with all costs.—Davis v. Searcy, 79 M. 292, 30 So. 823.

§ 344. Affidavit of jurors to sustain or impeach verdict.

(1839). Jurors cannot impeach their verdict, but they may fortify and sustain it, and show by their affidavits the verdict they actually intended to give. Where a verdict is returned by mistake, so as not to express the true meaning of the jury, it may be corrected by calling them back, even after they have separated for a short time. In this case, on the suggestion of one of the jury, who remained in the courtroom, they were called back immediately after they left, and allowed to correct their verdict, by finding in favor of two of the defendants, in an action of trespass—it having been returned at first against all—they stating it was not their intention to find against these two.—Prussel v. Knowles, 4 H. 90.

(1879). On motion for a new trial in slander, where there is a verdict for one cent, it is incompetent to prove by the jurors that they supposed such a verdict would carry costs.—Jones v. Edwards, 57 M. 28.

(B) SPECIAL INTERROGATORIES AND FINDINGS.

Interrogatories, see DEPOSITIONS, § 42; DISCOVERY, §§ 28–53.

X. TRIAL BY COURT.

(A) HEARING AND DETERMINATION OF CAUSE.

§ 376. Reception of evidence.

(1843). Objections to the competency of testimony offered to the court have not the same weight, as when made to evidence offered to the jury.—Clark v. Kingsland, 1 S. & M. 248.

(B) FINDINGS OF FACT AND CONCLUSIONS OF LAW.

§ 395. Sufficiency in general.

(1876). The conclusions of fact by the judge, intended by Code 1871, § 650, must be as full as a special verdict of the jury, and must embrace everything left open to evidence and not admitted by the pleadings, so that final judgment may be pronounced on the facts found. The judge must not state the evidence on either side but the facts proved alone.—Bloom v. Helm, 53 M. 21.

§ 400. Amendment or correction.

(1822). A judge may change his opinion during the progress of a trial at which he presides, though the opinion be excepted to and embodied in a bill of exceptions.—Winn v. Cole, W. 119.

§ 403. Filing and record.

(1876). Under Code 1871, § 650, where the judge's conclusions of fact and law are requested, it is not necessary to place the findings on the minutes. They may be embodied in a bill of exceptions.—Bloom v. Helm, 53 M. 21.

§ 404. Construction and operation.

(1860). If an issue of fact be submitted to the judge "in lieu" of a jury, the decision of the judge will have the force and effect of a verdict.—Kelley v. Miller, 39 M. 17.

§ 405. Objection and exceptions.

(1893). That the judges of this court would have found the facts otherwise, is not decisive of the propriety of disturbing a verdict found without any error of the court.—Holmes v. Simon, 71 M. 245, 15 So. 70.

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XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

§ 410. Rulings as to admissibility of evidence.

(1898). Error cannot be predicated of the improper admission of evidence when objection thereto has been subsequently withdrawn.—Dufour v. Chapotel, 75 M. 656, 23 So. 387.

(1892). Error in excluding certain testimony on direct examination will be cured by the subsequent admission of such testimony on cross- and re-examination.—Davis v. Miller, 12 So. 27, not officially reported.

§ 421. Instructions to jury.

(1848). Where an instruction is erroneous in assuming the existence of fraud, the error will not be cured by evidence, which seems to make out a case of fraud.—Gilliam v. Moore, 10 S. & M. 130.

(1877). Although after plaintiff closes his evidence the court erroneously refuses defendant's motion for an instruction, as in cases of nonsuit, if defendant then introduces testimony and takes his chances before the jury, he waives his objection.—Maclin v. Bloom, 54 M. 365.

(1892). One cannot assign for error the action of the trial court in giving an instruction for the opposite side, when he asked and obtained, as announcing the law of the case, an instruction to the same effect.—Wilson v. Zook, 69 M. 694, 13 So. 351.

TRIAL BY JURY.

See JURY.

TRIAL DE NOVO.

See APPEAL AND ERROR, § 892.
Appeal from justice, see CRIMINAL LAW, § 260; JUSTICES OF THE PEACE, §§ 170-181.
In tax proceedings, see TAXATION, § 493.

TRICK.

Obtaining property through trick as larceny, see LARCENY, § 14.

TRIVIAL ERRORS.

Not affecting result, see APPEAL AND ERROR, § 1027.

TROVER AND CONVERSION.

This topic INCLUDES dealings with personal property of others, without authority, in a manner inconsistent with the rights of the owner or other persons entitled to immediate possession, by wrongfully taking and retaining possession, altering the nature, quality, condition, &c., thereof; justification or excuse for such acts; nature and extent of liability for such conversion; and actions of trover and like actions for damages for conversion.

It EXCLUDES conversion by persons having a special property in or right of possession of the subject matter (see TENANCY IN COMMON; BAILMENT; CARRIERS; PRINCIPAL AND AGENT: FACTORS; and other specific heads); and remedies for recovery for possession of goods (see DETINUE; REPLEVIN).

See cross-references for complete list of exclusions.

Analysis.

I. Acts Constituting Conversion and Liability Therefor.

§ 1. Nature and elements of conversion in general.
§ 2. Property subject of conversion.
§ 6. Detention of property.
§ 10. Use or disposition of property.
§ 12. Destruction of or injury to property.

II. Actions.

(A) RIGHT OF ACTION AND DEFENSES.

§ 13. Nature and scope of remedy in general.
§ 15. Title and right to possession of plaintiff.
§ 21. Defenses.
§ 24. Persons entitled to sue.
§ 25. Persons liable.

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(B) JURISDICTION, PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.
§ 28. Time to sue and limitations.
§ 32. Declaration, complaint, or petition.
§ 33. Plea or answer and subsequent pleadings.
§ 34. Issues, proof, and variance.
(C) EVIDENCE.
§ 36. Admissibility in general.
§ 37. Title and right to possession.
§ 40. Weight and sufficiency.
(D) DAMAGES.
§ 43. Value of property.
§ 46. —— Time.
§ 60. Exemplary damages.
(E) TRIAL, JUDGMENT, AND REVIEW.
§ 65. Mode and conduct of trial in general.

Cross-References.

See TRESPASS.
Waiver of tort, see ACTIONS, § 28.

I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.

§ 1. Nature and elements of conversion in general.

(1839). The gist of the action of trover is the illegal conversion.—Phillips v. Lane, 4 H. 122.

§ 2. Property subject of conversion.

(1843). Trover is maintainable by the owner of land to recover the value of a house wrongfully removed from it.—Stillman v. Hamer, 7 H. 421.

(1853). The plaintiff in trover purchased a field of corn, and was proceeding to gather it, when the defendant came to the field and forbade the gathering, and plaintiff thereupon desisted and brought his action of trover for the conversion of the corn. *Held*, there was no conversion, as there was no severance of the corn from the freehold; and it was also said, if there had been a severance and conversion, the action could not be maintained.—Platner v. Johnson, 26 M. 142.

(1890). The Act of March 11, 1886, declaring that there shall be no property in intoxicating liquor kept for sale in violation of law, does not apply, as between partners in such unlawful business, so as to permit one partner to convert to his own use the stock of liquors without liability to his copartner.—Howe v. Jolly, 68 M. 323, 8 So. 513.

§ 6. Detention of property.

(1853). Where a party, without just claim or interest, wrongfully detains the property of another, after due demand, he is responsible for its value, if it should afterwards be destroyed or lost by casualty. But this rule does not apply where the party detaining the property has an interest in it equal to that of the party making the demand.—Trotter v. White, 26 M. 88.

(1854). Where a demand is made by a person who has no authority to make it, and the person upon whom the demand is made, upon that ground refuses to comply with it, no subsequent ratification by the principal of the unauthorized demand, will have the effect to put the party in default. Thus, where a demand for, followed by a refusal to deliver property, is made by an agent, and is sought to be made the ground of a conversion of the property by the defendant, the principal must show that the agent had authority to make the demand.—Robertson v. Crane, 27 M. 362, 61 Am. Dec. 520.

(1854). But, if the refusal to deliver does not turn upon the supposed want of authority, and if the party waives any inquiry into the authority of the agent, and puts his refusal upon another distinct ground, which cannot in point of law be sustained—or if he claim to detain the property on the ground that he is owner of it; or by arbitrary and illegal means; or under a frivolous or fraudulent pretext—without questioning the agent's authority, the demand is good, and evidence of conversion.—Robertson v. Crane, 27 M. 362, 61 Am. Dec. 520.

(1873). In trover demand and refusal to deliver is necessary before suit where the goods came into defendant's possession from the plaintiff or a third person and he simply detains them, but it is otherwise if the original taking was tortious.—Witherspoon v. Blewett, 47 M. 570.

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(1873). Unqualified refusal is not of itself a conversion, but is evidence of it where the defendant has it in his power to deliver up the goods, but where refusal is based upon reasonable grounds, as where one holding as bailee is not satisfied who is the real owner, or of the authority of the person demanding possession, a refusal is not a conversion. Defendant, however, will be held to good faith in the reasons he assigns for refusal.—Witherspoon v. Blewett, 47 M. 570.

(1873). Where one receives cattle from another as bailee, supposing such other to be the owner, and refuses to surrender them to a stranger unless upon an affidavit of ownership, such refusal negatives the idea of a conversion and will not support an action of trover.—Witherspoon v. Blewett, 47 M. 570.

§ 10. Use or disposition of property.

(1850). A tortious taking is a wrongful conversion, and so an unlawful disposition of the property is a conversion both in the seller and buyer, and so assuming to one's self the title and right to dispose of another's property, is a conversion.—Johnson v. White, 13 S. & M. 584.

(1857). A conversion is predicable of the sale of a chattel by the bailee thereof.—Crump v. Mitchell, 34 M. 449.

(1858). The hirer of a slave, who in violation of his contract with the owner, removes him to a locality where he is subject and liable to contract a mortal disease, will be responsible for his value, in case the slave contracts such disease and dies.—Wallace v. Seales, 36 M. 53.

§ 12. Destruction of or injury to property.

(1841). Where trees are severed from the soil by one having no right, and converted into wood or other material, the right of the owner of the soil is not divested, so long as their identity can be ascertained in the altered state. Hence, wood cut and corded on the *locus in quo*, by the defendant in ejectment, having no title, will, on recovery of possession by the true owner, belong to him.—Harris v. Newman, 5 H. 654.

(1882). A person in whose favor a creditor waives his deed of trust on a cotton crop, and who makes advances on the faith of the waiver, cannot recover from the creditor upon the ground that the cotton was delivered to him by the debtor and taken from him by a stranger.—Scarborough v. Webb, 59 M. 449.

II. ACTIONS.

(A) RIGHT OF ACTION AND DEFENSES.

§ 13. Nature and scope of remedy in general.

(1896). The owner of land after a reentry thereon by him may sue in trover or in trespass, d. b. a., for timber cut from his land by a disseisor or his grantee, during the period of the owner's dispossession.—Alliance Trust Co. v. Nettleton Hardwood Co., 74 M. 584, 21 So. 396.

(1902). When timber is cut by a tenant or others unnecessarily or unlawfully, the right of the reversioner or remainderman at once attaches and he may bring an action on the case in the nature of waste for his damages or he may bring trover or replevin for the timber severed from the inheritance.—Warren County v. Gans, 80 M. 76, 31 So. 539.

§ 15. Title and right to possession of plaintiff.

(1839). A seller with warranty of title is not liable to this action, for pointing out to the sheriff the property so sold for levy and sale under a judgment against him, which is a lien on the property, and of which the purchaser had notice, actual or constructive. The action of the sheriff in seizing and selling the property is perfectly legal, and, his action being legal, the conduct of the seller in pointing out the property, cannot be unlawful.—Phillips v. Lane, 4 H. 122.

(1841). Possession or qualified right is sufficient to enable a party to maintain an action of trespass or trover against any one except the true owner.—Harris v. Newman, 5 H. 654.

(1867). The plaintiff purchased eight bales of cotton, each to weigh four hundred and fifty pounds, out of a lot of unginned cotton supposed by the parties to be ten bales. The cotton purchased was not distinguished and separated from the bulk, and was to remain in the possession of the seller until a designated future date. Subsequently the defendant under an arrangement between himself and the seller, took possession of the entire lot of cotton, and ginned and baled the same, it turning out only six bales. *Held*, that the property in the cotton did not pass by the sale to the plaintiff, even though there may have been only eight bales in the entire lot at the time of the sale, and that consequently the plaintiff could not sue in trover.—Baldwin v. McKay, 41 M. 358.

§ 21. Defenses.

(1869). A party who wrongfully converts personal property to his own use, is liable to the true owner for the value thereof, though the property, subsequent to the conversion, was destroyed by the public enemy, or otherwise.—Mason v. O'Brien, 42 M. 420.

(1897). Where defendant was in possession of, and claimed to own a gravel pit, and plaintiff, doubting the validity of his own title thereto, accepted employment from the defendant to load the latter's cars with the gravel, he is not estopped thereby from recovering of defendant the value of the material taken during such employment, the maxim *volenti non fit injuria* having no application.—Illinois Cent. R. Co. v. La Blanc, 74 M. 626, 21 So. 748.

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§ 24. Persons entitled to sue.

(1820). Trover cannot be maintained by one tenant in common against another.—Hinds v. Terry, W. 80.

(1890). The defendant in an action for the conversion of crude turpentine taken from trees on the plaintiff's land was a dealer in the commodity mentioned and bought from parties who were trespassers on the land involved. The plaintiff held such land as beneficiary under an unforeclosed deed of trust; but the injury complained of was not established as having been inflicted after the plaintiff had taken possession of the land in pursuance of the terms of such mortgage. *Held*, that the plaintiff was not the proper party to maintain the action instituted.—Farmers' Loan &c. Co. v. Avera, 7 So. 358, not officially reported.

§ 25. Persons liable.

(1893). Where, on an absolute conveyance of a plantation, a balance of the purchase money is due four years from date, and for the accruing interest thereon the vendee gives notes due at the end of each of the intervening years, reciting that they are for purchase money, but it is specified in the deed that these notes shall be "considered as rent," and that a landlord's lien is retained, a valid equitable lien upon the agricultural products of the land for each of the years is created, and the holder receiving from the tenant of the vendee such products in payment of one of said notes is not liable in a suit by the heirs of the deceased vendee for a conversion of the same.—Maynard v. Cocke, 71 M. 493, 15 So. 788.

(B) JURISDICTION, PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

§ 28. Time to sue and limitations.

(1850). The statute commences to run against an action of trover from time of the conversion, whether plaintiff knew of the conversion or not, if no fraud was used to conceal it; and hence, where the conversion arises from buying from a person rightfully in possession, but with no authority to sell, the statute commences to run from the date of the sale.—Johnson v. White, 13 S. & M. 584.

§ 32. Declaration, complaint, or petition.

(1840). In an amended declaration in trover, the plaintiff changed his demand from a general right to the property sued for, as administrator of B, to a claim for it specially acquired by his intestate in the state after his marriage with H, and during the coverture. *Held*, that the amended declaration was not objectionable on the ground that it was identical with the original.—Carmichael v. Browder, 4 H. 431.

(1893). While the same particularity of description of the property in trover is not required as formerly, it is still necessary that the *res* for the conversion of which the action is brought, should be at least generally described in the declaration and identified by the evidence.—First Nat. Bank v. Montgomery, 70 M. 550, 13 So. 242.

§ 33. Plea or answer and subsequent pleadings.

(1896). Not guilty in trover does not admit that the plaintiff has such an interest in the property as entitles him to maintain the action nor possession of the property in the plaintiff.—Alliance Trust Co. v. Nettleton Hardwood Co., 74 M. 584, 21 So. 396.

§ 34. Issues, proof, and variance.

(1893). Where the declaration alleges the conversion of an entire stock of merchandise, consisting of numerous and different kinds of articles, and the evidence shows the conversion of only part of the stock, without designation of the quantity, character, or class to which the converted articles belong, plaintiffs are not entitled to a verdict, and an instruction for defendant is proper.—First Nat. Bank v. Montgomery, 70 M. 550, 13 So. 242.

(1904). One may sue for the value of trees cut from his land and join in such suit a count for the value of the timber contained in the trees, and, on proper proof, may recover upon either count.—Barclay v. Smith, 36 So. 449, not officially reported.

(1904). Where a plaintiff sues for the value of trees cut from his land and joins in such suit a count for the value of the timber contained in the trees, the proof must show with reasonable certainty the number and value of the trees cut by the defendant or his employes, or the amount and value of the timber coming into his possession.—Barclay v. Smith, 36 So. 449, not officially reported.

(1904). A complaint alleging that a specified number of trees had been wrongfully cut and moved by the defendant from the plaintiff's land, is not sustained by evidence which establishes the fact that a certain number of feet of timber had been received by the defendant from the land involved.—Barclay v. Smith, 36 So. 449, not officially reported.

(C) EVIDENCE.

§ 36. Admissibility in general.

(1841). On the trial of an action of trover for wood taken from land belonging to the plaintiff, a judgment which has been reversed on appeal, and a writ of *hab. fa.* issuing thereon, by which possession of the land had been secured to the defendant, are inadmissible in evidence in the latter's behalf.—Harris v. Newman, 5 H. 654.

(1857). Although the sheriff may have no power under a *distringas* issued against the claimant for the property, to sell the same; yet, in an action of trover by the claimant, against a purchaser from the sheriff, it is competent for the defendant to

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introduce in evidence, the record of the trial of the right of property, and the *distringas*, to show that the plaintiff has no title.—Shirley v. Fearne, 33 M. 653, 69 Am. Dec. 375.

(1892). Where one purchases, at the same time, and as one transaction, a farm and the stock thereon, receiving separate conveyances, and the seller refuses at the time agreed upon to deliver possession of the property, claiming a rescission of the whole trade, and the purchaser brings replevin for the stock, and asks punitive damages for its detention, he may as tending to show wilfulness, introduce evidence that the seller, on another occasion, unlawfully took and forcibly detained from him his deed to the land.—Johnson v. Stone, 69 M. 826, 13 So. 858.

(1897). In an action for the conversion of gravel taken from plaintiff's land it is competent on the issue of value to show any purpose for which the material could be used and hence that the defendant railroad company used it in ballasting its track.—Illinois Cent. R. Co. v. Le Blanc, 74 M. 626, 21 So. 748.

(1904). On the trial of a suit for the value of trees claimed to have been wrongfully cut and removed by the defendant from land belonging to the plaintiff, a witness cannot testify as to his measurement of stumpage on the land involved, where it is not shown by whom the trees were cut, or whether before or after the defendant's ownership of the land ceased.—Barclay v. Smith, 36 So. 449, not officially reported.

(1904). On the trial of a suit for the value of trees claimed to have been wrongfully cut and removed from land belonging to the plaintiff, a witness cannot testify as to his estimate of the amount of timber at the defendant's mill, where there was no proof of the land from which the timber came.—Barclay v. Smith, 36 So. 449, not officially reported.

§ 37. Title and right to possession.

(1886). In an action for the value of personalty converted, it is not sufficient proof of plaintiff's title for him to show by the evidence of witnesses, in a general way, that he purchased the property at a sale under attachment proceedings against a third person, without producing the record of such proceedings, or some substitute for the evidence they would afford.—Goodman v. Moss, 64 M. 303, 1 So. 241.

§ 40. Weight and sufficiency.

(1904). In suits for the value of trees cut, the rule as to the proof required to justify a recovery is that the plaintiff must show with "reasonable certainty" what trees were severed by the defendant or his servants from the soil.—Barclay v. Smith, 36 So. 449, not officially reported.

(D) DAMAGES.

§ 43. Value of property.

(1873). Where property wrongfully taken and converted has been altered and increased in value, the amount of the recovery will depend upon the character of the conversion; if the latter was tortious, wilful or oppressive, the value of the article so increased will be the rule, but if it was *bona fide*, under a supposed right or claim, defendant will be allowed for the value his labor has conferred upon the property.—Heard v. James, 49 M. 236.

(1889). It was announced below that if trees were taken through an innocent mistake, the measure of damages would be the value of the staves manufactured therefrom, less the cost of cutting, hauling and converting the timber. This is not approved; but what the rule is in such case, and whether the dictum in Heard v. James, 49 M. 236, is correct, the court does not decide, since the defendant has no cause to complain of the verdict that was rendered.—Peterson v. Polk, 67 M. 163, 6 So. 615.

(1889). When the defendant gives bond and retains the property, on a recovery by the plaintiff, if it appears that the defendant wilfully and knowingly cut plaintiff's trees, or negligently omitted reasonable precautions to ascertain the ownership, the measure of recovery is not the value of the trees but the value of the staves into which they have been cut at the time and place of seizure under the writ.—Peterson v. Polk, 67 M. 163, 6 So. 615.

(1897). Where material has been taken from the land of another under an honest claim of title, or where the trespass was from ignorance and was not wilful, the damages will be confined to the value of the property *in situ*, and such other damage to the land as the taking may have caused. Further, there being no recognized market value of the product, the value thereof is to be determined not from the price received from sales of the same in small quantities alone, but from the whole evidence.—Illinois Cent. R. Co. v. Le Blanc, 74 M. 626, 21 So. 748.

§ 46. —— Time.

(1820). In trover, the value of the chattel and interest from the time of conversion is the true measure of damages.—Hinds v. Terry, W. 80. But the measure of damages for the conversion of a slave, is his value at the time of his conversion, and his yearly value from that time to the trial.—(1824) Texada v. Camp, W. 150.

(1866). Where defendant agreed to gin and bale defendant's cotton for one-third of it, and under this contract he got possession of it and converted it to his own use, without complying with his contract, he was held liable for the highest market price of the cotton between the time of the conversion and that of the trial.—Fulton v. Woodman, 40 M. 593.

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In an action for a wrongful distress, when there is no proof of fraud, malice, oppression or wilful wrong, either in the taking or detention, the measure of damages is the value of the property at the time of the taking and interest until the time of the trial.—(1871) Briscoe v. McElween, 43 M. 556; (1871) Jamison v. Moon, 43 M. 598.

(1890). Where, in an action by a legatee against a railroad company for the value of certain shares of its stock that had been the property of the complainant's testator, it is established that the executor of the testator, whose property is involved, had surrendered the stock in question to a committee of reorganization, and had taken therefor negotiable certificates to be redeemed by a new issue of stock when the reorganization was effected; that these certificates were transferred by the executor, after his removal by the court from his trusteeship, and that after various transfers they were taken up by the company, and the new stock issued to the holders, the railroad company will be decreed liable for the value of the stock at the time of its wrongful transfer, of the certificates thereof by the one-time executor.—Mobile &c. R. Co. v. Humphries, 7 So. 522, not officially reported.

§ 60. Exemplary damages.

(1873). In trover, the recovery may be enhanced above the value of the thing converted according to the circumstances.—Heard v. James, 49 M. 236.

(1883). In the absence of fraud, oppression, or wilful wrong, punitive damages are not recoverable in an action for wrongful conversion of cotton, although bought at night and shipped immediately by express, to prevent its seizure by plaintiff. The measure of damages is the value of the cotton when taken, with interest, and it is error to instruct that "any other actual damages proved" may be assessed.—Black v. Robinson, 61 M. 54.

(1884). If, in converting personal property, one in good faith believes that he has a right to it, the owner recovering for the conversion is not entitled to punitive damages, but only to the value of the property and interest.—Black v. Robinson, 62 M. 68.

(E) TRIAL, JUDGMENT, AND REVIEW.

§ 65. Mode and conduct of trial in general.

(1867). In an action of trover, where the title of the plaintiff depends upon questions of law, it is improper to instruct the jury that if they believe the plaintiff was the owner of the property and the defendant converted the same to his own use, they will find for the plaintiff. The jury should have been instructed as to whom the property belonged, upon a hypothetical state of facts applicable to the case.—Baldwin v. McKay, 41 M. 358.

In an action for a wrongful distress, when there is proof of fraud, malice, oppression or wilful wrong either in the taking or detention, the measure of damage is left to the jury.—(1871) Briscoe v. McElween, 43 M. 556; (1871) Jameson v. Moon, 43 M. 598.

(1891). On the trial of an action, in form trover, for conversion, it was clearly established that the defendant received and converted to his own use the goods of the plaintiff and enough appeared from the evidence introduced to show that such goods were not without some value. Under such circumstances, although the plaintiff did not offer evidence of the value of the goods involved, he should have had a verdict for at least a nominal sum and it was erroneous to instruct the jury to find for the defendant.—Kellogg v. Hamilton, 10 So. 479, not officially reported.

TRUST DEEDS.

See CHATTEL MORTGAGES; MORTGAGES.

TRUSTEES.

Appointment of new, see MORTGAGES, § 342.
Appointment on dissolution of bank, see BANKS AND BANKING, § 71.
As parties, see PARTIES, §§ 7, 22.
Execution of power of sale by, see MORTGAGES, § 339.
Purchase at own sale, see MORTGAGES, § 362.
School trustees, see SCHOOLS AND SCHOOL DISTRICTS, §§ 16, 46, 53.

TRUSTEES IN BANKRUPTCY.

Actions by, see BANKRUPTCY, § 277.
Property and rights vesting in, see BANKRUPTCY, § 137.

TRUST FUNDS.

Deposits, see BANKS AND BANKING, §§ 80, 130.
Property of corporation as trust fund for creditors, see CORPORATIONS, § 550.

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TRUSTS.

This topic INCLUDES nature and incidents of estates in property the legal title or power of disposition of which is held by one or more persons, wholly or in part for the use of another or others, under an equitable obligation, express or implied, resting upon such person or persons by reason of confidence reposed in him or them, to convey, apply, or deal with such property or its profits at the will or for the benefit of such other person or persons according to the confidence so reposed; rights, powers, duties, and liabilities of persons creating such trusts, of trustees, and of *cestuis que trustent* or beneficiaries in general; judicial protection and control of trust property and trustees; and remedies and proceedings relating thereto.

It EXCLUDES conveyances in trust as security for payment of particular debts (see MORTGAGES; CHATTEL MORTGAGES) or for benefit of creditors in general (see ASSIGNMENT FOR BENEFIT OF CREDITORS); charitable uses (see CHARITIES); restrictions on creation of perpetuities or of trusts for accumulation (see PERPETUITIES); trade combinations, pools, &c. (see MONOPOLIES; CONTRACTS; CONSPIRACY); validity and construction of particular deeds (see DEEDS), marriage settlements (see HUSBAND AND WIFE), devises and bequests (see WILLS); rights and liabilities of particular classes of persons in respect of trusts (see INFANTS; and other specific heads); and personal relations of a fiduciary nature (see GUARDIAN AND WARD; EXECUTORS AND ADMINISTRATORS; ATTORNEY AND CLIENT; PRINCIPAL AND AGENT; BROKERS; FACTORS; and other specific heads).

See cross-references for complete list of exclusions.

Analysis.

I. Creation, Existence, and Validity.

(A) EXPRESS TRUSTS.

§ 2. What law governs.
§ 8. Persons who may create trusts.
§ 11. Purposes for which trusts may be created.
§ 14. Trusts taking effect in future.
§ 17. Validity of oral trusts, and requirement of statute of frauds.
§ 19. Written instruments creating or declaring trusts.
§ 24. Sufficiency of language used.
§ 29. —— Precatory words.
§ 30½. Transactons creating or operating as trusts in general.
§ 40. Evidence to establish trust.
§ 44. —— Weight and sufficiency.
§ 45. Validity.
§ 55. Right to contest validity of trust.
§ 59. Revocation.
§ 60. Duration.

(B) RESULTING TRUSTS.

§ 62. Nature of resulting trusts.
§ 63½. Effect of statute of frauds and statute prohibiting parol trusts.
§ 63¾. Creation and existence in general.
§ 64. Failure or defect in creation, operation, or execution of express trusts.
§ 69. Voluntary conveyance to grantee not entitled to take beneficial interest.
§ 70. Intention of grantee to hold for or convey to another.
§ 71. Payment of consideration for conveyance to another.
§ 77. —— Time of payment.
§ 78. —— Mode and sufficiency of payment.
§ 79. —— Part payment.
§ 81. —— Relationship between parties.
§ 82. —— Payment as gift or advancement.

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§ 83. Payment of purchase money on purchase of land.
§ 84. Payment of fiduciary funds for conveyance to person holding fiduciary relation.
§ 85. Evidence to establish trust.
§ 87. —— Admissibility in general.
§ 89. —— Weight and sufficiency.

(C) Constructive Trusts.

§ 92½. Statute of frauds and statutes prohibiting parol trusts.
§ 95. Fraud or other wrong in acquisition of property in general.
§ 96. Breach of oral agreement to hold in trust or convey land voluntarily conveyed.
§ 97. Fraud or undue influence in procuring or preventing devise or bequest.
§ 98. Breach of oral agreement as to lands to be purchased.
§ 101. Breach of contract of agency or employment.
§ 102. Breach of duty by person in fiduciary relation in general.
§ 103. Contracts and transactions between persons in confidential relations.
§ 105. Wrongful disposition of property.
§ 106. Evidence to establish trust.

II. Construction and Operation.

(A) In General.

§ 112. Application of general rules of construction.
§ 114. Trusts executed or executory.
§ 117. Construing instruments together.

(B) Estate or Interest of Trustee and of Cestui Que Trust.

§ 133. Extent of estate or interest of trustee.
§ 139. Extent of estate or interest of cestui que trust.
§ 146. Transfer of estate or interest of cestui que trust.

III. Appointment, Qualification, and Tenure of Trustee.

§ 155. Designation by creator of trust.
§ 157. Appointment by other trustees or by cestui que trust.
§ 159. Qualifications of trustee.
§ 160. Judicial appointment.
§ 164. Removal.
§ 169. Appointment and succession of new trustee.

IV. Management and Disposal of Trust Property.

§ 171. Authority of trustee in general.
§ 172. Limitations of authority imposed in creation of trust.
§ 176. Delegation of powers and duties.
§ 179. Diligence and good faith of trustee.
§ 181. Collection of outstanding property.
§ 182. Possession, use, and care of property.
§ 187. Charges on and claims against property.
§ 188. Sale and conveyance.
§ 193½. —— Authority of court and grounds for ordering sale.
§ 194. —— Proceedings for order of court for sale.
§ 197. —— Validity of sale.
§ 199. —— Purchase by cestui que trust.
§ 201. —— Payment or recovery of purchase money.
§ 203. —— Rights and title of purchasers.
§ 206. Mortgage or pledge.
§ 209. Contracts.
§ 216. Investments.
§ 219. Interest on funds of estate.

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§ 221. Deposits.
§ 224. Expenditures.
§ 227. —— Counsel fees and costs.
§ 231. Individual interest in transactions.
§ 232. Fraud.
§ 237. Ratification of unauthorized acts.
§ 238. Co-trustees.
§ 245. Actions between, by, or against trustees
§ 257. —— Parties.

V. Execution of Trust by Trustee or by Court.

§ 277. Advances by trustee.
§ 282. Payment or distribution of proceeds of trust property.
§ 283. Transactions between trustee and cestui que trust in general.
§ 286. Reconveyance of trust property to settler or creator of trust.

VI. Accounting and Compensation of Trustee.

§ 307. Charges.
§ 310. Credits.
§ 313. —— Counsel fees and costs.
§ 314. Compensation.
§ 322. Form and requisites of account.
§ 325. Evidence.

VII. Establishment and Enforcement of Trust.

(A) Rights of Cestui Que Trust as Against Trustee.

§ 336. Enforcing performance of duties of trust.
§ 337. Setting aside wrongful acts of trustee.
§ 342. Priorities of cestui que trust and trustee's creditors.
§ 344. Persons entitled to enforce trust.

(B) Right to Follow Trust Property or Proceeds Thereof.

§ 349. Nature and grounds of right.
§ 350. Election of remedy.
§ 351. Trust property or funds mingled with property or funds of trustee.
§ 355. Trust property transferred to third persons.
§ 357. —— Purchasers in good faith.

(C) Actions.

§ 360. Grounds of action.
§ 363. Jurisdiction.
§ 365. Time to sue, limitations, and laches.
§ 369. Receiver or deposit in court.
§ 371. Pleading.
§ 372. Evidence.
§ 374. Scope and extent of relief.
§ 375. Judgment or decree and enforcement thereof.

VIII. Liabilities on Trustees' Bonds.

§ 387. Actions.

Cross-References.

See Monopolies.
Conclusiveness of judgment against trustee, see Judgment, § 691.
Deceased's interest in trust, see Executors and Administrators, § 45.
Delegation of duties of trustee to agent, see Principal and Agent, § 54.
Delivery of stocks in trust, see Corporations, § 123.
Effect of failure of testamentary trust, see Wills, § 688.
Fraud in trust for grantor, see Fraudulent Conveyances, §§ 109–113.
Garnishee as trustee for debtor, see Garnishment, § 122.

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Garnishment of annuity, see GARNISHMENT, § 36.
Husband as trustee for separate property of wife, see HUSBAND AND WIFE, § 135.
Husband as trustee when wife conveys her estate for his benefit, see HUSBAND AND WIFE, § 48.
Levy on interest of beneficiary in future trust estate, see EXECUTION, § 40.
Limitations applicable, see LIMITATION OF ACTIONS, § 36.
Parol evidence to show trust in opposition to deed, see EVIDENCE, § 390.
Property acquired by husband in trust for wife as part of her separate estate, see HUSBAND AND WIFE, § 120.
Testamentary trusts, see WILLS, §§ 670-688.
Trustee as subject to creditors' suit, see CREDITORS' SUIT, § 20.
Trustees in marriage settlements, see HUSBAND AND WIFE, § 31.
Trust estate subject to execution, see EXECUTION, § 41.
Vendor as trustee of title for vendee, see VENDOR AND PURCHASER, § 188.

I. CREATION, EXISTENCE, AND VALIDITY.

Creation of testamentary, see WILLS, § 669.

(A) EXPRESS TRUSTS.

§ 2. What law governs.

(1858). A deed in trust made in the state of Tennessee, conveying slaves in that state, the *cestui que trust* also residing there, is governed by the laws of that state including the law for its registration, although the trustee resided in this state, if no duty be imposed on him by the deed requiring a removal of the slaves hither, unless it be clearly shown that the conveyance was intended to take effect here, and not in Tennessee; and a subsequent removal of the slaves to the state does not *per se*, amount to such proof.—Wyse v. Dandridge, 35 M. 672, 72 Am. Dec. 149.

(1858). It is not necessary that a foreign deed in trust should be registered here, in order to protect the interest of the *cestui que trust* against the claims of the creditors of the grantor in the deed, or of the trustee. But a *bona fide* purchaser of the legal title without actual notice will be protected in equity, unless the deed be registered here, notwithstanding its registration in the state where it was made.—Wyse v. Dandridge, 35 M. 672, 72 Am. Dec. 149.

§ 8. Persons who may create trusts.

See CONSTITUTIONAL LAW, § 50.

(1842). The legislature may convey public property in trust.—Commissioners of Sinking Fund v. Walker, 6 H. 143, 38 Am. Dec. 433.

§ 11. Purposes for which trusts may be created.

(1839-43). A lawful trust was held created by a will which directed the executors appointed therein to send the slaves of the testator to Africa under the direction and superintendence of the American Colonization Society provided that a majority of the whole number of said slaves should elect to go there.—Ross v. Duncan, Freem. Ch. 587.

(1839-43). A person may convey his property upon what trust or condition he pleases so that it be not against the law and the courts will only interfere at the instance of the heirs or distributees of the grantor or testator where there has been a failure or refusal to perform the condition of the trust.—Ross v. Duncan, Freem. Ch. 587.

§ 14. Trusts taking effect in future.

(1896). It is as competent for one to make the event in the future upon the happening of which the trust estate is to come into possession, and the trust is to be executed, the death of the donor, as any other event. The fact in such case, that the event named is death, rather than some other selected event, is not at all determinative of the quality or legal character of the trust. It is a mere time when the trust, completely and perfectly constituted theretofore, is, as to the estate already thus vested in interest by it in the trustee, for the beneficiaries, to come into possession—to be enjoyed.—Hiserodt v. Hamlett, 74 M. 37, 20 So. 143.

§ 17. Validity of oral trusts, and requirement of statute of frauds.

See FRAUDS, STATUTE OF, §§ 56, 62.

(1860). At common law, a parol declaration of a trust, both of real and personal estate, is valid. The 7th section of the English statute of frauds, which prohibits the creation of express trusts in lands, except by writing, was not embodied in the legislation of this state, prior to the adoption of the Code 1857; and prior to that date, a parol declaration of a trust in real estate was valid.—Anding v. Davis, 38 M. 574, 77 Am. Dec. 658.

(1860). D conveyed lands and personalty to A absolutely, and in fee simple, and delivered possession. A, when he accepted the deed, made parol agreement, that he would hold the property and use it so as to produce profits, and that he would apply the profits to a debt due by D to him, and after the debt was paid, would convey the property to D's children; and in furtherance of this agreement, that he would immediately execute and keep on hand a will, thus disposing of the property. A executed the will as he had agreed to do, but afterwards destroyed it. After the death of A, and the

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payment of the debt due him by D, the children of D filed a bill to recover the property. *Held*, that the trust in favor of the children of D was valid, and that they were entitled to recover.—Anding v. Davis, 38 M. 574, 77 Am. Dec. 658.

(1896). A completely constituted parol trust of personalty is not ambulatory at all, as to the present vesting of interest subject to revocation or not so subject. It is vitalized by what is done then, at the time of its constitution by the donor and is as effectual thenceforward, even when subject to revocation, until duly revoked, as any other disposition of property, and is to be administered according to the legal character stamped upon it at the time of its creation. —Hiserodt v. Hamlett, 74 M. 37, 20 So. 143.

§ 19. Written instruments creating or declaring trusts.

See *ante*, § 2.

(1883). If the judgment debtor has a beneficial interest in land, and conveys it or makes a declaration of trust in it, and the instrument is not acknowledged or proved and recorded, it is void as to a judgment creditors without notice, because the conveyance or declaration of the trust is void.—Nugent v. Priebatsch, 61 M. 402.

§ 24. Sufficiency of language used.

Words sufficient to create testamentary trust, see WILLS, § 670.

(1852). No form of words is necessary to create a trust; but, looking to the acts and intentions of the parties, if it appear that it was their intention to create a trust, the court will so declare and enforce it.—Norman v. Burnett, 25 M. 183.

(1852). A grandmother who had a life estate in certain slaves, remainder to her children, to be divided among them, hired two of the slaves to the defendant, her son, for the year 1831, "and to continue on in the same way, until a division takes place;" and the son agreed to board, clothe, and send to school the two grandchildren, the heirs of a deceased son of the bailor, "so long as the slaves may be undivided." This he did, until the two grandchildren married and left his house; and after this, the grandmother released him from his obligation to do so; and then the two grandchildren brought this bill to recover the value of the hire of the slaves since their marriage. *Held*, that the transaction created a trust, which was binding both on the grandmother and the son; and that it did not terminate on the marriage of the children, but continued until the death of the grandmother and a division of the slaves; that the trust was founded on a good, though, as to the grandmother, a voluntary consideration, and she could not revoke it, nor release the trustee from his obligation to carry it out; and that the *cestui que trust* were entitled to have boarding and clothing still furnished to them, proportioned to the value of the hire of the slaves. —Norman v. Burnett, 25 M. 183.

(1885). While a manifestation of trust in land may be made in the most informal instruments, though addressed to others than the *cestui que trust*, the exception or reservation in a deed of certain land described in the reservation as "now owned and occupied by K," a third person, is not a declaration of a trust by the grantor in favor of K, but rather a recognition of K's title.—King v. Bishop, 62 M. 553.

(1896). Where the insured in a life policy payable to himself, his administrators, executors, or assigns, transfers the same to a third person as collateral security for a small loan with directions that in case anything should happen to him (construed to mean in case of his death) while the loan remained unpaid, such person should collect the policy and after deducting the amount of his loan divide the remaining proceeds between the wife and children of the insured, a parol trust is created in favor of the wife and children whereby they acquire an interest *in præsenti*, and on the death of the insured, there having been no revocation of the trust, such interest becomes absolute as against his administrator, in a proceeding not involving the rights of creditors of the insured.—Hiserodt v. Hamlett, 74 M. 37, 20 So. 143.

§ 29. —— Precatory words.

If a bequest be accompanied by words expressing a command, recommendation, entreaty, or hope on the part of the testator, that the property may be disposed of in favor of another, a trust will be created, if the words, the subject, and the object be sufficiently certain.—(1846) Wade v. Am. Col. Society, 7 S. & M. 663, 45 Am. Dec. 324; (1848) Lucas v. Lockhardt, 10 S. & M. 466, 48 Am. Dec. 766.

§ 30½. Transactions creating or operating as trusts in general.

(1877). While, ordinarily, any expressions which show unequivocally the intention of the parties to create a trust, will have that effect, a written agreement between the owner and a builder of a house that for the balance due the latter the owner will pay him all the revenue of the property until the debt is satisfied, and that if the income for one year shall fail to discharge it the whole debt shall become due, not being an assignment of the rents, does not create a trust relation between the parties as to the income; nor does it operate as a lien or mortgage. It is a mere designation of the means with which the debtor is to pay, and is only a personal covenant.—Alexander v. Berry, 54 M. 422.

Where, under a decree in favor of an estate, the heirs buy land and are allowed to retain the purchase money on condition recited in the report of sale and commissioner's deed that the bid, though credited on the decree, shall be accounted for by them upon final settlement of the estate, this creates an express, direct and technical trust in the

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land in favor of the estate, available to the creditors of the estate.—(1883) Westbrook v. Munger, 61 M. 329; (1884) Westbrook v. Munger, 62 M. 316.

(1884). Where land is sold under a decree to pay a debt due to an executor as such, and to a co-complainant towards whom the executor stands in no trust relation, and the executor purchases the property with the funds of the estate, he may be charged with the entire proceeds, and this although by the terms of the decree if it had brought a fair price, the proceeds in excess of a certain amount would have gone to his co-complainant.—Cooper v. Cooper, 61 M. 676.

§ 40. Evidence to establish trust.

(1860). The admission of parol evidence to show that an absolute deed of real or personal estate, or both, was accepted by the grantee, upon the condition that he would hold the property thereby conveyed, subject to a trust in favor of the grantor, or of a third person, is not a violation of the statute of frauds in this state, as it existed prior to 1857, nor contrary to the rules of evidence on the subject of the admission of parol evidence to contradict, vary, or add to a written agreement.—Anding v. Davis, 38 M. 574, 77 Am. Dec. 658.

(1899). Under Code 1892, § 4230, which makes void all trusts in land, created by parol, a grantor cannot prove by parol that he executed his deed in order that the grantee might manage the land for the former's benefit and not to pass his title thereto.—Horne v. Higgins, 76 M. 813, 25 So. 489.

§ 44. —— Weight and sufficiency.

(1841). To enforce a specific trust upon real estate from loose and equivocal expressions made by one of the parties in mere social conversation held at different times, would be inequitable and contrary to the spirit and policy of the statute of frauds.—Mercer v. Stark, Sm. & M. Ch. 479.

(1848). A bill was filed in the name of A, as trustee, and of B, as *cestui que trust*, in which it was stated that A, though holding an absolute deed, was, nevertheless, but a trustee for B, and the object of the bill was to restrain an execution creditor of one to whom A had aliened the land from levying his execution on it, the deposition of the alienee that he bought from A, as trustee for B, was taken, and was held to be sufficient proof of B's interest.—Taylor v. Strong, 10 S. & M. 63.

§ 45. Validity.

(1839–43). If a trust be an illegal one it can make no difference whether it be tacit or expressed; the same consequence—invalidity—must follow it in either character.—Ross v. Duncan, Freem. Ch. 587.

(1846). If a trust conferred on a corporation be inconsistent with the purposes for which it was created, that fact may furnish ground why it cannot be compelled to execute it, but it is no ground for declaring the trust void if it be otherwise unexceptionable.—Wade v. Am. Col. Society, 7 S. & M. 663, 45 Am. Dec. 324.

(1882). One who in payment for land purchased in his own name uses the proceeds of a note given to his wife by her father in 1861, became her debtor, and she having died in 1868, a conveyance of his real estate made in 1879 to a trustee for his children to discharge the obligation, is valid to the extent of their interest in their mother's estate.—Rogers v. Mayer, 59 M. 524.

§ 55. Right to contest validity of trust.

(1846). The state only has the right to contest the right of a corporation to execute a trust, valid in point of law, and conferred upon it.—Wade v. Am. Col. Society, 7 S. & M. 663, 45 Am. Dec. 324.

§ 59. Revocation.

(1852). A trust which has been created upon a good, although a voluntary, consideration, vests rights in the beneficiary, which the settlor of the trust has no right to abrogate or impair by any act or dealing with the trustee.—Norman v. Burnett, 25 M. 183.

(1896). One may do what he will within legal limits with his own; he may declare a trust absolute, never thereafter having in any wise the right to interfere with it, or he may declare a trust revocable on a named contingency.—Hiserodt v. Hamlett, 74 M. 37, 20 So. 143.

§ 60. Duration.

See *post*, § 171.

(1858). After the purpose of a trust has ceased or been accomplished, the trust no longer remains.—Mitchell v. Mitchell, 35 M. 108.

(1896). A revocable trust is vital until revoked.—Hiserodt v. Hamlett, 74 M. 37, 20 So. 143.

(1903). The emancipation of a minor under Code 1892, §§ 493–497, authorizing the chancery court to remove the disability of infancy in certain cases does not empower him to demand a conveyance of a trustee who holds land by deed directing a conveyance to him when he becomes of age, since under Code 1892, § 1508, minority does not terminate short of twenty-one years.—Ray v. Kelly, 82 M. 597, 35 So. 165.

(B) RESULTING TRUSTS.

§ 62. Nature of resulting trusts.

(1867). A resulting trust can never be established so as to deprive the vendor of his lien on the land, for the balance of unpaid purchase money, and especially where he has made no conveyance. The whole doctrine of resulting trusts, proceeds on the idea that he has been paid for his land, and that he has conveyed to the nominal purchaser.—Capers v. McCaa, 41 M. 479.

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§ 63½. Effect of statute of frauds and statutes prohibiting parol trusts.

See FRAUDS, STATUTE OF, §§ 56, 62.

(1849). A grantor in a trust deed, made to secure the payment of his debts, sought to get the benefit of a sale made by the trustees, at which the *cestui que trust*, who was but an indorser on the debts secured by the deed, was the purchaser, upon an allegation that the sale was made by agreement between him, the *cestui que trust*, and the trustees, to the effect that the *cestui que trust* should purchase the property, and then mortgage it to a bank for a loan, and that the amount so raised should be applied for the benefit of the trust fund. The *cestui que trust* positively denied this arrangement in his answer, and the only evidence to sustain the claim, was that of the trustee. *Held*, that as agents of all the parties interested under the deed, the trustees should not have lent themselves to a secret understanding between the grantor and the *cestui que trust*, which was a departure from good faith, and created risk and hazard to the creditors secured by the deed, and this consideration speaks but little for the credibility of their testimony, given to prove the agreement. *Held*, also, that the agreement was void by the statute of frauds, as it was not in writing, and that the purchase was not a resulting trust.—Walker v. Brungard, 13 S. & M. 723.

(1856). A person who, in pursuance of a previous parol agreement with the debtor, purchases with his own means, the land of the debtor at execution sale, for the debtor's benefit, is a trustee for the debtor, and such an agreement is not within the statute of frauds.—Soggins v. Heard, 31 M. 426.

(1856). A parol agreement between the vendee of land, who holds a title bond, and a third person, by which the latter advanced the money and took a deed to the land in his own name, as security for the loan, is valid; and the trust thereby created in favor of the vendee in the title bond, will be enforced in a court of equity, upon an offer by such vendee to pay the advance, and a refusal of the lender to convey according to the agreement.—Jones v. McDougal, 32 M. 179.

(1866). Trusts, arising or resulting by implication of law out of any conveyance of land, are excepted from the operation of the statute of frauds and perjuries.—Kelly v. Mills, 41 M. 267.

If, on the facts proved, a trust would result by operation of law, without any agreement, the fact that a verbal agreement therefor, incapable of being enforced, was made, will not prevent the trust from arising.—(1881) Robinson v. Lefiore, 59 M. 148; (1885) Thomas v. Thomas, 62 M. 531.

(1884). Where one buying land, in order to raise the purchase money, procures another to become his surety on a note to a bank furnishing the money which is paid to the vendor, who, at the instance of the purchaser, conveys the title to such surety, to be held by him as an indemnity against loss on account of his suretyship, the money thus obtained, though borrowed on the joint credit of the two, is the money of the purchaser, and by operation of law a trust in the land results in his favor, unaffected by the statute of frauds.—Bratton v. Rogers, 62 M. 281.

(1891). Where land is sold under a decree, by agreement of all parties, it being bought in by one who is interested in the decree as mortgagee, and who receives a deed undertaking to hold the title for the benefit of defendant, the original owner, who advances a part of the money to buy it in, may enforce a resulting trust against the purchaser for the amount so advanced though the agreement in respect to the title is by parol.—Barton v. Magruder, 69 M. 462, 13 So. 839.

§ 63¾. Creation and existence in general.

(1845). Where a party purchases a legal title, with a knowledge of an outstanding equitable title he is but a trustee of the owner of the equitable title.—Thompson v. Wheatley, 5 S. & M. 499.

(1849). Where one by written contract agrees to sell land, and afterwards conveys to a different person who has knowledge of the previous contract, the latter will hold the legal title as trustee for the first purchaser, and a court of equity will compel him to convey.—Stone v. Buckner, 12 S. & M. 73.

(1855). If, in a contest between several judgment creditors in the circuit court, in relation to the application of money in the sheriff's hands, the creditors, whose claims were postponed, signify their intention to appeal, and it be thereupon agreed between all the parties, that the sheriff shall loan out the money for the benefit of the party who shall succeed in the litigation; if the creditor, whose claim was preferred in the circuit court, receive the money from the sheriff in payment of his judgment, he will be compelled to refund it, if upon determination of the appeal, his claim shall not be sustained, although he received the money before the appeal was taken, and whilst the judgment in his favor was good and unreversed; for by the agreement the sheriff was a trustee, and the creditor also became a trustee, by receiving the money in violation of the trust.—Gay v. Edwards, 30 M. 218.

(1883). A purchaser, under a judgment against a trustee, of land in which there is a resulting trust, not being a purchaser for value, does not acquire the right of the beneficiary, nor is the judgment creditor entitled, by virtue of the registry act, to subject the property, since such trust is not required to be recorded.—Nugent v. Priebatsch, 61 M. 402.

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(1887). No trust can result in favor of a grantor from a deed which recites a pecuniary consideration, though nominal, if the *habendum* declares a use to the grantees, who are children of the grantor, and the deed contains a covenant of warranty.—Moore v. Jordan, 65 M. 229, 3 So. 737, 7 Am. St. 641.

(1893). Where the seller of personal property has reserved title to secure the purchase money, evidenced by notes, he may, after default, bring replevin for the property, notwithstanding he has indorsed the notes and suits are pending against the vendee by the indorsees. The seller can enforce the security, but he will hold the property or proceeds in trust for the owners of the notes.—McPherson v. Acme Lumber Co., 70 M. 649, 12 So. 857.

§ 64. Failure or defect in creation, operation, or execution of express trusts.

(1873). The law does not favor the divestiture of a wife's separate estate by her implied consent or acquiescence, and where a trustee of personal property for the use of a married woman allows another to use it in part payment of land, she will not be held to have acquiesced in the sale or to have acquired a resulting trust in the land, where it appears that she did not claim by reason thereof; and, where she afterwards acquires the land by inheritance and purchase, her claim will be referred to these rather than to a resulting trust.—Dozier v. Freeman, 47 M. 647.

(1886). A conveyance of land to a trustee and his successors in fee simple, for the benefit of the grantor's wife and children, which provides that it shall be binding until set aside by agreement, or by a decree, and contains no provision as to what shall be done with the property after the death of the beneficiaries, passes the grantor's entire interest, and the beneficiaries take an estate co-extensive with the title of the trustee, whether the deed be voluntary or not. Such a conveyance reserves no interest and creates no resulting trust in the grantor.—Boone v. Davis, 64 M. 133, 8 So. 202.

§ 69. Voluntary conveyance to grantee not entitled to take beneficial interest.

(1853). When an intestate bought and paid for land under an executory contract for the purchase, and, after his death, the deed is made to the administrator, he will be a mere trustee for the heirs.—Hoel v. Coursery, 26 M. 511.

§ 70. Intention of grantee to hold for or convey to another.

See *ante*, § 63½.

(1836). Where the claimant of land is the meritorious cause of the purchase being made at a low price, and the advance of the purchase money is made for his benefit, and the deed taken in the name of the person making the advance, as a surety for its repayment, a trust will result. Thus, J having made improvements on public land, and having an inchoate pre-emption right, it was entered by P, who was ignorant of J's settlement. P, in consideration of this, agreed to let J have the land at the original cost, which was very low; J, not having the money, applied to R for a loan, who refused, but agreed to purchase in his own name, and let J have it if he would return the money by a day stipulated, and the deed was so made, P believing that J was to get the benefit of the purchase, and being unwilling to accept that price from another. *Held*, that a trust resulted to J, who was entitled to the land on paying the purchase money and interest.—Runnels v. Jackson, 1 H. 358.

(1849). A resulting trust will not be raised by an agreement merely to purchase for the benefit of another, the purchaser using his own means in the purchase, and buying in his own name, and being under no fiduciary relations which would prevent him from purchasing for himself.—Walker v. Brungard, 13 S. & M. 723.

(1852). E had made improvements on a quarter section of public land, which was sold at public sale; previous to the sale it was agreed between E and G that the latter should buy the quarter section and let E have that eighth on which his improvements were, upon E's returning one-half the purchase money. *Held*, that the case was within the principle of Runnels v. Jackson, 1 H. 358, and that E was entitled to recover the land according to the agreement.—Evans v. Green, 23 M. 294.

§ 71. Payment of consideration for conveyance to another.

(1839–43). A resulting trust arises where one furnishes the money for the purchase of land and the person selected to make the purchase buys in his own name and takes title to himself.—Powell v. Powell, Freem. Ch. 134.

(1849). A resulting trust is raised when the consideration was given or paid by one party and the conveyance was taken in the name of another.—Walker v. Brungard, 13 S. & M. 723.

(1881). Where, before a sale of land under a trust deed, one agrees with the wife of the grantor to loan her money to buy it, and attends the sale with her, and bids avowedly as her agent, but subsequently takes title to himself as security, she acquires a resulting trust, and, having repaid part of the money, after her death her heirs may maintain a bill against the heirs of such agent for an accounting, and to redeem and to enjoin them from prosecuting ejectment for the land. The trust arises from the facts and the relation of the parties, and is not affected by the parol, and therefore void, agreement that such agent should take the title in trust. (Miazza v. Yerger, 53 M. 135, distinguished.)—Robinson v. Lefiore, 59 M. 148. See also (1882) Dickerson v. Mays, 60 M. 388.

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(1897). A resulting trust is created in favor of a devisee, by the acts of a party in agreeing to loan money to the devisee of a mortgagor and with it, to bid in the land for the devisee at a foreclosure sale and take title in his own name, as security for the loan, and, in pursuance of such agreement, actually bidding in the land in his own name.—Hebron v. Kelly, 75 M. 74, 21 So. 799.

§ 77. —— Time of payment.

A resulting trust will not arise in favor of one whose funds were used in paying for the land, where the purchase was made on a credit.—(1856) Bowman v. O'Reilly, 31 M. 261; (1856) Gee v. Gee, 32 M. 190; (1866) Gibson v. Foote, 40 M. 788.

(1856). In order to establish a resulting trust the payment must be made at the time of the purchase; a surety, therefore, who afterwards pays the purchase money upon the default of his principal, thereby acquires no interest in the land.—Gee v. Gee, 32 M. 190.

(1849). In order to establish a resulting trust, the advance of the money by the party setting up the claim must precede the purchase; a subsequent payment will not raise the trust when it is denied by the alleged trustee.—Mahorner v. Harrison, 13 S. & M. 53.

(1873). After one has purchased land and received a conveyance, mere application by him of the money of a third person to pay an instalment of the purchase money will not create a resulting trust in favor of such third person.—McCarroll v. Alexander, 48 M. 128.

(1896). The rule that a resulting trust in land can only arise in favor of a third person paying the purchase money, when it is paid "at the time of purchase," means that the payment may be made at or before the time of the conveyance whereby the vendee acquires title.—Moore v. Moore, 74 M. 59, 19 So. 953.

§ 78. —— Mode and sufficiency of payment.

(1866). In order to establish a resulting trust from the use of the complainant's money in the purchase of property, where there is no valid agreement to purchase the property with the trust money, it is necessary to show that the money was, at the time of the purchase, the fund of the party claiming the trust, and that it was used in the purchase of the property. If the money had been loaned to the alleged trustee, it was his money, and a trust does not result. And this rule applies where a purchase had been made by the husband, with funds which he had borrowed from the wife. And it does not change the result that the husband or alleged trustee promised to invest the amount of the loan in the purchase of land, unless the promise were in writing, for that would make it an express, and not an implied trust and void by the statute of frauds, if not in writing.—Gibson v. Foote, 40 M. 788.

(1885). It is necessary to the existence of a resulting trust that in the purchase the money or credit of the beneficiary should be used, but a constructive payment by him is effectual. Thus, if two buy land jointly, each to pay one-half, and the one who actually furnishes the money is indebted to the other, and pays the entire amount of the consideration on an agreement that one-half of what is paid shall be in the discharge of his debt, takes the title in himself, a trust arises in favor of the other.—Thomas v. Thomas, 62 M. 531.

§ 79. —— Part payment.

(1857). Where a written bill of sale to personalty is taken in his own name, by one who purchases with funds belonging to himself and another jointly, if there be no understanding or agreement between them, at the time, in reference to the purchase, and if it does not appear to what extent they were severally interested in the purchase money, no trust will result in favor of the party whose money was so used, to the extent of his interest therein, but the title will vest in the purchaser, who will become a debtor to the other to the amount of his money used in the purchase.—Coppage v. Barnett, 34 M. 621.

(1896). A resulting trust is not predicable of the act of a person in loaning to the purchaser of land, money with which to pay a part of the purchase price.—Hitt v. Applewhite, 20 So. 161, not officially reported.

§ 81. —— Relationship between parties.

(1849). In the case at bar, a father-in-law advanced money to a son-in-law to buy land, and the money was so invested and the titles taken in the name of the son-in-law. The father-in-law claimed that all the lands were purchased for him, and the son-in-law claimed that all the money was an advancement to him. The court reviewed all the circumstances, and reached the conclusion that the main object of the parties was first to secure a home for the son-in-law, and afterwards to secure a large plantation to the father-in-law, and this conclusion was reached mainly on the ground that they had so designated the object of the purchase, and the court decreed the land in controversy to the father-in-law, leaving to the son a plantation on which he resided and had his home.—Mahorner v. Harrison, 13 S. & M. 53.

(1849). Several tracts of land had been purchased in the name of the son-in-law, he using the money of the father-in-law, and it appeared to have been the intention of the parties that after the son-in-law was settled in a home, the father-in-law should have a large plantation out of the lands so purchased. *Held*, that the father-in-law had a resulting trust in all the lands until the separate interest of each should be agreed on, and that this agreement might be by parol.—Mahorner v. Harrison, 13 S. & M. 53.

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(1856). The son, by the direction, and with the means of the father, and for his benefit, entered in his own name land which, by law, the father was forbidden to enter. *Held*, that no trust resulted to the father, since a court of equity will never raise a trust in violation of law.—Alsworth v. Cordtz, 31 M. 32.

(1881). Where, before a sale of land under a trust deed, one agrees with the wife of the grantor to loan her money to buy it, and attends the sale with her, and bids avowedly as her agent, but subsequently takes title to himself as security, she acquires a resulting trust, and, having repaid part of the money, after her death her heirs may maintain a bill against the heirs of such agent for an accounting, and to redeem and to enjoin them from prosecuting ejectment for the land. The trust arises from the facts and the relation of the parties, and is not affected by the parol and therefore void agreement that such agent should take the title in trust. (Miazza v. Yerger, 53 M. 135, explained.)—Robinson v. Leflore, 59 M. 148. See (1884) Bratton v. Rogers, 62 M. 281.

(1896). A tenant in common who in the prosecution of a scheme to acquire the interests of her co-tenants causes her husband to buy the land for her sole benefit at tax sale, the conveyance being made to the husband, cannot as against his attaching creditors, maintain a bill to enforce a resulting trust in the land on the ground that her money was used in the purchase.—Snider v. Udell Woodenware Co., 74 M. 353, 20 So. 836.

§ 82. —— Payment as gift or advancement.

(1856). A trust will not result in favor of the father who buys land in the name of the child; such transactions will be regarded as advancements.—Gee v. Gee, 32 M. 190.

(1879). A trust does not result in favor of a brother who purchases a homestead for his sisters to whom he stands *in loco parentis*, and who causes the title thereto to be conveyed to his eldest sister and the aunt with whom the girls lived, and this although the ones holding title subsequently permit the purchaser, owing to reverses of fortune, to live and build on the land, and the aunt reconveys to him her moiety.—Higdon v. Higdon, 57 M. 264.

§ 83. Payment of purchase money on purchase of land.

(1871). Where a vendee goes into possession of lands holding a bond for title on making a deferred payment, the vendor holds the legal title as trustee, to convey to the vendee on his making such payment.—Bell v. Flaherty, 45 M. 694.

§ 84. Payment of fiduciary funds for conveyance to person holding fiduciary relation.

(1894). An employe embezzled money from his employer, and used it to buy a lot and build a house thereon. Under such circumstances a resulting trust on the property will be declared in favor of the employer.—Grouch v. Hazelhurst Lumber Co., 16 So. 496, not officially reported.

§ 85. Evidence to establish trust.

See *ante*, § 63½.

(1841). The existence of an express trust necessarily excludes the idea of an implied trust in relation to the same thing.—Mercer v. Stark, Sm. & M. Ch. 479.

(1849). Where a son-in-law purchases land in his own name with money furnished by his wife's father, a resulting trust arises, *prima facie*, in favor of the father-in-law.—Mahorner v. Harrison, 13 S. & M. 53.

(1867). The ground upon which the doctrine of resulting trusts rests with reference to property purchased with the means of one person, the title being taken to another, is the presumption of law that the person whose funds are applied in payment of the property so purchased, intended it for his own benefit, and that the nominal purchaser or grantee is a mere trustee; and this presumption may be rebutted by proof, either positive or negative, or by the declarations of the parties contemporaneous with the purchase, or by other direct proof of intention, or by the circumstances attending the transaction, showing that such was not the intention of the parties at the time.—Capers v. McCaa, 41 M. 479.

(1870). The rule that a purchase by the husband in the name of the wife, or by a parent in the name of a child, shall be deemed an advancement, is not inflexible, but a mere presumption which exists in the absence of proof to the contrary; and hence, if it appear by the circumstances surrounding the purchase, that no advancement was intended, but that the title was vested in the wife or child for other reasons, to be held in trust, for father or husband, then this presumption ceases.—Wilson v. Beauchamp, 44 M. 556.

(1879). Where the purchaser of land causes the title thereto to be conveyed to a person other than himself, to whom he is under a legal or moral obligation to provide or toward whom he has placed himself *in loco parentis*, such act is presumed a settlement and not a trust for the purchaser, but such presumption may be rebutted by evidence.—Higdon v. Higdon, 57 M. 264.

§ 87. —— Admissibility in general.

(1876). Where an alleged resulting trust is not asserted for a great length of time, but is eventually set up as a defense, it becomes a question of intention on the part of the claimant thereto, and testimony in explanation of the delay and silence is to be considered.—House v. Harden, 52 M. 860.

(1876). Where a widow applies to an attorney to file a bill to establish a resulting trust in lands purchased by her deceased husband, and is advised not to do this, but

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to claim as widow, and she does so; but after litigating a number of years, abandons such claim and files a bill to enforce the trust, the testimony of the attorney is admissible in explanation of the delay, but not as evidence of the claim itself.—House v. Harden, 52 M. 860.

§ 89. —— Weight and sufficiency.

(1894). When the existence of a resulting trust depends upon parol proof, the evidence must be clear, strong, unequivocal, and unmistakable, and must establish the fact of the payment by the beneficiary beyond a reasonable doubt. The proof in the case at bar held insufficient.—Logan v. Johnson, 72 M. 185, 16 So. 231.

(C) CONSTRUCTIVE TRUSTS.

§ 92½. —— Statute of frauds and statutes prohibiting parol trusts.

See FRAUDS, STATUTE OF, §§ 56, 62.

(1873). The statute of frauds includes only those conveyances made by the debtor in fraud of his creditors. Purchases made with the debtor's means, the conveyance being made to a third person, though they create a trust for creditors, are not within the statute.—Carlisle v. Tindall, 49 M. 229.

But see (1883) Simmons v. Ingram, 60 M. 886, in which this case and others following it are criticized.

(1876). While no one can hold a benefit acquired by fraud, and an agent using his knowledge to acquire property becomes a trustee for his principal, yet a trust in land cannot be set up by mere parol agreement, and no trust arises from a breach thereof. Hence, parol proof cannot be received to establish a resulting trust in lands purchased by an agent and paid for by his own funds, no money of the principal being used for the payment. Such an agreement is within the statute of frauds, Code 1871, § 2196, and is not saved by the proviso in favor of trusts resulting by implication of law.—Miazza v. Yerger, 53 M. 135.

(1878). A trust arising or resulting as the result of the acquisition of land by the members of an attorney's family in fraud of a client of such attorney, though resting in parol, is created by implication of law, and is by Code 1871, § 2896, excepted from the statute of frauds.—Cameron v. Lewis, 56 M. 76.

A merely oral promise to hold land in trust, and its subsequent breach, however disappointing and harmful, and though ever so reprehensible in morals, is not of itself enough to cause a court of chancery to declare a trust.—(1890) Ragsdale v. Ragsdale, 68 M. 92, 24 Am. St. 256, 11 L. R. A. 316; (1904) Moore v. Crump, 84 M. 612, 37 So. 109.

While an oral promise to hold land in trust for another person is void, thus to interfere and prevent a testator from making provision for another, whereby a bounty intended for such other is intercepted, is a fraud, from which a trust arises by operation of law, not within the statute of frauds or wills.—(1890) Ragsdale v. Ragsdale, 68 M. 92, 8 So. 315, 24 Am. St. 256, 11 L. R. A. 316; (1904) Moore v. Crump, 84 M. 612, 37 So. 109.

§ 95. Fraud or other wrong in acquisition of property in general.

(1854). A party possessed of information as to the location and value of public land subject to private entry, who has sold this information to another to enable the latter to make an entry of the land, cannot afterwards enter the land in his own name, and thus deprive the vendor of the privilege of entering it. Such entry is fraudulent, and constitutes the enterer a trustee for the party to whom he sold the information.—Winn v. Dillon, 27 M. 494. See also (1852) Murphey v. Sloan, 24 M. 658.

(1854). Where one received notes from an agent in payment of the agent's private liability to him, knowing that the agent had no title to the notes, he is a trustee for the owner of the notes and liable to him for the proceeds.—Livermore v. Johnson, 27 M. 284.

(1879). Where, after a judgment debtor has paid the clerk's costs and promised to pay that of the other officers, the clerk, in order to strengthen a defective tax title, procures another officer's claim for costs, and, without notice to the debtor, whose residence and solvency he knows, issues execution and buys land thereunder at a sacrifice, chancery will vacate the sale; and in such case, the court will grant full relief by decreeing to complainant costs which were wrongfully demanded of him, and paid under protest. (Ezelle v. Parker, 41 M. 520, distinguished.) —Davis v. Bell, 57 M. 320.

(1889). One in possession of land receiving the rents, is under obligation to keep the taxes down. If default in payment is made by such occupant that the land may be sold, a purchaser at the tax sale, who confederates with the occupant, and who knows of the possession, will hold the title as trustee *ex maleficio* for the real owner; and this, although the right of such owner rests upon an equity unknown to the purchaser.—Chiles v. Gallagher, 67 M. 413, 7 So. 208.

(1892). A judgment creditor, under such obligation to pay his debtor's taxes, and who also held a trust deed covering his debtor's land, caused the same to be sold under an execution issued after the debtor's death, and without revivor against the heirs, and, on the same day, sold under the trust deed and suffered a sale for taxes, becoming the purchaser at all three sales, intending to concentrate the titles in himself. The debt secured by the trust deed was shown to be in large part satisfied. *Held*, the creditor was rightly decreed a trustee of the title for the heirs.—Faison v. Johnson, 70 M. 214, 12 So. 152.

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(1896). A tenant in common who purchases the joint estate under a deed of trust will at the election of the other tenants, hold the same as trustee for them; but adult cotenants with knowledge or sufficient information to charge them with knowledge must make such election within a reasonable time, otherwise, those who acquire rights in the property from the purchaser in good faith will be protected.—Smith v. McWhorter, 74 M. 400, 20 So. 870.

(1904). Where a grantee or devisee obtains the possession and title to land intended for another by actual fraud, on proof of the fraud, a trust will be raised in favor of the latter.—Moore v. Crump, 84 M. 612, 37 So. 109.

(1910). One who receives property from a trustee to whom it had been conveyed by a corporation for the benefit of all parties interested in the latter, and who sells the same and appropriates the proceeds to his own use, must account for the price received, the appropriation by him being unlawful.—Moyse v. Howie, — M. —, 53 So. 402.

§ 96. Breach of oral agreement to hold in trust or convey land voluntarily conveyed.

(1887). Where an heir, for the purpose of hindering, delaying or defrauding creditors of his ancestor's estate, makes a voluntary conveyance to one who is guilty of no fraud or imposition on him, he cannot afterwards maintain a bill to compel a reconveyance either on an express or implied parol promise to reconvey; and it makes no difference that the conveyance was made on the advice of the administrator of the estate and his promise that the grantee would reconvey, the administrator having secured no benefit to himself thereby.—Moore v. Jordan, 65 M. 229, 3 So. 737, 7 Am. St. 641.

§ 97. Fraud or undue influence in procuring or preventing devise or bequest.

See *ante*, § 92½.

(1890). One who is active in preventing a testator from making an intended provision by his will for another, and where but for such intervention, the intended provision would have been made, will be held to be trustee of any devise to himself, to the extent it would have been for such other if it had not been intercepted by him, and will be compelled to respond to the claim of the intended beneficiary.—Ragsdale v. Ragsdale, 68 M. 92, 8 So. 315, 24 Am. St. 256, 11 L. R. A. 316.

(1890). Where one has prepared a will naming his son as a devisee of certain land, and afterwards, in his last illness, when purposing to give by codicil a half interest therein to another son, the devisee named actively interferes, and by assurances that he will convey to his brother the half interest, together with other conduct and representations, prevents the making of the codicil, he will, after the testator's death, be held a trustee of a half interest in the land for his brother.—Ragsdale v. Ragsdale, 68 M. 92, 8 So. 315, 21 Am. St. 256, 11 L. R. A. 316.

(1910). Where the intention of a testator was to have his property divided among the children of a deceased brother, and he bequeathed the property to one of the children, and stated in his will that she fully understood his wishes as to what he wanted done and would carry them out, and the devisee had influenced the indicated disposition by giving her promise to make the division, she will, on her refusal to perform, be declared a trustee to carry out this purpose.—Benbrook v. Yancy, 96 M. 536, 51 So. 461.

§ 98. Breach of oral agreement as to lands to be purchased.

(1873). Where two persons agree to buy land which is to be sold at auction, each to pay his proportion of the purchase money, and have an interest accordingly, and one of them in bidding off the property, being financially embarrassed, takes the title to the whole in the name of his wife, a trust results in favor of the other party to the extent of his interest, which will be enforced against the wife, she being a mere volunteer.—Harvey v. Ledbetter, 48 M. 95.

§ 101. Breach of contract of agency or employment.

(1905). A defendant who, having received money from a testator in his lifetime to invest for the testator's benefit, invested it in lands for his own benefit, without the testator's knowledge, holds the lands as a constructive trustee for the legatees to whom the right was bequeathed.—Patton v. Pinkston, 86 M. 651, 38 So. 500.

§ 102. Breach of duty by person in fiduciary relation in general.

(1852). At a sale under execution of slaves belonging to an intestate V became the purchaser of six of them, for less than their value by $1,000, he having stated to the bidders, that he was buying for the widow, and thereby lulled competition. Afterwards, the widow, who was administratrix, paid to V all the purchase money but $1,000, and received from him four of the slaves; and it was also agreed between them, that the remaining $1,000 was to be paid at a specified time to V, who was then to surrender the other two slaves to the widow. The administrator *de bonis non* afterwards sued V for the two slaves, and for an account of the hire of all. *Held*, that V, by the purchase, became trustee for the creditors and distributees of the estate, and the administrator *de bonis non* was entitled to recover the two slaves, on paying the $1,000 still due, and interest, after deducting first the hire of the slaves.—Lindsey v. Platner, 23 M. 576.

(1874). Where the husband of a guardian has invested the money of his wife's ward in land, he is a volunteer, and the ward may in equity follow the money into

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the land as held in trust for him, or, if more to his advantage, may hold the husband as a debtor for the money. Such a trust can be enforced against all persons who come into the possession of the property with notice.—Wood v. Stafford, 50 M. 370.

(1876). Where an executor under order of the probate court duly sells land, but by the medium of another gets the title in his wife and children, on a bill filed by the devisees of the testator, the sale should not be decreed void, but the wife and children should be held trustees of the legal title for the complainants.—Chapman v. Sims, 53 M. 154.

(1876). In such case, if the executor has charged himself in his accounts with the purchase money, the court in decreeing a conveyance to the devisees should discharge the executor from liability in his accounts for the purchase money.—Chapman v. Sims, 53 M. 154.

(1877). If an executor delivers money or property to legatees before paying debts of the estate, the creditors, by such breach of trust, do not lose their right to follow the assets, but may, treat the legatees as trustees of such assets, with the same responsibility as the executors.—Buie v. Pollock, 55 M. 309.

(1877). Where land bought by an executrix with assets of the estate is sold by her to one with notice, he holds as trustee for the testator's creditors, and if in part so purchased, it is so held to the extent that such assets were used.—Buckingham v. Wesson, 54 M. 526. See also (1893) Fant v. Dunbar, 71 M. 576, 15 So. 30.

(1884). Where one who is administrator of two and guardian of other distributees, joins in an application to sell land upon which his wards have a lien, and becomes the purchaser thereof, taking the title in his own name, he holds it subject to the right of those to whom he sustains such fiduciary relation to have him declared a trustee for them.—Wooldrige v. Campbell, 61 M. 634.

(1884). Where at a sale under a decree in favor of an executor he buys and pays for the land by giving the commissioner his receipt as executor for the amount of the bid, he will be held as to such amount an express trustee, chargeable therewith, notwithstanding the lapse of time, but as to the property or its proceeds if afterwards sold by him, he will be treated as a resulting or constructive trustee, against whom the ten years statute of limitations runs from the time the trust first arose.—Cooper v. Cooper, 61 M. 676.

§ 103. Contracts and transactions between persons in confidential relations.

(1874). Where an active partner deals with the firm assets so as to put them beyond the reach of the other partners and deprive them of all benefit thereof, and is assisted in the scheme by another, such confederate, to the extent that the effects can be traced to him, will be held as a trustee thereof. In case of such fraudulent sale, one who buys under such circumstances as would impart knowledge but for the gross negligence, is likewise chargeable as trustee. —Stegall v. Covey, 49 M. 761.

(1878). Where an attorney employed to examine the title to land with a view to protect his client's interest, by reason of his fiduciary relation he cannot avail personally of information acquired in the investigation; and if he discovers that the land is held by the state under a tax title, a conveyance from the state secured by him in the name of relatives or members of his family, will be held in trust for the benefit of his client. —Cameron v. Lewis, 56 M. 76.

(1879). Where one intrusted by his mother with money to complete the purchase of land for her, without her knowledge and in violation of the trust, takes the title in his own name and exchanges it for other land, he holds the land so acquired as trustee for her, though she consented to the exchange.—Flynt v. Hubbard, 57 M. 471.

(1879). Where an attorney controls for different clients several judgments, he may procure the debtor's property to be sold under the senior judgment, and may purchase it for the plaintiff therein; if he purchase for himself, he will hold at the option of any of such clients to treat him as trustee. By refunding the money paid out by the attorney, they will be entitled to the benefit of his purchase, and in such case whether the purchase is made in good or bad faith, whether detrimental to the interest of the client or whether profitable to the attorney, is immaterial.—Johnson v. Outlaw, 56 M. 541.

(1879). Where one learns that his attorney has purchased property as to which he has a claim or interest, it is his duty, if he desires to claim the benefit of the purchase, to promptly notify the attorney of his election. This duty is especially incumbent upon the client where there has been no moral turpitude in the conduct of the attorney, and where delay in the assertion of the client's rights will affect the position of the parties to the transaction or the value of the property. If the client pursues a course indicating his acquiescence in the purchase by the attorney, he cannot, after the lapse of five years, and when the attorney has erected valuable improvements upon the land, claim the benefit of the purchase.—Johnson v. Outlaw, 56 M. 541.

(1885). Where an attorney buys land under such circumstances as make him trustee of the legal title for his client, and the latter, after notice thereof, delays three years to assert his rights, the former or his vendee, who has placed on the land improvements that are permanent, valuable and necessary to the use of the land, should be allowed therefor to the extent that value has

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thereby been added to the property, not to exceed in any event the actual cost of such improvements, and he should be chargeable for only such rents for the occupancy of the property prior to the exhibition of complainant's bill as were actually received.—Gaston v. King, 63 M. 326.

(1885). An attorney who obtains a foreclosure decree for a non-resident client, and who, to secure himself for costs advanced and for fees, buys in the land at a sale thereunder, may, at the election of the client, be treated as owner liable for his bid, or as a trustee of the legal title for the client.—Gaston v. King, 63 M. 326.

(1900). Members of an organization who purchase property with money belonging to the organization, and claim the same as owners, are answerable in equity as trustees *ex maleficio*.—Owen v. Monroe County Alliance, 77 M. 500, 27 So. 383.

§ 105. Wrongful disposition of property.

(1857). If a party fraudulently destroy the title deeds of another, and make a fraudulent sale of the land, and appropriate the proceeds to his own use, he will be liable, as upon an implied trust, to restore the injured party to his rights, and a court of equity will compel him to do so.—Philips v. Hines, 33 M. 163.

(1866). A purchaser with notice of a legal or equitable title in another, is guilty of a constructive fraud as against the owner, and is regarded in equity as a trustee for him; and a court of equity will entertain a bill against such purchaser, to make him account for the value of the property, in case he has disposed of it, so that he cannot make restitution of the specific property. And if, after such disposal, the property perish, as a slave by emancipation, this will be no reason why he shall not account for its full value.—Calhoun v. Burnett, 40 M. 599.

(1894). The owner of property sold may hold a person who sells the same and one who receives the proceeds of the unlawful sale from the seller, with notice of the owner's title, liable, as constructive trustees.—Smith v. Jeffreys, 16 So. 377, not officially reported.

§ 106. Evidence to establish trust.

(1904). A constructive trust as a result of fraud can be established only upon clear and convincing proof of such fraud.—Moore v. Crump, 84 M. 612, 37 So. 109.

II. CONSTRUCTION AND OPERATION.

Construction of testamentary trusts, see WILLS, § 679.

(A) IN GENERAL.

§ 112. Application of general rules of construction.

(1873). In general the same modes of construing language of trust estates obtain as are applied to legal estates.—Dibrell v. Carlisle, 48 M. 691.

§ 114. Trusts executed or executory.

(1857). A trust is executed, unless the instrument creating it contemplates some future act of conveyance by the trustee, and without which the estate would not vest in the *cestui que* trust.—Carradine v. Carradine, 33 M. 698.

§ 117. Construing instruments together.

(1846). Where an absolute deed was made, and the grantee at the time executed an instrument showing that the conveyance was a mere trust for the grantor, the two instruments are to be construed together.—Caillaret v. Bernard, 7 S. & M. 319.

(B) ESTATE OR INTEREST OF TRUSTEE AND OF CESTUI QUE TRUST.

§ 133. Extent of estate or interest of trustee.

See *post*, § 182.

(1843). Where one purchases land with the money of another, and takes a conveyance in his own name, or purchases for the benefit of another, and has been repaid his advance of the purchase money, he is a trustee of a satisfied trust, and cannot, on his mere naked legal title, recover possession from the owner of the complete equity.—Brown v. Weast, 7 H. 181.

(1856). A trustee of the bare legal title, for the purpose of protecting the property of the wife from the control or debts of the husband, may, even after the death of the husband, assert his title against those claiming against the wife, unless she object.—Gully v. Hull, 31 M. 20.

(1856). The title of a trustee, even where he is the mere holder of the legal title, is a vested estate, which cannot be defeated by the *cestui que trust*, so long as the necessity for the trust continues; therefore, the joint conveyance of the husband and wife during the life of the former, will not defeat the title of a trustee who holds the legal title to the property for the purpose of securing it from the debts and control of the husband.—Gully v. Hull, 31 M. 20.

(1891). In the absence of language conferring an estate upon executors, an estate by implication will arise when, from the nature of the trust, it is necessary that an estate should exist in the trustee for its execution; and, where an estate is expressly given, it will be limited in duration to the trust to be performed, if a precise period for its termination can be shown.—Cohea v. Jemison, 68 M. 510, 10 So. 46.

§ 139. Extent of estate or interest of cestui que trust.

(1854). A *cestui que trust*, entitled under the deed to possession for life, does not hold adversely to the trustee during the life estate; nor do those holding under the *cestui que trust*, though they hold wrongfully and in violation of the object of the trust; for

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those claiming the estate of the *cestui que trust* cannot, any more than he, set up an adverse possession against the trustee during the life of the *cestui que trust*.—Butler v. Spann, 27 M. 234.

(1857). The settler conveyed slaves to a trustee: 1st, to control and manage the same for the *cestui que trust*, until she arrived at full age, or married; 2d, then to deliver them into her possession, and account for the profits which had previously accrued; 3d, after such delivery, that he should see that the slaves were not disposed of, but preserved for the heirs of the body of the beneficiary, in whom, upon her death, they should vest, and if she should die without heirs of her body, that then the slaves should vest in her heirs by maternal line. *Held*, 1st, that the *cestui que trust* took a freehold in the slaves; 2d, upon delivery of possession to her, according to the directions of the deed, the trust became executed; and, 3d, that under the operation of the rule in Shelly's Case, the whole estate in the slaves vested in the beneficiary.—Carradine v. Carradine, 33 M. 698.

§ 146. Transfer of estate or interest of cestui que trust.

(1873). When real property is conveyed absolutely to the separate use of a married woman, in trust, she can dispose of it only in the manner prescribed by the instrument creating the trust, and if none be prescribed, then only in accordance with the statute.—Dibrell v. Carlisle, 48 M. 691.

(1896). If no person, other than the beneficiary, has an interest in the trust fund, the same can be voluntarily aliened by such beneficiary.—Stern v. Hampton, 19 So. 300, not officially reported.

(1896). Where a testator devises land to his wife in trust during her life or widowhood for her maintenance and for the maintenance and education of her children, the land to be divided among the widow and children according to the rules of descent, and each child on reaching its majority to receive half of the share it would be entitled to on division and the balance after the possibility of litigation against the estate has passed, the children on reaching majority, before there is any division of the estate, can quitclaim their interest to the widow and thus enable her to mortgage the estate for the benefit of persons supplying her with necessaries for the maintenance of herself and children.—Stern v. Hampton, 19 So. 300, not officially reported.

III. APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEE.

§ 155. Designation by creator of trust.

See CONSTITUTIONAL LAW, § 50.

(1842). The legislature may appoint trustees to hold public property in trust.—Commissioners of Sinking Fund v. Walker, 6 H. 143, 38 Am. Dec. 433.

§ 157. Appointment by other trustees or by cestui que trust.

Where a trustee dies or fails to act, it is only by authority expressly conferred that the beneficiary may substitute another.—(1872) Ready v. Hamm, 46 M. 422; (1876) Clark v. Wilson, 53 M. 119.

§ 159. Qualifications of trustee.

Corporation as trustee, see CORPORATIONS, § 381.

(1842). As a general rule, all persons capable of confidence, or of holding real or personal property, may be trustees.—Commissioners of Sinking Fund v. Walker, 6 H. 143, 38 Am. Dec. 433.

§ 160. Judicial appointment.

In the absence of authority to substitute a trustee, a court of equity will appoint one when necessary.—(1872) Ready v. Hamm, 46 M. 422; (1876) Clark v. Wilson, 53 M. 119.

(1893). Equity will not permit a trust to fail for want of a trustee.—Taylor v. Watkins, 13 So. 811, not officially reported.

§ 164. Removal.

(1910). The chancery court of a county in which a will was probated and the testamentary trustee appointed and his bond filed, has jurisdiction under Code 1906, §§ 554, and 561, to remove the trustee without regard to his domicile.—Nutt v. State, 96 M. 473, 51 So. 401.

(1910). The removal on its own motion of a trustee appointed by the chancery court for misconduct, will not be interfered with by the Supreme Court unless palpably unjust.—Nutt v. State, 96 M. 473, 51 So. 401.

(1910). A testamentary trustee was properly removed without notice, where he had ignored two summonses to appear and account, and more than two years had elapsed following his last act of discourtesy.—Nutt v. State, 96 M. 473, 51 So. 401.

§ 169. Appointment and succession of new trustee.

(1885). Where, in a devise to a trustee for the use of a testator's daughter for life, remainder to her children, it clearly appears that it was the intention of the testator that the daughter should not have the management and control of the property except where consumable in its use, it is error for the court, in removing the trustee, to appoint the daughter trustee in his stead.—Ligon v. Foster, 63 M. 241.

IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

§ 171. Authority of trustee in general.

(1895). A trustee, having accepted the trust and proceeded in its execution, cannot, by his own act or default, bring the trust to an end.—Nelson v. Ratliff, 72 M. 656, 18 So. 487.

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§ 172. Limitations of authority imposed in creation of trust.

(1872). Fiduciaries and trustees, if they exceed and violate their authority, are responsible, though no bad faith prompted their acts; and those who deal with them must be aware that they exercise only limited and delegated powers, and see to it that they confine themselves within the scope of their authority.—Vernon v. Tippah County, 47 M. 181.

(1885). In construing the powers of a trustee, conferred in a will, the general purpose or scheme of the testator must be looked to; and where the trustee is vested "with full discretionary power" with respect to the trust and the fund is given him "to control, administer, and manage and to make such investments and disposition of, as he may deem best," and to appropriate the proceeds of the same to certain beneficiaries named in the will, the power of the trustee is limited, and he is bound to have regard to the purposes of the trust and to act in accordance therewith.—Strong v. Cannon, 1 Miss. Dec. 11.

§ 176. Delegation of powers and duties.

(1852). As a general rule the office and duties of a trustee, being matters of confidence, cannot be delegated by him to another unless an express authority be conferred on him by the instrument creating the trust.—Skipwith v. Robinson, 24 M. 688.

(1854). Where a trustee was compelled to give security for the forthcoming of the trust property, to abide the result of an action at law, and in order to do so was compelled to agree with his sureties, that the property should be put in possession of an agent approved by them, the trustee will be justified in employing such agent, even though it should be shown that he was not entirely suitable to the business; it not appearing that the trustee acted with gross negligence in the matter.—Shirley v. Shattuck, 28 M. 13.

§ 179. Diligence and good faith of trustee.

See *post*, § 231.

(1860). A trustee is bound to use reasonable diligence in preserving the estate for the beneficiaries.—Joor v. Williams, 38 M. 546.

(1860). A trustee in a voluntary conveyance, made by a father for the benefit of his children, ought to interpose to prevent the appropriation of the estate, to the payment of the grantor's subsisting debts, by compelling the creditors to exhaust first, the property of the grantor not conveyed in the trust deed; and a creditor cannot subject property so conveyed, to the payment of his debts, through the co-operation of the trustee, and in violation of his duty to preserve the estate.—Joor v. Williams, 38 M. 546.

(1868). So long as a trustee of any description keeps himself strictly within the line of duty and exercises reasonable care and diligence, he cannot be held responsible for any loss or depreciation in the fund entrusted to him; but if he does not strictly pursue that line and a loss ensue, he is liable to make that loss good, although such loss may have been wholly unexpected.—Coffin v. Bramlitt, 42 M. 194, 97 Am. Dec. 449n.

(1871). The general rule applicable to all acting in a fiduciary capacity, including trustees, is, that so long as they keep themselves within the line of duty, are actuated by good motives, and use ordinary care and diligence, they are not personally chargeable with the loss or depreciation of funds intrusted to them. But, if they assume a discretion, not confided to them, or transcend the authority defining their mode of action, they are,—however pure their motives,—bound to make good losses which ensue.—Williams v. Campbell, 46 M. 57.

(1873). Equity exacts fidelity and loyalty to their principals from agents and fiduciaries, and will strip from them every advantage obtained from a breach of trust, and will turn over to the principal upon just terms the fruit of any transactions involving a breach of good faith.—Gillenwaters v. Miller, 49 M. 150.

(1873). A trustee, whether deriving his relation under the law or by appointment of an individual, must conduct the business of his trust with fidelity, and follow the line of duty prescribed by the appointing power.—Pressly v. Ellis, 48 M. 574.

§ 181. Collection of outstanding property.

(1885). A trustee under a will, with power to collect debts, may, acting in good faith, compromise or settle a claim in any manner he may deem most beneficial to the estate.—Zimmerman v. Planters' &c. Assn., 1 Miss. Dec. 256.

§ 182. Possession, use, and care of property.

See *ante*, § 133.

Where personal property is conveyed to a trustee for the separate use of a wife, remainder to her children, the trustee having the legal title, though not entitled to the immediate possession, that right being in the wife, can recover possession, in an action of replevin, from a person claiming the property. A court of equity alone can maintain the wife's right to the possession and use of the property against the claim of the trustee.—(1852) Presley v. Stribling, 24 M. 527; (1852) Presley v. Simmons, 24 M. 527.

(1854). Where the trustee, by the terms of the trust, has the legal right to the possession of the trust property (slaves), for his own indemnity, he will not be responsible for damages in withdrawing the slaves from the possession of the *cestui que trust*, whilst making a crop—it being shown that the *cestui que trust*, and his agent or overseer, refused to recognize the trustee's right, and also refused to sign a paper acknowledging

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that they held the slaves for him. Nor will he be liable, under such circumstances, for taking slaves which had been taken out of his possession by legal process, and which were restored to him on his giving a replevy bond to have them forthcoming, if he thought there was danger of their removal.—Shirley v. Shattuck, 28 M. 13.

§ 187. Charges on and claims against property.

(1853). A trust estate for the benefit of a married woman and her children, should be made chargeable for expenditures made, and services rendered by authority of the trustee, which were beneficial to the enjoyment of the estate; such as the removal of slaves from one state to another, where the beneficiaries resided.—Miller v. Pickens, 26 M. 182.

§ 188. Sale and conveyance.

(1873). A trustee "appointed to have and to hold" a slave to the use of a married woman, has no authority to transfer it without her consent, and if she does so, and warrants the soundness of the slave, she cannot be held liable on the warranty.—Dozier v. Freeman, 47 M. 647.

§ 193½. —— Authority of court and grounds for ordering sale.

(1853). If a court of equity would in any case touch the *corpus* of a trust estate, merely to pay the expenses of its management, it will not do so where it is shown that the income is sufficient and had been employed in part for that purpose.—Pettibone v. James, 25 M. 495.

(1858). A court of equity in determining upon an application to order a sale of the *corpus* of a trust estate, which the trustee is authorized, in his discretion, to appropriate to the maintenance and support of the beneficiaries, will look with favor upon the claims of those who have supplied the beneficiaries with necessaries, which could not be procured by the proceeds of the estate; but it will refuse its aid to secure enforcement of improvident contracts and extravagant purchases made by the *cestui que trust*, even if they were sanctioned by the trustee.—Prewett v. Land, 36 M. 495.

(1858). Where property is vested in a trustee for the support and maintenance of a married woman and her children, and the trustee is clothed with the discretion to use the *corpus* of the trust estate for this purpose, a court of equity will control this discretion where it is abused, and compel the trustee to sell a portion of the principal of the estate, where it is necessary for the welfare of the beneficiaries.—Prewett v. Land, 36 M. 495.

§ 194. —— Proceedings for order of court for sale.

(1858). A decree cannot be rendered, ordering a sale of property settled in trust for the benefit of a married woman and her minor children, unless the children be made parties to the bill.—Prewett v. Land, 36 M. 495.

(1858). A complainant who seeks to have a court of chancery decree the sale of property held in trust for a married woman and her minor children, in order that he may obtain satisfaction of an indebtedness owing him by the beneficiaries, must prove his claim against the minors,—the acknowledgment of the mother that the claim against her children is just, will not be sufficient.—Prewett v. Land, 36 M. 495.

§ 197. —— Validity of sale.

(1839–43). The fact that a trustee made a sale of property at a time when money was scarce and there were but twelve to twenty persons present at the sale is no evidence of fraud or unfairness in the sale.—Newman v. Meek, Freem. Ch. 441.

§ 199. —— Purchase by cestui que trust.

(1849). A *cestui que trust* is not a trustee with respect to the trust property, and he may, as if he were a stranger, purchase it when sold by the trustee, and if he do so and the property be afterwards sold under execution against him and purchased by his wife, with her separate means, she will be entitled to hold it, if there be no other objection to the sale.—Walker v. Brungard, 13 S. & M. 723.

(1849). And it will be no objection to such purchase by the wife, that the *cestui que trust*, after his purchase, voluntarily and without consideration promised the grantor in the deed, in writing, that he should have the benefit of the purchase; for the promise, being without consideration, it could not be enforced.—Walker v. Brungard, 13 S. & M. 723.

§ 201. —— Payment or recovery of purchase money.

(1842). A trustee who sells land is not supposed to have any interest in it, and is not bound for a failure of title; and if the sale convey no title, the vendee may plead failure of consideration to an action for the purchase money.—Campbell v. Brown, 6 H. 106, 230.

§ 203. —— Rights and title of purchasers.

See *ante*, § 2.
See *post*, §§ 355, 357.

A *bona fide* purchaser for a valuable consideration who has acquired a legal title and possession from the trustee, will be protected in equity against the *cestui que trust*.—(1851) Bank of England v. Tarleton, 23 M. 173; (1852) Lusk v. McNamee, 24 M. 58; (1854) Henderson v. Warmack, 27 M. 830; (1858) Wyse v. Dandridge, 35 M. 672.

§ 206. Mortgage or pledge.

(1895). When property is conveyed to a trustee to pay debts, including one secured by a prior incumbrance on the property, the

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holder thereof, by merely accepting interest from the trustee in the second deed, does not waive his right of priority.—Nelson v. Ratliff, 72 M. 656, 18 So. 487.

§ 209. Contracts.

(1876). While trustees have a lien on the trust fund for costs and expenses incurred in its administration, agents employed by them must look to the trustees alone for the payment of their services and expenses in the management of the trust estate, and this although the instrument creating the trust provides that the expenses of administration shall be charged upon the fund, and authorizes the trustees to appoint agents "to do anything which the said trustees could do in the execution of the trust."—Fearn v. Mayers, 53 M. 458.

(1876). Nor will such agent acquire a lien on the trust estate for the rent of personal property belonging jointly to himself and the estate which he allows the trustees to use in extinguishing the residuary interest of one of the beneficiaries; he stands in no better position than a stranger in making such loan.—Fearn v. Mayers, 53 M. 458.

(1895). A creditor to whom a trustee has become liable for a debt authorized by the trust, cannot, if the trustee is solvent and a resident of this state, rely upon the principle that in respect to such debts, creditors are entitled to be subrogated to the right of the trustee to recover a debt out of the estate, where the estate has become indebted to him by reason of his having paid the debt, or would become so should he pay it.—Stern v. Hampton, 73 M. 555, 19 So. 300.

§ 216. Investments.

(1842). The word "manage," when applied to money, is a word of trust; and a power conferred to "manage" money, embraces the power to invest it.—Commissioners of Sinking Fund v. Walker, 6 H. 143, 38 Am. Dec. 433.

(1868). An investment of trust funds in stocks, in the trustee's individual name, is itself a breach of trust.—Coffin v. Bramlitt, 42 M. 194, 97 Am. Dec. 449n.

(1889). Realty was devised and money bequeathed, in trust for the testator's granddaughter for life, with remainder to her children. *Held*, that the trustee could not at the instance of the granddaughter, even with the consent of a court of chancery, invest the money in land, so as to conclude the rights of the remainder-men, Code 1880, § 2112, which permits a conversion of property belonging to a ward for the purpose of changing the character of the investment, not being applicable.—West v. Robertson, 67 M. 213, 7 So. 224.

§ 219. Interest on funds of estate.

(1856). A trustee receiving money in a foreign state for a *cestui que trust* residing here and using it, must account for interest according to the law of the state in which it was received.—Neill v. Neill, 31 M. 36.

(1856). A trustee who is the mere depository of the legal title, is not liable to account for profits, unless he has actually received them.—Tucker v. Cocke, 32 M. 184.

(1857). The holder of collateral securities is liable for interest on the amount collected by him from that source, and applied to his own use; but he will only be chargeable with the legal rate, though the securities bore a higher rate.—Tarpley v. Wilson, 33 M. 467.

§ 221. Deposits.

(1868). Where the trustee deposits the funds of a trust estate in a bank, in his own name individually, and not as trustee, and with his own private funds, he thereby becomes the debtor of the estate and the creditor of the bank; and in case the trust funds are lost through the insolvency of the bank, the loss will fall upon him.—Coffin v. Bramlitt, 42 M. 194, 97 Am. Dec. 449n.

§ 224. Expenditures.

(1852). Where a plantation and slaves have been conveyed in trust for the payment of debts, property purchased by the manager, being the agent of the *cestui que trust* and of the owner of the equity of redemption, and afterwards sold to pay the trust debts, if chargeable at all to the estate, is chargeable on the interest of the *cestui que trust*, as well as on the equity of redemption, and the remedy will be in equity.—Boyd v. Lambeth, 24 M. 433.

(1884). The mere fact that the father, who holds an estate, as trustee, for the benefit of his children, to be appropriated to their maintenance and education, has incurred a debt for the education of one of the beneficiaries, is insufficient to establish a charge on the trust estate.—Palmer v. Lowery, 1 Miss. Dec. 579.

§ 227. —— Counsel fees and costs.

See *post*, § 313.

(1849). If an agent, appointed by a trustee, with consent of the grantor, or the surety of such agent, be subjected to damages resulting from an effort to collect the trust funds, that fund will be justly chargeable with the damages, if the agent acted with good faith and reasonable skill. Hence, if he sue out an attachment for that purpose in good faith, and is made liable to damages, the trust fund should pay them.—Walker v. Brungard, 13 S. & M. 723.

(1854). Trustees are entitled to an allowance for counsel fees, expended by them in prosecuting or defending suits for the estate, in the *bona fide* assertion or protection of its interests.—Shirley v. Shattuck, 28 M. 13.

§ 231. Individual interest in transactions.

(1846). Whenever the trustee sells the trust estate and becomes himself the purchaser, the sale may be set aside at the option of the *cestui que trust*, as a matter of course, without regard to the fairness or un-

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fairness of the sale. The trustee will not be permitted to buy the trust estate in any event. In setting aside such a purchase, the court will order the property resold, and if it should not bring a higher price on the second sale, then the original sale to the trustee will be confirmed; or the court may in its discretion set aside the sale entirely, and order the purchase money to be refunded.—Scott v. Freeland, 7 S. & M. 409, 45 Am. Dec. 310.

(1848). If a trustee borrows money on his own credit, and purchases property in his name as trustee, and repays the money out of the proceeds of the trust estate, the property will be trust property, and not liable for his debts.—Butler v. Hicks, 11 S. & M. 78.

(1854). Although a trustee cannot acquire an interest in the trust property adverse to the interest of the *cestui que trust*, during the continuance of the trust, yet when the trust is at an end, and a new trust is created to which he is a party, it is competent for him to make new terms and stipulations for his own security in undertaking the new trust. Hence, where a part of the trust property had been condemned as the property of another, and is liable for his debts, and an arrangement was made by the trustee and the *cestui que trust*, by which the trustee was to become responsible for the debt, and retake the property, it is competent for the trustee in this new arrangement to prescribe the terms and conditions on which he will act in reference to it, and he may provide for compensation for his trouble in relation to it, and also for the power to keep and sell the property for his own indemnity.—Shirley v. Shattuck, 28 M. 13.

(1860). Property purchased by a trustee with the trust funds will not be liable for his debts, merely because he took the title in his own name, if he always treated it as trust property.—Hancock v. Titus, 39 M. 224.

(1860). It is a rule of public policy necessary to the proper administration of trust estates, that the trustee cannot, under any circumstances, become the purchaser of, or acquire any interest in the trust estate adverse to the beneficiary.—Joor v. Williams, 38 M. 546.

(1878). While a trustee cannot, by virtue of his position as such, obtain an advantage for himself over his *cestui que* trust, he is not precluded from applying to the chancery court, to which he is subject, as trustee, to adjudge his right as an individual to an interest in the trust property not acquired after he became trustee, nor in hostility to the *cestui que trust*, but had before the acceptance of the trust.—Davis v. Bowmar, 55 M. 671.

(1878). The doctrine, as often announced, "that under no circumstances can a trustee claim, or set up a claim, to the trust property adverse to the *cestui que trust*," is too broadly stated; the true rule is that a trustee shall not take advantage of his situation to obtain any personal benefit at the expense of his *cestui que trust*.—Davis v. Bowmar, 55 M. 671.

(1879). A trustee wrongfully using land of the beneficiary is not entitled to an allowance for improvements thereon, but he is not chargeable with increased rent because of such improvements.—Tatum v. McLellan, 56 M. 352.

(1898). It is well settled that one occupying a fiduciary relation to another can do no act while executing his trust whereby his principal's interests shall suffer hurt, and his (trustee's) adverse interests be promoted. The utmost good faith must characterize the trustee's conduct in dealing with the principal's business committed to his keeping and management.—Stokes v. Terrell, 23 So. 371, not officially reported.

§ 232. Fraud.

(1848). Where a trustee, empowered to sell the trust estate and invest the proceeds for the beneficiaries, sells to one having full notice that the property is trust property, in discharge of his own liabilities to the purchaser, the sale will confer no title; and such purchaser, geting no title, a sub-purchaser from him will get none, as he could get the title only of his vendor.—Butler v. Hicks, 11 S. & M. 78.

(1898). One who, acting as the trustee and confidential adviser of his sister, had $300 belonging to her in his hands for safe investment, transferred to her in exchange therefor a valueless note for a like sum, owing him. *Held*, that the transaction was voidable.—Stokes v. Terrell, 23 So. 371, not officially reported.

(1899). An agreement of a *cestui que trust* obtained by the fraud of a trustee and his confederates whereby the beneficiary is deprived of the fruits of the trust is subject to cancellation in equity.—Field v. Middlesex Banking Co., 77 M. 180, 26 So. 365.

§ 237. Ratification of unauthorized acts.

(1857). Where the trustee has been guilty of no positive act of fraud in a purchase made by him from the *cestui que trust*, the latter will lose his right to annul the agreement, for want of the *uberrima fides*, required of trustees in such transactions, if he fail to take steps to set aside the contract in a reasonable time after its consummation. In such case, the unreasonable delay will be held a ratification, and in such a case, a failure to take steps to set it aside for three years and eight months will be held a ratification by the *cestui que trust*.—Jones v. Smith, 33 M. 215.

§ 238. Co-trustees.

(1850). As a general rule, trustees cannot act separately, but they must all join in receipts for money in respect of their office; but where trustees are appointed for public purposes, the acts of a majority are binding.—Hill v. Josselyn, 13 S. & M. 597.

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§ 245. Actions between, by, or against trustees.

A trustee is regarded as the legal owner and may sue at law on any contract, made within the scope of his power.—(1842) Commissioners of Sinking Fund v. Walker, 6 H. 143, 38 Am. Dec. 433; (1849) Young v. Hughes, 12 S. & M. 93.

§ 257. —— Parties.

(1848). A trustee, who by the terms of the trust is entitled to possession of the trust property, is the only necessary party complainant to a bill to recover possession of the trust property.—Fergurson v. Applewhite, 10 S. & M. 301.

V. EXECUTION OF TRUST BY TRUSTEE OR BY COURT.

§ 277. Advances by trustee.

(1879). While, ordinarily, the contracts of a guardian or other trustee bind him personally and not the estate he represents, one whose money has discharged debts against a trust estate, which it is bound to pay, will, in equity, be substituted to the rights of the holder of such debts, but the right cannot be enforced by action at law.—Hines v. Potts, 56 M. 346.

§ 282. Payment or distribution of proceeds of trust property.

(1856). Infancy is not so exclusively a personal privilege that a trustee may not refuse to pay to the assignee of an infant *cestui que trust*, his share in the trust estate. —Haynes v. Slack, 32 M. 193.

§ 283. Transactions between trustee and cestui que trust in general.

(1857). A trustee may purchase from the *cestui que trust* the trust estate, but such a transaction will be regarded with much suspicion and criticized with the utmost rigor, and if attacked by the *cestui que trust*, it is incumbent on the trustee to show that it was fair and just in all respects, and consummated on his part with the most abundant good faith, and that the *cestui que trust* had all the information in relation to the trust estate possessed by the trustee.—Jones v. Smith, 33 M. 215.

(1907). Where the owner of lands executes a deed of trust thereon, the property is sold under such mortgage, the purchaser conveys the premises to a third person as trustee for the original owner of the property, and this trustee on deeding the land to such owner improperly places in the deed the name of the latter's wife as grantee, no title vests in the wife under the conveyance.—Gross v. Jones, 89 M. 44, 42 So. 802.

§ 286. Reconveyance of trust property to settlor or creator of trust.

(1860). A conveyance of a chattel in trust for the sole and separate use of a married woman for life, and upon her death that the trustee shall return the chattel to the plaintiff, vests a legal estate in the plaintiff immediately upon the death of the tenant for life, without any return or delivery of the chattel by the trustee.—Davis v. Rhodes, 39 M. 152.

VI. ACCOUNTING AND COMPENSATION OF TRUSTEE.

§ 307. Charges.

(1854). Where, by the terms of the trust, the trustee has the right to keep and sell the property for his indemnity, on account of his liabilities and advances for the estate, if by consent of the agent of the *cestui que trust*, he retain some of the property (slaves) at a stipulated price, the trustee should be charged in the account with the value of the slaves at the time of the appropriation, and not for hire of the slaves till the account was taken.—Shirley v. Shattuck, 28 M. 13.

§ 310. Credits.

(1877). Even without an express declaration in the trust instrument, a trustee is entitled to be reimbursed all expenses properly incurred in the execution of the trust. Under a conveyance which provides that the trustee shall permit an agent to superintend and control the property, with power to sell and exchange, and that he shall be exempt from personal responsibility for the agent's acts, expenditures in management incurred by the agent should be borne by the trust property.—Norton v. Phelps, 54 M. 467.

(1879). A trustee who is also the assignee of legacies charged on the trust fund, may retain a sufficiency to pay the same, and on a bill against him to enforce the trust he will be regarded as paid to the extent of the fund which he has appropriated to his own use.—Tatum v. McLellan, 56 M. 352.

(1879). A trustee wrongfully using land of the beneficiary is not entitled to an allowance for improvements thereon, but he is not chargeable with increased rent because of such improvements.—Tatum v. McLellan, 56 M. 352.

§ 313. —— Counsel fees and costs.

See *ante*, § 227.

(1854). Where a trustee had a right to retain trust property to indemnify against loss for advances made and responsibilities incurred on account of the trust estate, he would have the right, in taking an account, to charge on such property the costs of a suit he had defended for the estate.—Shirley v. Shattuck, 28 M. 13.

(1854). The rule allowing a person acting in a fiduciary capacity all reasonable counsel fees, paid in prosecuting or defending suits for or against the estate, in the *bona fide* assertion or protection of its interests, should be applied when a trustee himself is a lawyer, and acts for the estate as such, where it is manifestly for the interest of the estate, or an advancement of

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the trust, and he performs his duties with skill and fidelity, and the proceedings were undertaken with an eye single to the best interest of the estate, and were necessary to protect its rights, and were such as a judicious and discreet man would have instituted on his own account. And it is a strong justification for such services, that they were undertaken at the instance of the *cestui que trust*. But, considering the danger of temptation in such cases, and the opportunities the trustee has of imposing on the trust estate, it is safer for the trustee to employ other counsel.—Shirley v. Shattuck, 28 M. 13.

§ 314. Compensation.

(1854). The general rule is well established in England that a trustee shall have no allowance for his care and trouble in the performance of his duties in relation to the trust estate; but this rule has been modified, so as to allow a solicitor, who is a trustee, compensation for his services as solicitor for the benefit of the trust estate; also, so as to allow the creator of a trust to provide generally for the compensation of a trustee, or to fix it specifically. And it is also competent for the trustee to contract with the *cestui que trust* for compensation for acting. —Shirley v. Shattuck, 28 M. 13.

(1854). The English rule, making a trustee's office purely honorary, has been generally abandoned.—Shirley v. Shattuck, 28 M. 13.

(1893). Without any express contract therefor, a trustee is entitled to compensation for executing the trust. The English rule to the contrary does not prevail in this state.—Niolon v. McDonald, 71 M. 337, 13 So. 870, 42 Am. St. 466.

(1893). Where, after condition broken, the trustee in a deed of trust to secure a debt, advertises the property for sale, he is entitled to compensation, although, the debt being paid, the sale does not take place; and if the trust deed provides for payment out of the proceeds of the expenses of executing the trust, and payment of his compensation and expenses is refused by the grantor, the trustee may re-advertise and sell the property to pay the same.—Niolon v. McDonald, 71 M. 337, 13 So. 870, 42 Am. St. 466.

(1910). Under the terms of a will creating a trust, it was held that the trustee was entitled to not more than the amount fixed as his compensation in the will, and a reasonable compensation for his services from year to year, according to his success and trouble in administering the trust.—Thomas v. Thomas, — M. —, 53 So. 630.

§ 322. Form and requisites of account.

(1885). A decree of the chancery court allowing a final account and discharging a trustee under a will is erroneous when the final account fails to show, with certainty, what the trustee received under the will, when he received it, and how he disposed of it.—Strong v. Cannon, 1 Miss. Dec. 11.

§ 325. Evidence.

(1887). The complainant, the owner of a carriage factory in this state before the war, placed the title to the property in the surety on his note. At the opening of the war, the complainant entered the southern army and his father persuaded his brother who remained loyal to take charge of the business. Upon the note being paid, the defendant caused the title to the property to be conveyed to him, declaring that he was the agent of the complainant and that if the title was put in such complainant it would be subjected to his debts. Twenty years afterwards, the complainant filed his bill to have the defendant adjudged a trustee and to compel an accounting. Under the circumstances as stated, the defendant will be held a trustee and will be compelled to account, but on the accounting each party should be permitted to introduce evidence, in addition to the facts regarding the trusteeship, as to the items of account.—Clark v. Clark, 1 So. 835, not officially reported.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

(A) RIGHTS OF CESTUI QUE TRUST AS AGAINST TRUSTEE.

§ 336. Enforcing performance of duties of trust.

(1839-43). A trust may be created which may be perfectly consistent with the law and yet the law may have pointed out no mode of enforcement; still it would not interpose to prevent its enforcement but would leave its execution to the voluntary action of the trustees.—Ross v. Duncan, Freem. Ch. 587.

§ 337. Setting aside wrongful acts of trustee.

(1889). Beneficiaries may sue in equity to cancel a lease executed by their trustee in payment of his private debt to the lessees. Further, where as, in the instant case, the complainants are infants, they may file their bill to charge as bailiff or trustee, the recipient of the rents and profits of their lands, despite the fact that their title is legal instead of equitable.—Johns v. Williams, 66 M. 350, 6 So. 207.

§ 342. Priorities of cestui que trust and trustee's creditors.

(1879). Where the trustee of a resulting trust mortgages the subject matter of such trust, which he holds by title bond and afterwards, but before the assertion of any claim by the *cestui que trust*, acquires the legal title thereto, the rights of the mortgagee will take precedence over those of the beneficiary under the trust.—Flynt v. Hubbard, 57 M. 471.

§ 344. Persons entitled to enforce trust.

(1843). A person for whose benefit a trust is created without his knowledge may afterwards affirm it and enforce its execution.—Pleasants v. Glasscock, Sm. & M. Ch. 17.

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(B) RIGHT TO FOLLOW TRUST PROPERTY OR PROCEEDS THEREOF.

§ 349. Nature and grounds of right.

(1849). If trust money be wrongfully invested in land, the funds may be followed.—Walker v. Brungard, 13 S. & M. 723.

(1893). Equity will follow a trust fund through all changes, whether its identity is preserved or it is merged in a mass of which it forms a part; but one seeking to recover a specific fund, or to fix a charge upon a mass, must trace his estate, and show that the specific fund or thing is in equity his, or that his estate has gone into and remains in the mass he seeks to recover.—Shields v. Thomas, 71 M. 260, 14 So. 84, 42 Am. St. 458.

§ 350. Election of remedy.

(1868). Where the trustee has, in violation of his trust, invested the trust property in any other property, the *cestui que trust* has his option either to hold the substituted property liable to the original trust, or hold the trustee personally responsible for the breach of the trust.—McLeod v. First Nat. Bank, 42 M. 99.

(1873). Where, to protect their title nonresident owners of land acquire an assignment of a trust deed thereon, and their resident agent, in charge of the land for them, without their knowledge, buys it under a judgment junior to the trust deed, they may elect to treat the purchase as made for themselves, or have him repudiate it and sell under their trust deed.—Gillenwaters v. Miller, 49 M. 150.

(1876). If the trust property, or its proceeds has been invested in any other property into which it can be distinctly traced, the beneficiary has an election to follow the same into the new investment, or to hold the trustee personally liable.—Isom v. First Nat. Bank, 52 M. 902.

(1877). Where a trustee uses the trust fund for his own benefit and has made, or there is ground to infer that he has made, a profit, the beneficiary may elect to take the profits or the principal with compound interest.—Troup v. Rice, 55 M. 278.

§ 351. Trust property or funds mingled with property or funds of trustee.

(1868). Trust funds must be kept separate from the private funds of the trustee; and if mingled with his own, he may be charged with such funds as being himself the borrower.—Coffin v. Bramlitt, 42 M. 194, 97 Am. Dec. 449n.

(1877). A trust fund may be traced into whatever property it may be converted. Mingling the fund with the trustee's money in the purchase of land in his own name will not prevent separation.—Morrison v. Kinstra, 55 M. 71.

§ 335. Trust property tansferred to third persons.

See *ante*, §§ 2, 203.

(1839-43). A purchaser of property, with knowledge, from one holding it in trust, becomes *ipso facto* a trustee and is liable to the *cestui que trust* to the same extent as the original trustee.—Holmes v. Carman, Freem. Ch. 408.

(1860). A third person cannot acquire any interest in a trust estate through a violation of duty on the part of the trustee, if he have notice of the misconduct of the trustee; nor can he acquire such interest through the enforcement of the paramount claims of creditors, if he co-operate with the trustee in enforcing such claims, when it was the duty of the trustee to have taken steps to prevent it.—Joor v. Williams, 38 M. 546.

(1868). When the trustee has violated his trust by an illegal conversion of the trust property, the *cestui que trust* has the right to follow the property into the hands of whomsoever he may find it, if the possessor be not a *bona fide* purchaser for a valuable consideration, without notice.—McLeod v. First Nat. Bank, 42 M. 99.

(1876). Where a trustee is guilty of a breach of trust, and, in violation of his duty, transfers the trust property to a third person, who purchases with notice of the trust, though such purchaser pay a valuable consideration therefor, he becomes liable to the beneficiary as trustee.—Isom v. First Nat Bank, 52 M. 902.

(1877). Where a guardian buys land with funds of his ward, though without authority of the court, and takes title in his own name with the addition of "trustee," this is notice that the land is held in trust, and, although the guardian has an interest in it, a purchaser from him takes the title subject to the right of the ward to pursue the fund into the land.—Morrison v. Kinstra, 55 M. 71. See also (1891) Shelton v. Laird, 68 M. 175, 8 So. 271.

(1893). One having notice which is sufficient to put him on inquiry as to the misappropriation of a trust fund, who, without making the inquiry, participates beneficially in the disposition thereof, is liable to the true owner, though he may have been without actual knowledge of the rights of such owner.—Newman v. Tillman, 71 M. 26, 13 So. 934.

(1893). Where the payee of a note dies after its execution, and it goes into the hands of a third person, who collects it from the maker, the fact that the paper is not indorsed by the payee is sufficient to put the person collecting it on inquiry, and to charge him with notice of the payee's death, and that his estate is in process of administration, and to impose the obligation of paying the proceeds to the real owners.—Newman v. Tillman, 71 M. 26, 13 So. 934.

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§ 357. —— Purchasers in good faith.

(1839–43). Where a trustee sells trust property to a stranger, who has no knowledge of its trust character, the stranger may acquire title to the property by the acts of the trustee, and hold it discharged from the trust.—Ford v. McGehee, Freem. Ch. 460.

(C) ACTIONS.

§ 360. Grounds of action.

(1860). After the rendition of a judgment against a principal and his two sureties, the principal made a voluntary conveyance of a part of his property, in trust, to one of his sureties, who accepted the trust for the benefit of the grantor's minor children. The sureties afterwards, by agreement with the creditor, purchaser the trust estate at a judicial sale made to collect the judgment; in this they acted as trustees for the creditor, but under an agreement that they should have the absolute title whenever they paid the judgment. A third person afterward paid the judgment, and took from the sureties a conveyance of the title, and filed a bill in equity against the grantor and the *cestui que trust*, his infant children, and procured a decree setting aside the trust deed, on the ground that it was fraudulent as to creditors, and procured also a confirmation of his title. *Held*, that these proceedings were a fraud upon the rights of the *cestuis que trust*, and that a court of equity would grant them relief against all the parties.—Joor v. Williams, 38 M. 546.

§ 363. Jurisdiction.

(1871). A court of equity has jurisdiction of a bill for relief, exhibited by one who had conveyed property to a trustee, upon certain conditions, among others, for the payment to complainant of a certain sum annually, in reference to which annual payments default had been made.—Brandon v. Brandon, 46 M. 222.

§ 365. Time to sue, limitations, and laches.

(1896). Rights acquired by innocent third parties in property which is the subject of a constructive trust will not be defeated when the *cestuis que trust* have been guilty of an unreasonable delay in asserting the existence of such a trust.—Smith v. McWhorter, 74 M. 400, 20 So. 870.

(1905). An action to enforce a constructive trust on land, raised on account of the fraudulent act of the one holding the legal title thereto, will not be barred until the ten-year limitation, applicable to express trusts (Code 1892, § 2763) shall have fully run.—Patton v. Pinkston, 86 M. 651, 38 So. 500.

§ 369. Receiver or deposit in court.

(1887). After the administrator for the estate of a life tenant has partially administered the trust estate which had been committed to her, a receiver for such estate, being unnecessary, will not be appointed, though such appointment would at first have been proper.—Shannon v. Davis, 64 M. 717, 2 So. 240.

§ 371. Pleading.

(1880). Where, in order to establish a trust in land, a suit is brought against the holder of the legal title and one to whom he has given a mortgage, and, pending suit, the mortgagee causes the land to be sold under his mortgage and buys it, the complainant may file an amended or supplemental bill setting up this fact with a view to vacating the sale, but he is not bound to do so. He may wait until the termination of his suit, and then file an original bill. The mere fact that the matter might have been introduced into the former suit and was not, does not make it *res judicata*.—Hubbard v. Flynt, 58 M. 266.

(1883). A bill by a judgment creditor of the deceased to subject a trust in favor of the heirs, resulting from their bid on a sale by the administrator to enforce a vendor's lien being credited on their distributory shares, need not aver that the estate of decedent, the heirs or administrator or sureties on his bond are insolvent.—Westbrook v. Munger, 61 M. 329.

(1890). The plaintiffs filed their bill to compel the defendant to reconvey to them certain land, averring in the said bill that they were owners of the land by inheritance; that said land was sold for taxes; that, being unable themselves to redeem, they procured the defendant to advance the money necessary therefor, he to take the title to himself as security; that the defendant did advance the money and received conveyance of the land; and that they have offered to pay the money advanced by the defendant, and now offer to pay the same, with interest. *Held*, that a demurrer to the bill should have been overruled, for while it is not as full and specific as it should have been touching the facts from which the complainants' right is claimed to spring, it would be competent under its averments to introduce evidence sufficient to support their right to redeem.—McLemore v. Carter, 7 So. 357, not officially reported.

(1891). In a bill to enforce a resulting trust in land against one who has purchased from the trustee, where the facts of the purchase are shown, and it thereby appears that the defendant is a purchaser for value, he may raise the defense by demurrer. But where the facts do not so appear, the defense, being affirmative, must be raised by plea or answer.—Greaves v. Atkinson, 68 M. 598, 10 So. 73.

§ 372. Evidence.

(1849). A claim to subject property purchased with trust funds, wrongfully applied, may be supported by parol evidence.—Walker v. Brungard, 13 S. & M. 723.

§ 374. Scope and extent of relief.

(1883). Where a party holds land in trust for another, but is equitably entitled to a lien thereon, the court will recognize his right in a decree adjudging him trustee.—Sturges v. Radford, 2 Miss. Dec. 379.

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§ 375. Judgment or decree and enforcement thereof.

(1858). On a bill filed against the trustee and the wife, a decree cannot be rendered ordering a sale of property settled in trust for the benefit of a married woman and her minor children, unless the children be made parties to the bill.—Prewett v. Land, 36 M. 495.

(1898). Where a decree requires a person, held as trustee, to deed lands on satisfaction of a debt owing him, it should specify a time for the performance of such acts.—Hebron v. Kelly, 23 So. 641, not officially reported.

VIII. LIABILITIES ON TRUSTEES' BONDS.

§ 387. Actions.

(1859). In an action on the official bond executed by a guardian or other trustee, the obligee is merely a nominal party and the *cestui que trust* is the real plaintiff, and therefore the statute of limitations will not run in such case while the *cestui que trust* is under the disability of infancy or coverture.—Pearson v. McMillan, 37 M. 588.

TRUTH.

As justification for libel or slander, see LIBEL AND SLANDER, § 54.

TUNICA COUNTY.

Scrip, see PUBLIC LANDS, § 157.

TURNPIKES AND TOLL ROADS.

This topic INCLUDES the construction, maintenance, regulation, and use of wagon roads for passage over which tolls are taken; organization, franchises, and powers of companies formed to construct and maintain such roads; and rights, duties, and liabilities of such companies, as to the public and as to the individuals, in respect of the management and operation of their roads.

It EXCLUDES toll bridges (see BRIDGES); matters applicable to corporations in general (see CORPORATIONS); powers of municipalities to aid such roads and liabilities incurred by them for that purpose (see MUNICIPAL CORPORATIONS; COUNTIES); exercise of the power of eminent domain (see EMINENT DOMAIN); and taxation of such roads (see TAXATION).

See cross-references for complete list of exclusions.

Analysis.

I. Establishment, Construction, and Maintenance.

§ 12. Location.
§ 17. Construction.

II. Regulation and Use for Travel.

§ 37. Tolls.

Cross-References.

Disturbance of franchise, see FRANCHISES, § 5.

Highways generally, see HIGHWAYS.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 12. Location.

(1856). It is no ground for restraining a company from using their franchises under a charter authorizing them to build a turnpike and establish a ferry, that they have located their road so near the road of another company, which had been previously built under a charter granted for that purpose, that persons traveling the former might commit a trespass on the latter, by traveling on it without paying toll.—Collins v. Sherman, 31 M. 679.

§ 17. Construction.

(1846). A contract was made by a bridge company and P, by which the latter was to build a bridge and turnpike; afterwards a

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contract was made between P, the bridge company, and a railroad company, by which P agreed to build a railroad for a sum in gross, of which road the bridge and turnpike mentioned in the first contract was to be a part, and the bridge company assigned all its rights under their contract with P to the railroad company, but it was expressly stipulated in the last contract that the building of the bridge was not included in it. It was held upon a review of both agreements, that not only the bridge but the embankments for the turnpike, were excluded from the last agreement, and that P was entitled to recover for building the railroad, the amount agreed to be paid him by the bridge company, in addition to the sum in gross agreed to be paid by the railroad company.—Petrie v. Wright, 6 S. & M. 647.

II. REGULATION AND USE FOR TRAVEL.

§ 37. Tolls.

(1846). When the assignees of a turnpike company sue for tolls in passing over their road, it is not necessary to make profert in the declaration of the grant of the franchise, its transfer, and their authority to exact the toll. These are all matters of evidence, and need not be pleaded.—Dulaney v. Starke, 7 S. & M. 375.

(1846). The declaration in an action by the assignee of a turnpike company, to recover tolls from passengers over the road, averred, that the defendants were indebted to plaintiff for tolls due for the passage of their stage-coaches over the turnpike road of plaintiff, the right to which had been duly granted by the legislature to G, and by him assigned to plaintiff. *Held*, on demurrer to be sufficient.—Dulaney v. Starke, 7 S. & M. 375.

(1859). There is an implied undertaking on the part of an incorporated plank road company, with a person traveling on their road, that the road is reasonably fit for use; and such undertaking on the part of the company constitutes the consideration for the obligation of the traveler to pay toll; and hence, if the company fail in the performance of their undertaking, there is no binding obligation on the part of the traveler to pay toll, and he cannot be compelled to do so.—Sims v. Yazoo &c. Plank Road Co., 38 M. 23.

TURNTABLE CASE.

See NEGLIGENCE, § 136.

ULTRA VIRES.

See CORPORATIONS, § 385–388, 515.
Effect on contracts of counties, see COUNTIES, § 24.
Government alone entitled to raise question against national bank, see BANKS AND BANKING, § 261.

UMPIRE.

See ARBITRATION AND AWARD, § 36.

UNANIMITY.

In arbitration award, see ARBITRATION AND AWARD, § 35.

UNAVOIDABLE ACCIDENT.

Excuse for non-performance of contract, see CONTRACTS, § 303.

UNBORN CHILDREN.

Succession, see DESCENT AND DISTRIBUTION, § 6.

UNCERTAINTY.

Parol evidence to explain uncertain provisions in instrument, see EVIDENCE, § 449.

UNCONSCIONABLE TRANSACTIONS.

Jurisdiction of equity to grant relief, see EQUITY, § 13.

UNDERTAKINGS.

Bail bonds, see BAIL, § 54.
Liability on attachment bonds, see ATTACHMENT, §§ 330–353.
On appeal, see APPEAL AND ERROR, §§ 369–395.
Replevin, see REPLEVIN, § 33.

UNDERWRITERS.

See INSURANCE.

UNDISCLOSED AGENCY.

See PRINCIPAL AND AGENT, §§ 143–145.

UNDISCLOSED PARTNERSHIP.

See PARTNERSHIP, § 162.

UNDISCLOSED PRINCIPAL.

Liabilities, see PRINCIPAL AND AGENT, § 145.

UNDUE INFLUENCE.

Affecting validity of contracts, see CONTRACTS, § 96.
Assignment of insurance, see ASSIGNMENTS, § 64.
Execution of deeds, see DEEDS, § 72.
Inducing execution of contract by weak-minded person, see INSANE PERSONS, § 73.
Instructions in will contest, see WILLS, § 332.
Test, see CONTRACTS, § 96.

UNDUE PROMINENCE.

Particular matters in instructions, see CRIMINAL LAW, § 811; TRIAL, § 244.

UNIFORMITY.

License taxes, see LICENSES, § 7.
Taxes, in general, see TAXATION, §§ 39–47.

UNIONS.

See TRADE UNIONS.

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UNITED STATES.

This topic INCLUDES the political entity formed by the adoption of the constitution of the United States; the nature of the Union; rights and powers of the national government in general, of congress, and of the president and of the executive departments and inferior officers in general; its property, contracts, rights of priority of payment, indebtedness, and bonds and other securities; claims against the United States; and actions by or against the United States.

Analysis.

I. Government and Officers.

§ 7. Congress.
§ 26. President.

II. Property, Contracts, and Liabilities.

III. Fiscal Management, Public Debt, and Securities.

§ 90. Treasury notes, certificates, and other securities intended to circulate as money.

IV. Claims Against United States.

§ 111. Assignment.
§ 119. Disposition of proceeds.

V. Actions.

Cross-References.

Conclusiveness of decisions of the Supreme Court of the United States, see COURTS, §§ 96, 97.
Elections for members of congress, see ELECTIONS, § 38.
Exercise of power of eminent domain, see EMINENT DOMAIN, § 5.
Operation of statutes of limitation against, see LIMITATION OF ACTIONS, § 11.
Ownership and disposition of public land, see PUBLIC LANDS.
Power to raise question of *ultra vires* against national bank, see BANKS AND BANKING, § 261.
Surveys, see BOUNDARIES.
Taxation of property by state, see TAXATION, § 5.

I. GOVERNMENT AND OFFICERS.

§ 7. Congress.

(1880). The house of representatives of the congress of the United States is the judge of the election, returns and qualifications of its members, and the courts of the states have nothing to do with these matters.—Oglesby v. Sigman, 58 M. 502. See also (1883) Myers v. Chalmers, 60 M. 772.

§ 26. President.

(1866). The president of the United States has the power to create a government for conquered territory, and he may delegate the power to another, but such power must be exercised according to the controlling provisions of the federal constitution.—Scott v. Billgerry, 40 M. 119.

(1866). The state of Mississippi, after the close of the war between the United States and the Confederate states, being held, according to the theory of the federal government, as conquered territory, and the state government being abolished by force of arms, the president of the United States had the power to appoint a provisional government therefor, and the government so created had the authority to establish tribunals for the administration of the laws, subject to the restrictions and general principles of the federal constitution.—Scott v. Billgerry, 40 M. 119.

II. PROPERTY, CONTRACTS, AND LIABILITIES.

Public lands, see PUBLIC LANDS.
Taxation of property, see TAXATION, § 5.

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III. FISCAL MANAGEMENT, PUBLIC DEBT, AND SECURITIES.

§ 90. Treasury notes, certificates, and other securities intended to circulate as money.

(1867). The court in this case was under the impression that the Supreme Court of the United States had decided that the legal tender act of congress was constitutional, and in consequence thereof, held that where it was necessary to ascertain the value of Confederate states treasury notes, their value should be estimated in the legal tender United States treasury notes, and not in specie.—Ezelle v. Parker, 41 M. 520.

IV. CLAIMS AGAINST UNITED STATES.

§ 111. Assignment.

(1876). An agreement to assign an interest in a claim against the United States, valid as between the parties, is not affected by the subsequent passage of the act of 1853, U. S. Rev. St., § 3477, entitled, "An act to prevent frauds upon the treasury of the United States," prohibiting the making of such assignments without witnesses, and before the allowance of the claim and ascertainment of the amount due, and the issuance of a warrant therefor.—Whitney v. Cook, 53 M. 551.

(1898). In a suit by the United States on a contractor's bond for the use of one who has furnished materials used in the construction of a government building, a plea setting up an assignment by the contractor of a claim for work unperformed, with power of attorney to agents to complete the building and collect moneys that might thereafter become due, presents no defense under Rev. Stat. U. S. 1878 (2d ed.), § 3477.—American Surety Co. v. United States, 76 M. 289, 24 So. 388.

(1902). Sections 3477, 3737, Revised Statutes of the United States, relating to assignments of contracts made with the government have no application to a controversy between private persons, after the contract is executed, touching the disposition of money received from the government.—Fewell v. American Surety Co., 80 M. 782, 28 So. 755.

(1903). Under the federal statutes (Rev. St. U. S., § 3477), providing that all transfers and assignments of claims against the government and powers of attorney for receiving payment of such claims shall be void, unless made after the allowance of the claim, an irrevocable power authorizing an attorney to prosecute a claim against the United States before any of the United States courts or any departments of the government, made before the allowance of the claim, is void.—Knut v. Nutt, 83 M. 365, 35 So. 686, 102 Am. St. 452, aff'd 200 U. S. 13, 26 S. Ct. 216, 50 L. Ed. 348.

(1903). But a written agreement made before the allowance of the claim, to pay an attorney a sum equal to one-third of any amount that might be allowed on a claim against the United States in consideration of services in securing its allowance, is not within the meaning of such section and is valid.—Knut v. Nutt, 83 M. 365, 35 So. 686, 103 Am. St. 452, aff'd 200 U. S. 13, 26 S. Ct. 216, 50 L. Ed. 348.

(1903). The invalidity under Rev. Stat. U. S., § 3477, of power to collect a claim against the United States, will not affect injuriously a contract for the payment of fees, executed at the same time.—Knut v. Nutt, 83 M. 365, 35 So. 686, 102 Am. St. 452, aff'd 200 U. S. 13, 26 S. Ct. 216, 50 L. Ed. 348.

§ 119. Disposition of proceeds.

(1904). The representatives of deceased heirs are entitled to share with the living heirs in the distribution of a sum of money appropriated by congress to the administrator of their common ancestor in payment of a claim against the government.—Nutt v. Forsythe, 84 M. 211, 36 So. 247.

V. ACTIONS.

Actions on contractor's bond, see *ante*, § 111.

UNITED STATES BONDS.

Exemption from taxation, see TAXATION, § 216.
Taxation by state, see TAXATION, § 7.

UNITED STATES COURTS.

Conformity to state practice, see COURTS, § 333.
District in which suit must be brought, see COURTS, § 267.
Enforcement of rights under state statutes, see COURTS, § 371.
Jurisdiction dependent on diverse citizenship, see COURTS, § 306.
Liens of judgments, see COURTS, § 354.
Priority of jurisdiction between state and federal courts, see COURTS, § 492.
Removal of cause from state to federal court, see REMOVAL OF CAUSES.
Rights of receiver under prior appointment by federal court, see COURTS, § 500.

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UNITED STATES MARSHALS.

This topic INCLUDES the marshals of the United States; their appointment, qualification, and tenure of office; and rights, powers, duties, and liabilities of United States marshals, their deputies and assistants in general.

See cross-references for complete list of exclusions.

Analysis.

§ 28. Authority and powers.

Cross-References.

Levy of execution by United States marshals, see EXECUTION.

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§ 28. Authority and powers.

Execution sales by, see EXECUTION, § 220.

(1895). Rev. Stat. U. S., § 788, in providing that "marshals and their deputies shall have, in each state, the same powers in executing the laws of the United States as the sheriffs and their deputies in such state may have by law in executing the laws thereof," did not confer merely such power as was then by law possessed by sheriffs, but such as the respective states might from time to time confer. Hence, a deputy marshal, while executing criminal process in this state, and in his district, may lawfully carry a concealed weapon, this being permitted to the state's peace officers and their deputies by Code 1892, § 1027.—State v. Williams, 72 M. 992, 18 So. 486.

UNIVERSITIES.

See COLLEGES AND UNIVERSITIES.

UNIVERSITY LANDS.

See PUBLIC LANDS, §§ 51–55.

UNIVERSITY OF MISSISSIPPI.

Sale of intoxicants within five miles, see INTOXICATING LIQUORS, § 111.

UNJUST DISPOSITION.

Of property by will, see WILLS, § 82.

UNKNOWN OWNERS.

Parties to action to confirm tax title, see TAXATION, § 806.

UNLAWFUL COHABITATION.

See ADULTERY; FORNICATION; LEWDNESS.

UNLAWFUL DETAINER.

See FORCIBLE ENTRY AND DETAINER.
Actions, see LANDLORD AND TENANT, §§ 287–292.

UNLIQUIDATED DAMAGES.

Stockholders' liability, see CORPORATIONS, § 239.

UNMARRIED PERSONS.

Exemptions, see EXEMPTIONS, § 21.
Homestead exemptions, see HOMESTEAD, § 23.

UNNATURAL DISPOSITION.

Of property by will, see WILLS, § 82.

UNSOUND MIND.

See INSANE PERSONS.

UNUSUAL PUNISHMENT.

See CRIMINAL LAW, § 1213.

USAGES.

See CUSTOMS AND USAGES.

USE.

Dedicated property, see DEDICATION, § 56.
Mortgaged property, see CHATTEL MORTGAGES, § 163.
Party wall by adjoining owner, see PARTY WALLS, § 8.
Personal property as constituting conversion, see TROVER AND CONVERSION, § 10.

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USE AND OCCUPATION.

This topic INCLUDES obligations implied or imposed by law to pay for the use of real property of another, occupied by his permission, independent of any lease or agreement reserving or fixing a sum to be paid as rent; and rights, liabilities, and remedies of the party in general.

It EXCLUDES rights and liabilities as to rent and recovery thereof (see LANDLORD AND TENANT); and proceedings in actions of *assumpsit* (see ASSUMPSIT, ACTION OF).

See cross-references for complete list of exclusions.

Analysis.

§ 6. Nature and form of remedy.
§ 9. Evidence.
§ 11. Trial, judgment, and review.

Cross-References.

As element of adverse possession, see ADVERSE POSSESSION, § 17.

Right of way by husband as possession of wife, see EJECTMENT, § 8.

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§ 6. Nature and form of remedy.

See ASSUMPSIT, ACTION OF, § 1.

(1853). An action for use and occupation does not lie, except where the relation of landlord and tenant exists either expressly or by implication; being an action *ex contractu*, it cannot be supported where there is no pretense of a contract and certainly not where the land is held adversely to plaintiff by the defendant.—Scales v. Anderson, 26 M. 94.

(1853). A pending action of unlawful detainer is no bar to an action for use and occupation of the same premises, because: 1st. The gist of the action of unlawful detainer is to recover possession of the premises, and the rent is merely incidental, and 2d. The amount of the rent recoverable in the proceeding of unlawful detainer could not, under the statute, exceed $50.—Scale v. Anderson, 26 M. 94.

(1880). Where land is held adversely, *assumpsit* for the use and occupation thereof will not lie, trespass being the proper form of action for the recovery of mesne profits.—Dean v. Tucker, 58 M. 487.

(1885). Code 1880, § 1323, gives the right to the action for use and occupation in all cases where possession is held in recognition of the title of the owner, and it is not necessary that there be an implied contract arising from the consent of the owner and expectation of the occupant to pay, or even that the owner shall know of or consent to such occupancy.—Newberg v. Cowan, 62 M. 570. The action does not lie where defendant's possession is adverse to plaintiff.—(1885) Inman v. Morris, 63 M. 347.

§ 9. Evidence.

(1889). The defendant in an action for use and occupation of certain premises, moved to the house of the plaintiff's then husband, who was the brother of the defendant, at the request of the husband, and for the purpose of looking after his farming interest; the husband being unable, by reason of a lingering disease, to look after his own affairs. The plaintiff's husband continued in this state of incapacity for business for four or five years and finally died. During all this time the defendant managed the business and looked after the interests of the farm, the premises in question, and supported the family out of the proceeds. After the death of the husband, the defendant continued to live on the place exactly as he had done prior to the husband's demise, until the remarriage of the plaintiff with her present husband, two years later. Nothing was ever said, nor as far as the record shows was there ever any contemplation, during all these years, of making any demand whatever on the defendant for such use and occupation until about one year after the remarriage of the plaintiff and about eight years after the defendant had begun to live with his brother's family. Under such circumstances, the Supreme Court on appeal will refuse to disturb a finding for the defendant.—Fleming v. Hughes, 6 So. 842, not officially reported.

§ 11. Trial, judgment, and review.

(1885). The owner of land used and occupied by another, cannot recover from the occupant more than the reasonable satisfaction

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allowed by the statute notwithstanding the occupancy was worth more to the occupant situated as he was.—Newberg v. Cowan, 62 M. 570.

(1891). In an action for the use and occupation of land, where the only issue raised by the pleadings is whether an outstanding term in a stranger has been surrendered or abandoned, it is error to give an instruction which declares that the defendant should be held liable if the jury believes certain evidence, which, if true, establishes, not a surrender or abandonment, but an estoppel against defendant to deny that he is the assignee of the term and liable for the rent.—Solomon v. City Compress Co., 69 M. 819, 10 So. 446, 12 So. 339.

USEE.

As plaintiff in action for trespass, see TRESPASS, § 36.

USE PLAINTIFFS.

See PARTIES, §§ 4, 70.

USURPATION.

Quo warranto to try usurpation of public office, see QUO WARRANTO, § 12.

USURY.

This topic INCLUDES compensation for use or forbearance of money at a rate greater than allowed by law, and the reserving, taking, or paying such unlawful rate; validity and effect of agreements therefor; pleading usury and proof thereof as a defense; and civil and criminal liabilities and remedies for violations of usury laws.

It EXCLUDES rate of interest allowed by law in general (see INTEREST), and on particular classes of transactions (see BANKS AND BANKING; BUILDING AND LOAN ASSOCIATIONS; SHIPPING).

See cross-references for complete list of exclusions.

Analysis.

I. Usurious Contracts and Transactions.

(A) NATURE AND VALIDITY.

§ 2. What law governs.
§ 10. Elements of usury.
§ 16. Nature and subject matter of transaction in general.
§ 17. Loans or advances of money.
§ 19. —— Depreciated currency or funds.
§ 20. —— Repayment in medium other than money.
§ 21. Bills, notes, and other instruments for payment of money.
§ 27. Forbearance or suspension of legal remedy or process.
§ 29. Loans of personal property.
§ 30. Sales or exchanges of property.
§ 32. —— Credit, deferred payments, and instalments of price.
§ 36. Contracts and transactions involving hazard or contingency.
§ 42. Rate and amount of interest in general.
§ 44. Interest in advance.
§ 48. Interest after maturity of debt.
§ 49. Compound interest.
§ 51. Use of interest tables.
§ 52. Contemporaneous collateral agreements in general.
§ 53. Compensation for services or expenses or losses incurred by lender.
§ 54. Commission or bonus to agent, broker, or other third person.
§ 61. Stipulations as to liquidated damages on breach of contract.
§ 62. Stipulations as to attorney's fees on default in payment.
§ 66. Renewal of bill, note, or other obligation.
§ 72. Construction of contracts as to usury.
§ 74. Effect of usury.
§ 82. Persons who may take advantage of existence of usury in general.
§ 87. Usury in partnership transactions.

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(B) Rights and Remedies of Parties.
§ 91. Equitable relief.
§ 94. —— Restraining or refusing enforcement of obligation or security.
§ 95. —— Tender or payment of amount actually paid or due.
§ 96. Enforcement of usurious contract or security.
§ 99. Usury as a defense.
§ 100. Application of payments of usury.
§ 102. Recovery of usury paid.
§ 103. Estoppel to take advantage of usury.
§ 109. Time to sue, limitations, and laches.
§ 111. Pleading.
§ 112. Evidence.
§ 119. Questions for jury.
§ 120. Instructions.

(C) Rights and Remedies of Third Persons.
§ 127. Privity with parties to usury in general.
§ 128. Assignees of usurious contract or security.
§ 130. Subsequent purchasers of incumbered property.
§ 131. Subsequent incumbrances.
§ 133. Actions by or against third persons.

II. Penalties and Forfeitures.

§ 146. Forfeiture of interest.

III. Criminal Responsibility.

Cross-References.

By banks, see Banks and Banking, §§ 68, 181.
By foreign building and loan association, see Building and Loan Associations, § 46.
Jurisdiction of equity to compel accounting between lender and agent, see Equity, § 25.
Preference of usurious debt, see Assignment for Benefit of Creditors, § 136.
Premiums as usury, see Building and Loan Associations, § 33.
Right of building association to charge, see Building and Loan Associations, § 32.
Usurious consideration for transfer of note, see Bills and Notes, § 355.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(A) NATURE AND VALIDITY.

§ 2. What law governs.

If a note executed here, but made payable in another state, bear a greater rate of interest than is allowed here, it will not be usurious, if in accordance with the law of the state wherein it is payable.—(1845) Henry v. Halsey, 5 S. & M. 573; (1854) Brown v. Nevitt, 27 M. 801.

A note made in this state and payable in Louisiana, and stipulating for a rate of interest allowed by the law of Louisiana, is not usurious, though the rate exceed that allowed by the laws of this state; and in the absence of proof as to the law of Louisiana, the rate stipulated will not be presumed usurious by that law.—(1843) Martin, Aiken & Co. v. Martin, Pleasants & Co., 1 S. & M. 176; (1848) Robb v. Halsey, 11 S. & M. 140.

(1854). The rule that a note will not be usurious if in accordance with the law of the state where payable does not apply where usury inheres in and is a part of the original contract made here, and constitutes a part of the principal sum. It seems it applies only to the rate of interest to be collected on the face of the principal. For in such cases the courts here will not enforce a contract made in violation of our laws, merely because it was to be performed elsewhere.—Brown v. Nevitt, 27 M. 801.

(1854). A note drawn in this state and made payable in another state and bearing a higher rate of interest than allowed in this state must not be made payable elsewhere with intent to evade the usury laws of this state.—Brown v. Nevitt, 27 M. 801.

(1857). If a merchant, residing in this state and doing business here, advance for a customer the amount of a bill drawn by the latter and payable in New Orleans, La., he will be entitled to interest according to

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the course of trade and the agreement between them in relation to their dealings with each other, though it exceed the legal rate of interest in Louisiana.—Carson v. Alexander, 34 M. 528.

When a contract made in one country to be performed in another stipulates for a payment of a rate of interest liable by the *lex loci contractus* but prohibited by the *lex loci solutionis*, it will be governed by the law of the place where it was entered into. For as it was competent for the parties to contract with reference to the law of either place, it will be presumed that they contracted with reference to that law which their contract did not violate. A presumption will never be indulged that a contract is in violation of law when it is capable of any other reasonable construction.—(1857) Brown v. Freeland, 34 M. 131; (1897) Commercial Bank v. Auze, 74 M. 609, 21 So. 754.

When a contract is made in one country to be performed in another, the law presumes, in the absence of any other circumstances, that the parties contracted with reference to the place where it is to be performed; and in that case the contract as to its nature, construction, and validity will be governed by the *lex loci solutionis*. But this is a mere presumption of law and is not enforceable and it will not control if the attendant circumstances show that the parties contracted with reference to the place where the contract was entered into.—(1857) Brown v. Freeland, 34 M. 131; (1897) Commercial Bank v. Auze, 74 M. 609, 21 So. 754.

(1892). The laws of this state and access to its courts cannot be the subject of contract. If a contract for the loan of money be usurious under the laws of another state, by which it is governed, the courts of this state will not respect a stipulation therein that, in case of litigation, it shall be governed by the laws of this state; and this, although the loan be secured by mortgage on land here.—American &c. Mortgage Co. v. Jefferson, 69 M. 770, 12 So. 464, 30 Am. St. 587.

(1892). A Tennessee mortgage of personalty to secure a note stipulating for ten per cent. interest per annum from maturity is not void for usury either in the state above mentioned or here.—Vaccaro v. Asher, 11 So. 531, not officially reported.

(1896). Where a note given for a loan, and a deed of trust to secure it, are executed in Tennessee, and the note is expressly made payable there, where the payee lived, and the loan was negotiated, but the makers of the note live in this state and the paper is dated here, the transactions constitute a Tennessee contract which will be governed by the Tennessee usury laws.—Armistead v. Blythe, 20 So. 298, not officially reported.

(1897). The execution of a mortgage on lands in another state to secure a loan made in this state does not make the contract one to be governed by the interest laws of such other state.—Commercial Bank v. Auze, 74 M. 609, 21 So. 754.

(1900). There is no principle of comity requiring one state or nation to enforce another's criminal statutes concerning usury. —Kendrick v. Kyle, 78 M. 278, 28 So. 951.

(1900). Where, prior to the passage of Sheet Acts Tenn. 1897, pp. 149, 150, 227, which validated usurious contracts by making them enforceable for the recovery of the amount loaned with 6 per cent. annual interest, and with the agreed interest on loans secured by property in another state, provided the same was not prohibited by the laws of such state, suit was brought here on 8 per cent. notes for the purchase price of land in this state, dated and payable in Tennessee, the holder of the paper was entitled to a decree at the stipulated rate.—Kendrick v. Kyle, 78 M. 278, 28 So. 951.

(1900). Where suit is brought here on a Tennessee contract before the passage of such acts, but does not reach final decree until subsequently to their repeal, the complainant will not be stripped of his rights by such repeal,—this by reason of the facts that the contract was only unenforceable, never void, in Tennessee, and therefore, once vitalized, no consequence attaches to its status either prior to the passage or following the repeal of the acts.—Kendrick v. Kyle, 78 M. 278, 28 So. 951.

(1900). Usury will not be available to a subsequent purchaser of mortgaged land as a defense to an action to enforce payment by a sale of the land of the mortgage notes, which were dated and are payable in Tennessee, such exaction of excessive interest not constituting a defense in the latter state. —Kendrick v. Kyle, 78 M. 278, 28 So. 951.

(1901). A note given in renewal of another note is a new contract, and is governed by the usury law in force at its date, although the law has been changed since the execution of the original note.—Purvis v. Woodward, 78 M. 922, 29 So. 917.

§ 10. Elements of usury.

(1840). To constitute usury, there must be an agreement between the lender and the borrower, to which both parties assent, by which the borrower knowingly agrees to pay, and the lender knowingly agrees to receive or take, a higher rate of interest than the law allows, and with an intent to violate the statute. An inference of an intention to violate the statute may be drawn from the lender's knowingly taking illegal interest; but this inference will not be indulged if a different conclusion is consistent with the facts of the case. And if the excess be very small, such as results from calculating the interest at three hundred and sixty days for a year, and this calculation is not made for the purpose of taking excessive interest, but results from the use of

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interest tables (Rowlett's), for the sake of convenience only, the inference of illegality cannot be drawn.—Planters' Bank v. Snodgrass, 4 H. 573.

(1889). The law against usury being penal, mere mistake in fact, error in calculation, or inadvertence in the insertion of date will not make a contract usurious. There must be an agreement by which the debtor knowingly gives or promises, and the lender knowingly takes or reserves, excessive interest, with intent to violate the statute.—Smythe v. Allen, 67 M. 146, 6 So. 627.

(1900). A note for $2,729, with 10 per cent. interest from date, was secured by a mortgage which recited that the note was to bear 10 per cent. interest from maturity. The maker testified that he had received a loan of $2,500, and that $229 was added to the face of the note for interest until maturity and that the note was executed to draw interest from date by mistake. *Held*, that the paper was usurious without regard to the intention to reserve a usurious rate.—Carter v. Holloway, 28 So. 941, not officially reported.

§ 16. Nature and subject matter of transaction in general.

(1843). The law will not tolerate any device to defeat its provisions, where the consummation of usury is really intended.—Bank of Manchester v. Nolan, 7 H. 508.

(1899). Usury is determined by what the creditor has the right, according to the terms of the contract if enforced, to demand in any situation during its life, and not by what he may ask under an accidental situation.—Crofton v. New South Bldg. & Loan Assn., 77 M. 166, 26 So. 362.

(1902). An agreement that a debtor shall forward a certain amount of cotton to his creditor, and, if he fail to do so, shall pay commissions on it as if it had been shipped, entered into with no expectation in the mind of either party that the cotton should actually be forwarded but intended as a mere device to enable the creditor to obtain a usurious rate of interest, is void.—Brown v. West, 80 M. 764, 32 So. 52.

§ 17. Loans or advances of money.

(1887). Complainant sought to enjoin a foreclosure sale of certain land under a deed of trust on the ground of usury. On a trial of the bill, evidence was introduced establishing that the mortgagor applied to a certain person who advertised himself as prepared to negotiate loans of money; that she signed an application and executed a deed of trust to secure $2,000 and also an agreement to pay the negotiator and the parties through whom he negotiated, 20 per cent. of the loan as commission. The negotiator sent the application and deed to a correspondent who in turn sent them to another, who presented the papers to the defendant, who agreed to make the loan, and who sent the full amount to the negotiator's correspondent, of which $1,600 was paid to the complainant and the balance retained by the three intermediaries as their commission. It was established that the defendant had no knowledge of these arrangements for commission and that it had no interest in the independent business of the three middlemen. Under these circumstances the defendant was entitled to recover the sum advanced by it.—New England Mortgage Security Co. v. Townes, 1 So. 242, not officially reported.

(1895). When interest is charged on a mere promise to lend money in the future and is carried into the loan afterwards made and the borrower is, in addition, charged the highest legal rate on the money from the time advanced, the transaction is usurious.—Hiller v. Ellis, 72 M. 701, 18 So. 95, 41 L. R. A. 707n.

§ 19. —— Depreciated currency or funds.

Where the consideration of a contract or obligation entered into was bank credits, whether loaned or transferred or sold, and the credits are shown to have been greatly depreciated below the nominal value at which they were received at the time, which fact was known to all the parties, such contract is usurious.—(1844) Scott v. Hamblin, 3 S. & M. 285; (1847) Bondurant v. Bank, 8 S. & M. 533; (1847) Cook v. Bank, 8 S. & M. 543; (1849) Archer v. Putnam, 12 S. & M. 286; (1849) Walker v. Meek, 12 S. & M. 495; (1850) Coulter v. Robertson, 14 S. & M. 18; (1854) Brown v. Nevitt, 27 M. 801.

(1854). Where the notes or stock lent afterwards reach par, the contract is to be determined by the circumstances existing when the loan was made. If the contract was usurious at the time it was entered into, then it remains so ever after.—Brown v. Nevitt, 27 M. 801.

(1854). When a bank or any other party loans depreciated bank paper or credits, and thereupon takes the note of the borrower for the nominal amount loaned, the contract is usurious.—Maury v. Ingraham, 28 M. 171.

(1854). The failure of a bank to redeem its notes, whereby they became depreciated, cannot be urged as a defense of usury.—Maury v. Ingraham, 28 M. 171.

§ 20. —— Repayment in medium other than money.

(1859). The defendant loaned the complainant a sum of money, and received a conveyance of land and slaves, by which the borrower was at liberty to redeem the slaves after twelve months, by paying one-half the principal, and the lender was to take the land for the other half. After a year had elapsed, the land was conveyed to the lender absolutely, in payment of one-half the principal, and one of the slaves for the other half, and at the same time, or soon afterwards, it was agreed that the borrower might repurchase this slave, at any time

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within three years, at the same price for which he had been sold to the lender. Before the expiration of that period the borrower repurchased the slave, and the transaction was finally settled. After this, the borrower filed his bill in equity, charging that the transaction was usurious; that the rent of the land and hire of the slave greatly exceeded in value the legal interest on the sum loaned, and that the land was worth double the price which the lender agreed to pay for it, and seeking an account and a recovery back of the illegal interest. *Held*, there was nothing in the transaction which could give a court of equity jurisdiction, and that the bill must be dismissed.—Kelly v. Weaver, 37 M. 631.

§ 21. Bills, notes, and other instruments for payment of money.

(1841). Under the law as it existed prior to 1842, if the note for the sale of property express it to be for loaned money, and 10 per cent. be reserved, it will, nevertheless, be usurious.—Parchman v. McKinney, 12 S. & M. 631.

(1853). Where a note is given, due in twelve months for $400 and only $360 is loaned, this a reservation of more than 10 per cent. interest, and the contract is usurious.—Hyde v. Finley, 26 M. 468.

(1855). It is well settled that when a promissory note is made without reference to a usurious loan or the raising of money, and is complete and valid in the hands of the holder, it may be sold by him for a sum less than its nominal value, and at a rate of discount, which would have made it usurious if it had entered into the original transaction. But in order to make such transfer valid, it must be a *bona fide* sale upon a consideration paid or secured, and must not be in any wise a security for the usurious loan of money by the indorsee or party taking the paper, and it must not be in consideration of forbearance and giving time of payment for a debt due the party acquiring it; for if it be transferred either upon a loan at unlawful interest, or as security for a pre-existing debt agreed to be forborne at an illegal rate of interest, it falls within the statute against usury.—Newman v. Williams, 29 M. 212.

(1855). Where the transferee is a creditor of the holder and assignor, and agrees to give indulgence on the debt for a stipulated time, at an usurious rate, and thereupon, the debtor indorses a valid and legal note of a third party to the creditor, for the amount of the debt so calculated at an usurious rate, the transaction is usurious; and if the creditor file a bill to foreclose a mortgage given by the maker of the transferred note to the debtor and assignor, he can only recover so much of the note and mortgage as the principal of his debt amounted to, and the assignor being a party defendant to the bill, will be entitled to the remainder, including the interest which has accrued on that much of the note as represents the principal of the creditor's debt.—Newman v. Williams, 29 M. 212.

(1889). If one person, at the suggestion of another, takes up a note of the latter in the hands of a third person, paying less than the face of the note, and afterwards collects from the maker the full amount of the obligation, so that more than 10 per cent. per annum is realized, the transaction is not necessarily usurious, and an instruction stating that it is usurious should not be given if there is evidence tending to show that the money was not advanced as a loan, but that there was simply a purchase of the note.—Smythe v. Allen, 67 M. 146, 6 So. 627.

§ 27. Forbearance or suspension of legal remedy or process.

(1844). Where a bank had brought suit against one of its debtors, and required as a condition of dismissing the suit and allowing the debtor to renew his note, that he must pay the attorney of the bank one-half of his usual commissions, it was held not to be an exaction, as a condition of the loan, but as a consideration of a bargain to withdraw legal proceedings and hence not usury.—Simmons v. Mississippi Union Bank, 3 S. & M. 781.

(1856). A promise to pay more than the legal rate of interest, in consideration of forbearance, is usurious.—McAllister v. Jerman, 32 M. 142.

§ 29. Loans of personal property.

Where bank stock is loaned as at par and it is below specie par, and on this account the interest received and the discount will be greater than the legal interest, the contract is usurious and the bank can recover only the specie value of the stock lent without interest; and it makes no difference that the lender used the stock (or notes) at specie par.—(1848) Robb v. Halsey, 11 S. & M. 140; (1850) Coulter v. Robinson, 14 S. & M. 18; (1854) Brown v. Nevitt, 27 M. 801.

(1849). Bank stock is not money, and under the law as it existed prior to 1842, and which allowed the reservation of 10 per cent. interest on *bona fide* contracts for the loan of money, and 8 per cent. on all other contracts, the taking of more than 8 per cent. interest on a loan of bank stock is usurious.—Archer v. Putnam, 12 S. & M. 286.

§ 30. Sales or exchanges of property.

(1884). Where, under a trust deed to secure a debt payable with usurious interest, land is bought in by the beneficiary and then conveyed to the debtor in consideration of a sum equal to the principal and interest of the original debt, and the evidence shows that there was no collusion between the parties by making the sale to evade the usury laws, the grantee cannot recover of the beneficiary the difference between such consideration and the amount which was legally due on the secured debt.—Matlock v. Cobb, 62 M. 43.

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§ 32. —— Credit, deferred payments, and instalments of price.

(1848). Whether the difference, being greater than the rate of legal interest, between the cash price of property and the sum for which it is sold on credit, will constitute usury, depends on the intention of the parties. If the sale be made on such terms, that it was for a cash price, and to be considered as cash, and interest be calculated regularly at a rate exceeding the amount allowed by law, and the sum so produced be added to the cash price, and included in the note for the purchase money, the transaction will be usurious; the intent of the parties being clear that the increased price was contracted for as interest, and *eo nomine*.—Torrey v. Grant, 10 S. & M. 89.

(1849). A sale of goods on a credit at a price beyond their value, when the object is to cover a loan of money at a usurious rate, has always been held to be within the statute of usury.—Archer v. Putnam, 12 S. & M. 286.

(1890). Under Code 1880, § 1141, which declares that if a greater rate of interest than 10 per cent. shall be stipulated for, all interest shall be forfeited, a contract for the sale of goods to be paid for in thirty days at a certain price, is not usurious because of an agreement at the time of sale that if payment is not made within thirty days, the price shall be 15 per cent. additional.—Bass v. Patterson, 68 M. 310, 8 So. 849, 24 Am. St. 279.

(1890). But where the sale is in fact at an agreed cash price, and the form of a sale on credit is resorted to for the purpose of evading the statute, such transaction is usurious. It is a question of intention.—Bass v. Patterson, 68 M. 310, 8 So. 849, 24 Am. St. 279.

§ 36. Contracts and transactions involving hazard or contingency.

(1843). Where a bank in this state loaned money, and received as security therefor cotton to be shipped to Liverpool, England, and stipulated to receive as compensation for its trouble in making the shipment the domestic exchange between the locality of the bank and New York, it was held that the transaction was not usurious, the bank taking the risk as to whether the exchange would be a loss or profit, and it not appearing that the stipulation was a mere device for usury.—Bank of Manchester v. Nolan, 7 H. 508.

(1843). In contracts of loan, if there is a hazard that the creditor may receive less than his principal, an agreement that he may receive more than the principal and legal interest will not constitute usury. But the hazard must be real, and not a mere cover for usury.—Bank of Manchester v. Nolan, 7 H. 508.

§ 42. Rate and amount of interest in general.

(1886). Any stipulation for a greater rate of interest than 10 per cent. per annum, whenever and however made, whether evidenced by writing or resting in parol, comes within the prohibition of Code 1880, § 1140, against usury, and forfeits all interest thereafter growing out of the contract.—Rozelle v. Dickerson, 63 M. 538.

§ 44. Interest in advance.

Reserving in advance out of a loan interest at the highest legal rate is usurious. —(1883) Polkinghorne v. Hendricks, 61 M. 366; (1895) Hiller v. Ellis, 72 M. 701, 18 So. 95, 41 L. R. A. 707n.

§ 48. Interest after maturity of debt.

(1857). A stipulation in a contract, that if the debt be not punctually paid at maturity, the debtor shall pay interest from date, is not usurious, and interest will be given accordingly.—Rogers v. Sample, 33 M. 310, 69 Am. Dec. 349.

§ 49. Compound interest.

(1875). If interest is past due it may be compounded and carried into a new contract, but a promise to pay compound interest at the highest legal rate for future forbearance does not come within the rule. Hence, a note payable twenty-six months after date, with 10 per cent. interest, "to be compounded annually," is usurious.—Perkins v. Coleman, 51 M. 298.

A note providing for interest from maturity at 10 per cent. per annum and for interest on the principal and interest at the same rate in case of failure to pay the interest when due, is not usurious, the compound interest being exacted only in case of failure to pay the annual interest when due. —(1909) Palm v. Fancher, 93 M. 785, 48 So. 818; (1910) Merchants' &c. Bank v. Caston, — M. —, 52 So. 633.

§ 51. Use of interest tables.

(1840). Usury cannot be predicated of a small excess of interest, resulting from the proper use in computation of Rowlett's interest tables.—Planters' Bank v. Snodgrass, 4 H. 573.

§ 52. Contemporaneous collateral agreements in general.

(1885). The statute as to usury cannot be evaded by taking a note stipulating for 10 per cent. interest on its face, and at the same time having a verbal agreement for the payment of a higher rate.—Union Nat. Bank v. Fraser, 63 M. 231.

§ 53. Compensation for services or expenses or losses incurred by lender.

(1843). It is well settled, that where, besides the contract of loan, there is also a contract by way of pledge, mortgage or collateral security, to secure the principal and interest of the loan, that a fair and just com-

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pensation for the labor, trouble and expense, to be incurred by the creditor about the pledge or other security, may be stipulated for, but the stipulation must not be merely a cover for usury.—Commercial Bank v. Nolan, 7 H. 508.

§ 54. Commission or bonus to agent, broker, or other third person.

(1889). Interest is the price paid for the use of money. And a loan at the highest legal rate of interest is not rendered usurious by the fact that the borrower pays another than the lender a certain sum for negotiating the loan. Further, the fact that the lender has knowledge that the borrower is paying a certain sum, even though it be exorbitant, to a third person for procuring the loan, does not render the transaction usurious, if the lender receives no more than the legal rate of interest for the use of his money.—Pass v. Mortgage Co., 66 M. 365, 6 So. 239.

§ 61. Stipulations as to liquidated damages on breach of contract.

(1879). A contract with a commission merchant to ship him a specified number of bales of cotton during the year, or, in default, pay commissions on the cotton not shipped, is valid.—Chaffe v. Hughes, 57 M. 256. See also (1876) Lengsfield v. Richardson, 52 M. 443.

(1886). To an action of damages for breach of a contract, by which the defendant, in consideration of supplies to be furnished, agreed to ship plaintiff cotton, to be sold on commission, and for every bale less than the agreed number to pay $1.25, a plea that there was no consideration for the contract, and that the agreement was only a scheme to avoid the usury laws, and to enable plaintiff to collect a greater rate of interest for furnishing the supplies than the law allowed, is good on demurrer.—Grayson v. Brooks, 64 M. 410, 1 So. 482.

§ 62. Stipulations as to attorney's fees on default in payment.

A stipulation in a note that the maker, in addition to interest, will pay an attorney's fee for collection, is not usurious nor contrary to public policy.—(1882) Meacham v. Pinson, 60 M. 217; (1894) Brahan v. First Nat. Bank, 72 M. 266, 16 So. 203. See also (1889) Eyrich v. Capital State Bank, 67 M. 60, 6 So. 615.

§ 66. Renewal of bill, note, or other obligation.

(1840). Where the creditor had brought suit on his demand and a compromise was made, by which the suit was dismissed, and a renewed note was given by the debtor, for the principal and interest of the debt, and the plaintiff's attorney's fee for bringing the suit—the fee being voluntarily included in the note by the debtor, and not exacted as a condition of the renewal of the loan—it will not be usurious.—Planters' Bank v. Snodgrass, 4 H. 573.

(1848). If an original note be affected by usury, every renewal of it will likewise be affected; nor will the usury be cured when a greater sum than the usurious interest has been paid on the note.—Torry v. Grant, 10 S. & M. 89. And the rule is the same if a third party, by agreement or debtor and creditor, substitute his note in place of the note affected by usury; and it makes no difference in such a case that the substituted note, as between the maker and the original debtor, was based on a good and valuable consideration.—(1850) Coulter v. Robertson, 14 S. & M. 18.

(1905). The giving of new notes for the balance appearing to be due on old and usurious ones does not purge the usury, although the new notes be made payable to a voluntary third party and be transferred by said party to an innocent purchaser.—Armor v. Bank of London, 86 M. 658, 39 So. 17.

§ 72. Construction of contracts as to usury.

(1905). Where a subscription for stock in a building and loan association was not an investment, but a part of a scheme to secure a loan, and the monthly payments on the stock for interest, dues, and premiums amounted to more than the legal contractual rate, the loan was usurious.—Armor v. Bank of London, 86 M. 658, 39 So. 17.

§ 74. Effect of usury.

See *post*, § 146.

(1854). Where a transaction is one entire contract, and it is usurious as to part of it, it is illegal as to the whole.—Brown v. Nevitt, 27 M. 801.

(1876). Under Code 1871, § 2279, usury forfeits only the illegal excess. Hence, while a contract between a creditor and the principal debtor to forbear for a definite period in consideration of the payment of usurious interest, being valid except as to the excess, releases a non-consenting surety, whether the interest is paid or not, yet, in the absence of such a contract, payment of the stipulated interest will not discharge the surety, even though, because of such payment, the creditor continues to indulge.—Brown v. Prophit, 53 M. 649.

(1885). Where a note sued on is the last of a succession of renewal notes which evidence items of a running account between the payee, a bank, and its customer, it will, even in the hands of a purchaser for value without notice, be affected by usury to the entire extent to which usury enters into the running account.—Union Nat. Bank v. Fraser, 63 M. 231.

(1886). Where, prior to the Code of 1880, which, by § 1141, forfeits not only the excess, but the whole interest if more than 10 per cent. be stipulated for, a note was given on its face stipulating for only 10 per cent., but with a secret verbal agreement to pay 20 per cent., and after said code was adopted, another note was taken for the "excess of

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interest not expressed in the note," the usurious contract contained in the last note destroyed entirely the interest-bearing quality of the first note, and thereafter it bore no interest.—Warmack v. Boyd, 63 M. 488.

Since the chancery court, in determining the amount to be paid by a complainant as a condition of relief against a usurious contract, is not controlled by the terms of the contract, a stipulation therein for the payment of attorney's fees, in case of litigation or foreclosure, will not be regarded. It must fall with the contract, of which it is a part. —(1892) American &c. Mortgage Co. v. Jefferson, 69 M. 770, 12 So. 464, 30 Am. St. 587; (1899) Crofton v. New South B. & L. Assn., 77 M. 166, 26 So. 362.

§ 82. Persons who may take advantage of existence of usury in general.

A junior mortgagee, as well as a purchaser of the equity of redemption, may maintain a bill to show usury in a prior mortgage on the property; and this right exists even after foreclosure *in pais*, each mortgagee purchasing under his mortgage. So held where it was shown that the property was insufficient in value to pay both debts and the mortgagor was insolvent.—(1881) Chaffe v. Wilson, 59 M. 42; (1885) Boyd v. Warmack, 62 M. 536.

§ 87. Usury in partnership transactions.

(1854). Usury does not make the contract wholly void, but only to the extent of the interest. Hence, a partner cannot avoid a usurious contract made by his associate, upon the ground that the whole contract is void. He can only avoid it to the extent of the interest.—Wallace v. Fouche, 27 M. 266.

(1882). Where the legal representative of a deceased partner pays a debt affected with usury, without objection by the surviving partner who contracted the debt, the latter cannot, on the settlement of the partnership, charge the estate of the deceased partner with the usury then paid. But if it appears that the estate received a part of the benefit of such payment, no injury is done the estate by disallowing the usury to the extent that it was benefited by its collection. —Berry v. Folkes, 60 M. 576.

(1892). A contract by which complainant is to advance money to publish and introduce defendant's book, and, in consideration thereof, is to be paid his advances, with legal interest, out of the net profits, if any, and also one-half of such profits, imposes no personal liability on defendant, and is not usurious.—Duvall v. Neal, 70 M. 288, 12 So. 145.

(B) RIGHTS AND REMEDIES OF PARTIES.

§ 91. Equitable relief.

(1859). A court of equity has jurisdiction to grant relief against an usurious contract, only where there are circumstances connected with the transaction, aside from the usurious agreement, which calls for the interposition of the court, on account of the inadequacy of the powers of a court of law to grant full and complete relief.—Kelly v. Weaver, 37 M. 631. See also (1868) Hooker v. Austin, 41 M. 717.

§ 94. —— Restraining or refusing enforcement of obligation or security.

(1892). The rule, that one who seeks equity must do equity, applies although complainant seeks to enjoin a foreclosure *in pais* of a trust deed given to secure a usurious debt.—American Mortgage Co. v. Jefferson, 69 M. 770, 12 So. 464.

(1901). Under the provisions of Code 1880, § 1141, and Code 1892, § 2348, on the subject of interest and usury, where sale under a deed of trust is enjoined, the creditor can, the contract being usurious, recover only the principal of his debt.—Purvis v. Woodward, 78 M. 922, 29 So. 917.

§ 95. —— Tender or payment of amount actually paid or due.

(1842). A court of equity will not relieve against an usurious contract, unless complainant offer in his bill to pay the principal and legal interest.—McRaven v. Forbes, 6 H. 569.

The rule in equity, under statutes against usury declaring the whole contract void, which required as a condition of relief against usury, that the complainant should pay what was really due, is applicable to cases in which a remedy at law might have been had, or in which a discovery was asked in aid of a defense at law, and where it is said the court is not bound to interfere, but having a discretion on the subject, can prescribe the terms on which relief will be granted. That rule has no application to a case where the debtor seeks relief against a threatened sale by a trustee under a deed in trust to secure a debt affected by usury; for there the debtor has no remedy to restrain the sale, except in equity, and is compelled to resort to chancery in the first instance. Moreover, under our statute there is no forfeiture of the principal, and even at law the lender can recover the money he actually loaned.—(1849) Parchman v. McKinney, 12 S. & M. 631; (1857) Norcum v. Lum, 33 M. 299.

(1849). The statute (H. & H. 374), provides, that if any contract founded on any other consideration than the *bona fide* loan of money, shall fraudulently and deceitfully express therein, that the same is entered into for loaned money, and specify a greater interest than is allowed by law, and if such fraud or deception shall be discovered in any suit or action, either at law or equity, no interest shall be allowed, &c., prevents the application of the rule in equity which requires a debtor to pay the principal and legal interest, when he seeks relief against an usurious contract, to a case where the debtor is compelled to resort to equity for relief in the first instance.—Parchman v. McKinney, 12 S. & M. 631.

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(1887). Where relief against usury is only part of the relief prayed for, there being other and independent circumstances justifying resort to equity in the first instance, it is not necessary for complainant to offer to pay legal interest in order to obtain relief from the usury. (Parchman v. McKinney, 12 S. & M. 61, criticized but followed.)—Long v. McGregor, 65 M. 70, 3 So. 240.

(1892). Where our courts of equity are appealed to by a debtor seeking relief against a usurious contract which is governed by the laws of another state, they will apply the general doctrine of equity, regardless of the terms of the contract or of our statutes as to usury, and will require that complainant do equity, by refunding or tendering with his bill, the principal of the debt, with legal interest. (Parchman v. McKinney, 12 S. & M. 631, explained and distinguished.)—American &c. Mortgage Co. v. Jefferson, 69 M. 770, 12 So. 464, 30 Am. St. 587.

(1897). Before an action to recover usurious interest paid can be maintained, the borrower must extinguish the principal debt due the lender, and payments will be applied to such debt until it is satisfied.—Commercial Bank v. Auze, 74 M. 609, 21 So. 754.

(1901). In order to enjoin a sale under a deed of trust, given to secure an usurious debt, it is unnecessary for the complainant to have paid or tendered more than the principal of the debt, since under the statute (Code 1892, § 2348) he could recover back all interest paid.—Purvis v. Woodward, 78 M. 916, 29 So. 825.

In a suit for an injunction, where an accounting is necessary to determine the sum due from the complainant to the defendant, the only tender required is of the amount which the complainant in good faith admits to be due, with an offer in the bill to pay whatever sum shall be ascertained to be due. —(1901) Purvis v. Woodward, 78 M. 922, 29 So. 917; (1906) Crittenden v. Ragan, 89 M. 185, 42 So. 281.

(1906). Demurrer will lie to a bill by a second mortgagee against a first mortgagee which charges usury and prays for an accounting of the indebtedness due the defendant and for a re-sale of the mortgaged property sold by the defendant and admits some amount to be due the defendant but makes no tender, and this although such bill further alleges repeated demands on the defendant for an itemized account of what was due him and the failure of the defendant to furnish such account.—Crittenden v. Ragan, 89 M. 185, 42 So. 281.

(1907). A debtor will not be allowed to restrain the collection of a debt tainted with usury, unless he tenders or pays the amount admitted to be due.—Rush v. Pearson, 92 M. 153, 45 So. 723.

§ 96. Enforcement of usurious contract or security.

Under the Mississippi statute, there is no forfeiture of the principal, and even at law the lender can recover the money he actually loaned.—(1849) Parchman v. McKinney, 12 S. & M. 631; (1857) Norcum v. Lum, 33 M. 299.

(1899). One seeking equity jurisdiction to enforce a usurious contract is only entitled to the amount actually loaned without interest and sums advanced by him for taxes and insurance with six per cent. interest per annum.—Crofton v. New South B. & Loan Assn., 77 M. 166, 26 So. 362.

§ 99. Usury as a defense.

Usury is a defense which can be made at law, when the debtor is sued, and if he neglects to make it there, he cannot come into a court of equity, after judgment. If any discovery is needed to make his defense at law, he can resort to chancery before judgment, and the necessity for such discovery is, therefore, no excuse for not having made defense at law.—(1847) Smith v. Walker, 8 S. & M. 131; (1848) Robb v. Halsey, 11 S. & M. 140.

(1852). The defense of usury can be made at law, and when the plea sets up usury alone, that is an admission of the justice of the principal, and a judgment by default may be taken for that, and a trial had on the issue as to the usury.—McLaurin v. Parker, 24 M. 509.

(1876). As usury is a defense only for the illegal excess, where any part of the debt is valid, a plea of usury which professes to answer the whole cause of action is demurrable. It should be limited to such part as the defendant is entitled to avoid, so that the plaintiff can take judgment *nil dicit* for all not denied.—Tittle v. Bonner, 53 M. 578, See (1892) American &c. Mortgage Co. v. Jefferson, 69 M. 770, 12 So. 464, 30 Am. St. 587.

(1885). It is not permissible to avoid the statute as to usury by an agreement between the contracting parties that its provisions shall not prevail. Hence, a stipulation in a note that it shall be paid without default or discount, and that all defenses against a *bona fide* holder for value shall be waived, does not preclude the maker from availing himself of the defense of usury even against a *bona fide* purchaser for value. —Union Nat. Bank v. Fraser, 63 M. 231.

(1899). Where an action of replevin is brought by the trustee in a deed of trust given to secure a recited debt, the defendant may show illegality in a part of the debt and usury in other parts and is entitled to an appropriation of payments to the valid part of the debt.—Puckett v. Fore, 77 M. 391, 27 So. 381.

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§ 100. Application of payments of usury.

(1847). If, after judgment at law, against which the defense of usury was successfully made, and the usury deducted from the note, the defendant voluntarily, in consideration of indulgence granted on the judgment, pay the deducted usury, he will be entitled, in equity, to have the sum so paid credited on the judgment as a payment on it.—Bond v. Jones, 8 S. & M. 368.

(1849). It is a rule both at law and in equity, applicable to usurious loans, that where the debtor sues to recover back usury paid by him, he can only recover the excess over the lawful interest, but this rule applies only to a transaction completely executed, and does not extend to a case where the whole money being not paid, the debtor seeks to be relieved from liability on an alleged balance of the debt; and in such a case the debtor can have his payments applied to the extinguishment of the principal, though they have been applied by the creditor to the interest. If, in any case, the creditor would have the right to prevent the application of the previous payments to the principal, it could only be done where it appears that they were expressly made as payments of interest, and where in the dealings between the parties the interest and principal are clearly distinguishable.—Parchman v. McKinney, 12 S. & M. 631.

(1856). In ascertaining the balance due on a debt upon which usurious interest has been exacted, the proper mode is to charge the debtor with the principal of the debt, and credit him with all the payments, including the amounts paid on it as usury.—McAllister v. Jerman, 32 M. 142.

(1883). Usurious interest, prepaid, will be applied to the principal.—Polkinghorne v. Hendricks, 61 M. 366.

(1885). Under Code 1880, § 1141, forfeiting all interest in case of usury, the amount paid for usurious interest is not a mere set off against which the statute of limitations would run, but is, by operation of law, a payment on the debt.—Union Nat. Bank v. Fraser, 63 M. 231.

§ 102. Recovery of usury paid.

See PRINCIPAL AND AGENT, § 159.

(1847). Usury may be recovered back at law, and also in equity, when there are special circumstances to give a court of chancery jurisdiction.—Bond v. Jones, 8 S. & M. 368.

(1882). One who pays usurious interest may recover it by action at law.—O'Connor v. Clopton, 60 M. 349. See (1886) Warmack v. Boyd, 63 M. 488; (1886) Rozelle v. Dickerson, 63 M. 538. See also (1885) Union Nat. Bank v. Fraser, 63 M. 231; (1890) Dickerson v. Thomas, 67 M. 777, 7 So. 503. These cases were decided under the Code of 1880. Note the change made by Code 1892, § 2348, as to recovering back usury whether the contract be executory or executed.

(1882). One who, as agent, receives for his principal usurious interest, and is notified before he pays it over that he will be held accountable for it by the party paying, is liable therefor, and cannot shield himself from liability by claiming that the suit should be against his principal.—O'Connor v. Clopton, 60 M. 349.

(1890). Notwithstanding Code 1880, § 1141, which provides that "if a greater rate of interest than ten per cent. shall be stipulated for in any case, all interest shall be forfeited," if a contract for the payment of usury has been executed, only the excess of interest over the legal rate can be recovered back. (Bond v. Jones, 8 S. & M. 368, distinguished.)—Dickerson v. Thomas, 67 M. 777, 7 So. 503. Note the change made in the wording of the statute as to this, by Code 1892, § 2348.

(1897). Code 1880, § 1141, declared a forfeiture of all interest in all cases where a greater rate of interest than ten per cent. was stipulated for; Code 1892, § 2348, declares a forfeiture of all interest in all cases where a greater rate of interest was stipulated for or received. So far as concerns the right of the borrower to sue for and recover usurious interest paid where the same was stipulated for in this state, the codes are substantially the same.—Commercial Bank v. Auze, 74 M. 609, 21 So. 754.

§ 103. Estoppel to take advantage of usury.

(1888). One may be estopped to set up usury as a defense. A maker of a note affected by usury is estopped to plead it against a holder who without notice purchased it from one who, likewise ignorant of the usury, at the maker's request, took up the note, paying the full amount on his assurance that it was amply secured.—Henderson v. Hartman, 65 M. 466, 4 So. 549.

§ 109. Time to sue, limitations, and laches.

(1905). An obligation to repay interest collected upon a usurious agreement (liability for which arose under Code 1892, § 2348) is in its nature an implied contract, and a suit thereon will be barred by limitation (Code 1892, § 2739) unless brought within three years next after the cause of action accrued.—Buntyn v. National Mut. B. & L. Assn., 86 M. 454, 38 So. 345.

§ 111. Pleading.

(1892). A bill seeking relief against an alleged usurious mortgage is demurrable unless it shows an offer to do equity—that is, either a tender of the principal and legal interest, and, this being refused, the bringing of the same into court, or an offer by the bill so to do.—American &c. Mortgage Co. v. Jefferson, 69 M. 770, 12 So. 464, 30 Am. St. 587.

(1906). Usury was sufficiently set up by a bill which shows that defendant discounted notes for advances to be made and placed the amount to the credit of the maker of the notes and afterwards when the advances

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were made charged ten per cent. interest on the advances.—Crittenden & Co. v. Ragan, 89 M. 185, 42 So. 281.

§ 112. Evidence.

See EVIDENCE, § 402.

(1849). If usury be set up against a note bearing on its face ten per cent. interest, when such rate is allowed only for loaned money, the holder may show by parol that the note was given for loaned money.—Luckett v. Henderson, 12 S. & M. 334.

§ 119. Questions for jury.

(1902). Where, in an action upon a promissory note, the rights of a *bona fide* holder for value not being involved, the defendant under proper pleadings, offers evidence tending to establish that a portion of the sum demanded was for usury, a peremptory instruction for the plaintiff directing the finding, in his favor, of the full amount sued for, should not be given.—Brown v. West, 80 M. 764, 32 So. 52.

§ 120. Instructions.

(1889). On an issue as to usury, where there is evidence tending to show that an overcharge of interest complained of was the result of mere inadvertance in making notes payable a short time before it was intended they should be, it is error to instruct that no express contract to pay usury is necessary, and that if the effect is that one realizes more than ten per cent., all interest is forfeited.—Smythe v. Allen, 67 M. 146, 6 So. 627.

(C) RIGHTS AND REMEDIES OF THIRD PERSONS.

§ 127. Privity with parties to usury in general.

(1850). Where A borrowed money at an usurious rate of interest, and B being his (A's) debtor on a valid contract, it was agreed between A, B and the lender, that B should substitute his note to the lender in the place of A's, which was done, and A's note given up to him, it was held that B could set up the usury in the loan to A, and was only liable on his substituted note to the lender, to the same extent A was liable on his original note, which was given for the usurious loan.—Coulter v. Robertson, 14 S. & M. 18.

§ 128. Assignees of usurious contract or security.

(1848). Usurious interest is an illegal consideration for a contract, and if an indorsee take a note with notice that it is affected by usury, he cannot recover, though the maker assured him before he took the note that he had no defense against it.—Torrey v. Grant, 10 S. & M. 89.

§ 130. Subsequent purchasers of incumbered property.

(1856). The purchaser of a tract of land upon which there is an incumbrance, to secure a debt due by his vendor, is not bound by his agreement to pay the balance due on the incumbrance, to pay more than is legally due, and hence, he can make the same defense as to usury that the vendee could have made.—McAllister v. Jerman, 32 M. 142.

(1881). A purchaser of an equity of redemption with notice of payments of usurious interest by the mortgagor, can, under Code 1871, § 2279, compel their appropriation to the principal in exoneration of his land.—Chaffe v. Wilson, 59 M. 42.

§ 131. Subsequent incumbrances.

(1885). A mortgagee may maintain a bill to show usury in a prior mortgage on the property, and this right exists even after foreclosure *in pais*, when each mortgagee purchases under his mortgage. So held in this case, it being shown that the property was insufficient in value to pay both debts, and the mortgagor being insolvent.—Boyd v. Warmack, 62 M. 536.

§ 133. Actions by or against third persons.

(1884). It is not competent, on collateral attack by third persons, to show that the debt upon which a judgment was rendered upon an office confession was usurious.—Black v. Pattison, 61 M. 599. This is changed. Such judgment, if tainted with usury or fraud, is void as to third persons. Code 1892, § 755.

II. PENALTIES AND FORFEITURES.

§ 146. Forfeiture of interest.

See *ante*, § 74.

(1843). The general usury laws of the state apply to banks and other corporations as well as to natural persons; and if there be nothing in the charter of the bank on this subject, besides a mere prohibition to it, to take interest in excess of a rate named, an usurious contract by it will not be wholly void, but as provided in the general law, will be void only as to the interest. The contract of loan, so far as the principal sum is concerned, being within the powers of the corporation, is good, notwithstanding the void and illegal excess, which may be separated from it. It is not like a contract made by a corporation foreign to its existence, as a contract of insurance by a bank and the like; for in such cases the contract is utterly void for want of power. Neither is the taking of usury *malum in se*, but only *malum prohibitum*; and hence, an usurious contract only is invalid to the extent prescribed by law.—Commercial Bank v. Nolan, 7 H. 508. Sharkey, C. J., in (1840) Planters' Bank v. Snodgrass, 4 H. 573, in a dissenting opinion, held the contrary of this, citing Bank of United States v. Owen, 2 Pet. 527.

(1854). Where more than legal interest has been reserved, notwithstanding any custom of a particular place fixing a higher rate, it is firmly settled that no more than the principal can be recovered.—Wallace v. Fouche, 27 M. 266.

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(1883). Payment in advance of the highest legal rate of interest is usury, which, under Code 1880, § 1141, works a forfeiture of all interest.—Polkinghorne v. Hendricks, 61 M. 366.

(1885). On so much of a usurious running account, as accrued after the Code of 1880, the holder of the note must lose not only the excess of interest over the legal rate, but all interest. (Code 1880, § 1141.)—Union Nat. Bank v. Fraser, 63 M. 231.

(1895). When interest is charged on a mere promise to lend money in the future and is carried into the loan afterwards made, and the borrower is, in addition, charged the highest legal rate on the money from the time advanced, the transaction is usurious, and the whole interest is forfeited under Code 1892, § 2348; and, if paid, the debtor may recover it by suit.—Hiller v. Ellis, 72 M. 701, 18 So. 95, 41 L. R. A. 707n.

(1905). A new contract for the payment of money, taken in lieu of an old one, when tainted with usury, is not enforceable for more than the unpaid principal of the original loan.—Armor v. Bank of London, 86 M. 658, 39 So. 17.

VACANCY.

Filling vacancy in office of justice of the peace, see JUSTICES OF THE PEACE, § 8.
In office, see OFFICERS, §§ 53–59.
In office by election of disqualified person, see OFFICERS, § 32.
In office of judge, see JUDGES, § 8.
In public office, see COUNTIES, § 65.
Office of clerk, see CLERKS OF COURTS, § 7.
Suspension of policy during vacancy of building, see INSURANCE, § 323.
Term of officer appointed to fill vacancy, see OFFICERS, § 59.

VACATING DECREES.

See EQUITY, § 430.

VACATION.

Actions of executor or administrator, see EXECUTORS AND ADMINISTRATORS, § 509.
Administrator's sale, see EXECUTORS AND ADMINISTRATORS, § 379.
Attachment, see ATTACHMENT, §§ 225–279.
Authority of judge to act on *quo warranto* in vacation, see QUO WARRANTO, § 27.
Award of arbitrators, see ARBITRATION AND AWARD, §§ 75–78.
Decree in equity, see EQUITY, §§ 419, 430.
Default judgment, see JUDGMENT, §§ 137–174.
Discharge of bankrupt, see BANKRUPTCY, § 417.
Entry of satisfaction of execution, see EXECUTION, § 357.
Execution sales, see EXECUTION, §§ 246–251.
Guardian's sale, see GUARDIAN AND WARD, § 104.
Injunction, see INJUNCTION, §§ 163–185.
Judgments, see JUDGMENT, §§ 66, 339–396.
Judgment or decree of foreclosure, see MORTGAGES, § 496.
Judicial sales, see JUDICIAL SALES, §§ 34–41.
Of judgment on appeal, see APPEAL AND ERROR, § 1185.
Order or decree for sale of property of deceased, see EXECUTORS AND ADMINISTRATORS, § 348.
Order made in vacation, see JUDGMENT, § 296.
Power to dissolve injunction during vacation, see INJUNCTION, § 164.
Probate of will, see WILLS, § 247.
Proceedings of court in vacation, see COURTS, § 69.
Process, see PROCESS, § 157.
Sale of property of deceased, see EXECUTORS AND ADMINISTRATORS, §§ 149, 380, 389.
Sale of property of infant, see GUARDIAN AND WARD, § 105.
Sale on foreclosure of mortgage, see MORTGAGES, § 369.
Signing bill of exceptions in vacation, see EXCEPTIONS, BILL OF, §§ 35–40.
Streets, see MUNICIPAL CORPORATIONS, § 657.
Tax sale or certificate, see TAXATION, §§ 689, 798.

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VAGRANCY.

This topic INCLUDES an idle, wandering, disorderly, or criminal mode or course of life, punishable as such, independent of any specific offense committed; and prosecution and punishment thereof.

It EXCLUDES vagrant children (see INFANTS); and punishment of habitual criminals, and successive convictions (see CRIMINAL LAW).

See cross-references for complete list of exclusions.

Analysis.

§ 1. Nature and elements of offenses.
§ 3. Evidence.
§ 4. Trial and review.

Cross-References.

Appeal from conviction, see CRIMINAL LAW, § 260.

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§ 1. Nature and elements of offenses.

(1909). In vagrancy, the offense consists in general worthlessness; that is to say, in being idle and though able to work, refusing to do so, and living without labor and on the charity of others.—Gavin v. State, 96 M. 377, 50 So. 498.

§ 3. Evidence.

(1894). Under Code 1892, § 1322 (Code 1880, § 2969), making keepers of houses of prostitution and common prostitutes punishable as vagrants, where it was shown that defendants, charged with being common prostitutes, had no other means of support, did not work, but habitually arrayed themselves in the evening and sat on front steps, or strolled on the street and solicited men, who went into the house with them, when the doors would be closed, together with evidence of other like acts, a conviction will not be disturbed. In such cases, direct proof of guilt is not required; it may be inferred from circumstances.—Peabody v. State, 72 M. 104, 17 So. 213.

§ 4. Trial and review.

(1892). One charged with vagrancy and required by a justice of the peace to give bond for good behavior or be committed to jail, under Code 1892, § 1323, may appeal to the circuit court.—Jones v. State, 70 M. 398, 12 So. 710.

VALUE.

Property replevied, see REPLEVIN, §§ 96, 106.

VALIDITY.

Bills and notes, see BILLS AND NOTES, §§ 100–114.
Deeds, see DEEDS, §§ 68–78.
Wills, see WILLS, §§ 69–202.

VALUATION.

Capital for purpose of taxation, see TAXATION, 377.
Property for assignment of dower, see DOWER, § 83.

VALUE.

Actions for value of goods sold, see SALES, §§ 340–366.
As element of larceny, see LARCENY, §§ 46, 59.
As limitation on jurisdiction, see APPEAL AND ERROR, §§ 45–65; COURTS, §§ 119–121; JUSTICES OF THE PEACE, §§ 41–44, 145.
Competency of expert witnesses on question, see EVIDENCE, § 543.
Evidence of value of condemned property, see EMINENT DOMAIN, § 199.
Expert testimony, see EVIDENCE, § 521.
Goods sold and misrepresented by seller, see SALES, § 40.
Hearsay evidence, see EVIDENCE, § 323.
Homestead, see HOMESTEAD, § 65.
Improvements, see EJECTMENT, § 145.
Judicial notice in criminal prosecution, see CRIMINAL LAW, § 304.
Misrepresentations of insured as to value of building, see INSURANCE, § 281.
Opinion evidence, see EVIDENCE, § 485.
Proof in action of detinue, see DETINUE, § 19.
Proof of value of attorneys' services, see ATTORNEY AND CLIENT, § 139.
Proof of value of stolen property, see LARCENY, § 46.
Property for assessment, see TAXATION, § 346.
Property insured, see INSURANCE, § 498.
Property obtained by false pretenses, see FALSE PRETENSES, § 32.
Recital in verdict in replevin, see REPLEVIN, § 96.
Relevancy of evidence of market price of property, see EVIDENCE, § 113.

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Relevancy of evidence of value of services, see EVIDENCE, § 112.
Taxation of property according to value, see MUNICIPAL CORPORATIONS, § 407.

VALUED POLICIES.

See INSURANCE, §§ 172–475, 500.

VARIANCE.

Between allegations and proof in equity, see EQUITY, § 327.
Between indictment and proof as to burglary, see BURGLARY, § 28.
Between indictment and proof as to person committing offense, see INDICTMENT, § 180.
Between indictment and proof as to time of offense, see INDICTMENT, § 176.
Between judgment and execution, see EXECUTION, § 100.
Between judgment and process pleadings, proofs, verdict or finding, see JUDGMENT, §§ 247–257.
Between judgment and writ of execution, see EXECUTION, § 84.
Between pleading and exhibit, see PLEADING, § 312.
Between pleading and proof in civil action, see JUSTICES OF THE PEACE, § 100.
Between pleading and proof in criminal prosecution, see INDICTMENT, § 170.
Between process and pleading, see ABATEMENT AND REVIVAL, § 31.
Between recognizance and *scire facias*, see SCIRE FACIAS, § 13.
Between *scire facias* and judgment *nisi*, see JUDGMENT, § 247.
Discretion of court as to vacation of judgment, see APPEAL AND ERROR, § 982.
Names in deed, see DEEDS, § 45.
Objections must be made in lower court, see APPEAL AND ERROR, § 197.
Objections to evidence on ground of variance, see PLEADING, § 430.
Pleadings and proof in civil actions, see PLEADING, §§ 373–392.
Timeliness of objection on ground of variance, see APPEAL AND ERROR, § 197.
Writs of an affidavit for attachment, see ATTACHMENT, § 156.

VEHICLES.

Negligence of driver imputed to occupant, see NEGLIGENCE, § 93.

VENDOR.

Competency as witness, see WITNESSES, § 91.

VENDOR AND PURCHASER.

This topic INCLUDES contracts for transfer of ownership of real property for a price in money or its equivalent, executory or executed; rights and liabilities of parties to such contracts in general; and remedies relating thereto.

It EXCLUDES transfers by way of exchange (see EXCHANGE OF PROPERTY); sales by or to particular classes of persons (see ALIENS; INFANTS; and other specific heads), or persons in representative or fiduciary relations (see GUARDIAN AND WARD; EXECUTORS AND ADMINISTRATORS; PRINCIPAL AND AGENT; BROKERS; TRUSTS; and other specific heads); sales of particular species of property (see PUBLIC LANDS, MINES AND MINERALS; HOMESTEAD; and other specific heads); sales in execution of powers in general (see POWERS); enforcement, by sale, of mortgages (see MORTGAGES); sales by assignees for benefit of creditors, receivers, &c. (see ASSIGNMENTS FOR BENEFIT OF CREDITORS; RECEIVERS); sales under judgments, decrees, and orders of court (see JUDICIAL SALES; INFANTS; GUARDIAN AND WARD; EXECUTORS AND ADMINISTRATORS; PARTITION), and under judicial process (see ATTACHMENT; EXECUTION; SHERIFFS AND CONSTABLES); sales for taxes (see TAXATION); requirements of statute of frauds (see FRAUDS, STATUTE OF); conveyances and merger of contracts therein (see DEEDS); reforming or compelling cancellation, surrender, &c., of contracts (see REFORMATION OF INSTRUMENTS; CANCELLATION OF INSTRUMENTS); compelling performance of contracts (see SPECIFIC PERFORMANCE); and subrogation to lien or other rights of vendor (see SUBROGATION).

See cross-references for complete list of exclusions.

Analysis.

I. Requisites and Validity of Contract.

§ 2. What law governs.
§ 4. Real property which may be subject of sale.
§ 8. —— After-acquired property.
§ 9. Parties.
§ 11. Participation in and relation to transaction.

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§ 12. Consideration.
§ 16. Offer to sell, and acceptance thereof.
§ 18. Options and exercise thereof.
§ 19. Oral contracts.
§ 20. Written contracts in general.
§ 27. Bonds for title or to convey.
§ 30. Validity of assent in general.
§ 31. Mistake.
§ 32. Misrepresentation and fraud by vendor.
§ 34. —— Quantity, boundaries, and location.
§ 35. —— Title, estate, or interest.
§ 36. —— Quality or value.
§ 37. —— Application of doctrine of caveat emptor.
§ 39. Illegality.
§ 42. Estoppel or waiver as to defects or objections.

II. Construction and Operation of Contract.
§ 49. Provisions of written contracts in general.
§ 53. Executory or executed contracts.
§ 54. Effect of executory contract on title to property.
§ 59. Construction as to parties.
§ 60. Subject matter.
§ 74. Time of performance and payment.
§ 77. —— Term of credit and deferred payments.
§ 78. —— Time as of the essence of the contract.
§ 80. Evidence to aid construction.

III. Modification or Rescission of Contract.
(A) By Agreement of Parties.
§ 84. Option to rescind.
§ 85. Agreement to rescind.
§ 87. Operation and effect.

(B) Rescission by Vendor.
§ 88. Right to rescind.
§ 90. —— Invalidity of contract.
§ 92. —— Breach of covenant or condition in general.
§ 95. Estoppel or waiver.
§ 96. Conditions precedent.
§ 98. —— Restoration of consideration.
§ 100. Time for rescission and laches.
§ 102. Acts constituting rescission.
§ 104. Actions for rescission.
§ 105. Operation and effect.

(C) Rescission by Purchaser.
§ 106. Right to rescind.
§ 108. —— Invalidity of contract.
§ 110. —— Breach of covenant or condition in general.
§ 112. —— Defect in title of vendor.
§ 114. Waiver or estoppel.
§ 115. Conditions precedent.
§ 117. —— Restoration of possession of land.
§ 119. Time for rescission, and laches.
§ 120. Election to rescind, and notice.
§ 121. Acts constituting rescission.
§ 123. Actions for rescission.
§ 123a. —— Persons entitled to file bill.
§ 123b. —— Pleading.
§ 123c. —— Evidence.

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§ 123d. —— Decree.
§ 124. Operation and effect.

IV. Performance of Contract.

(A) TITLE AND ESTATE OF VENDOR.
§ 129. Sufficiency of title in general.
§ 132. Sufficiency of record title.
§ 141. Objections to title.
§ 142. Effect of insufficiency.
§ 143. Waiver of defects and objections.
§ 144. Curing defects and perfecting title.

(B) CONVEYANCE.
§ 145. Obligation to convey in general.
§ 147. Demand.
§ 148. Tender.
§ 149. Sufficiency.
§ 153. —— Covenants.
§ 157. Delivery of possession of property.

(C) QUANTITY OF LAND AND APPURTENANCES.
§ 161. Specific quantity or measurement.
§ 165. Effect of deficiency.

(D) PAYMENT OF PURCHASE MONEY.
§ 170. Tender.
§ 173. Abatement or deductions.
§ 176. —— Deficiency in quantity of land.
§ 178. Mode and sufficiency of payment.
§ 186. Excuses for default or delay.
§ 187. Waiver of default or delay.

V. Rights and Liabilities of Parties.

(A) AS TO EACH OTHER.
§ 188. Nature of the relation.
§ 190. Acquisition or assertion of adverse title or claim.
§ 191. Possession or control of property.
§ 193. Trees and timber.
§ 198. Taxes and assessments.

(B) AS TO THIRD PERSONS IN GENERAL.
§ 212. Subsequent purchasers from vendor.
§ 213. Creditors of vendor.
§ 214. Assignees of contract or bond for title.
§ 219. Actions between vendor or purchaser and third persons.

(C) BONA FIDE PURCHASERS.
§ 220. Nature and grounds of protection in general.
§ 225. Notice.
§ 227. —— Actual notice.
§ 228. —— Effect of notice.
§ 229. —— Constructive notice, and facts putting on inquiry.
§ 230. —— Recitals in conveyance.
§ 231. —— Records.
§ 232. —— Possession.
§ 233. Failure to record deed or other instrument.
§ 234. Consideration.
§ 236. —— Payment of value.
§ 237. —— Pre-existing debt.
§ 238. Purchasers from *bona fide* purchaser.
§ 239. Title and rights acquired by *bona fide* purchasers and equities and defenses against them.

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§ 240. Pleading purchase in good faith.
§ 241. Evidence as to purchase in good faith.
§ 243. —— Admissibility.

VI. Remedies of Vendor.

(A) LIEN AND RECOVERY OF LAND.

§ 246. Nature of lien in general.
§ 251. Creation of lien in general.
§ 253. Lien reserved in contract or conveyance.
§ 254. Equitable lien.
§ 254a. —— Under bond for title.
§ 254b. —— Duration.
§ 257. Operation and effect of lien in general.
§ 259. Property or interest subject to lien.
§ 260. Priority of lien.
§ 261. Assignment of lien or claim for purchase money.
§ 262. Transfer of property by purchaser.
§ 266. Waiver, loss, or discharge of lien.
§ 266a. —— By taking security.
§ 266b. —— By executing conveyance.
§ 266c. —— Persons entitled to assert.
§ 267. Payment, release, or satisfaction of lien.
§ 268. Enforcement of lien.
§ 272. —— Restraining enforcement.
§ 273. —— Conditions precedent.
§ 274. —— Defenses.
§ 275. —— Persons entitled to enforce.
§ 278. —— Time to sue, limitations, and laches.
§ 279. —— Parties.
§ 280. —— Pleading.
§ 281. —— Evidence.
§ 282. —— Injunction.
§ 284. —— Trial or hearing.
§ 285. —— Judgment or decree.
§ 287. —— Sale.
§ 292. —— Proceeds and surplus.
§ 294. —— Fees and costs.
§ 295. —— Operation and effect.
§ 296. Right to recover possession in general.
§ 298. Summary remedies for recovery of possession.
§ 299. Actions for recovery of possession.

(B) ACTIONS FOR PURCHASE MONEY.

§ 301. Nature and form.
§ 303. Conditions precedent.
§ 304. Defenses.
§ 307. —— Breach of covenant or condition in general.
§ 308. —— Defect in title of vendor.
§ 308a. —— Conditions precedent to raising defense.
§ 309. —— Defect in quantity or quality of land.
§ 310. —— Set-off and counterclaim.
§ 314. Pleading.
§ 315. Evidence.
§ 317. Trial.
§ 319. Appeal and error.

(C) ACTIONS FOR DAMAGES.

§ 322. Right of action.
§ 324. Defenses.

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VII. Remedies of Purchaser.

(A) Recovery of Purchase Money Paid.

§ 334. Grounds for recovery of payments.

§ 337. Lien for purchase money and value of improvements and enforcement thereof.

§ 339. Conditions precedent.

(B) Actions for Breach of Contract.

§ 342. Nature and form.

§ 343. Right of action.

§ 344. Conditions precedent.

§ 345. Defenses.

§ 349. Pleading.

§ 351. Damages.

§ 352. Trial.

Cross-References.

Adverse possession, see Adverse Possession, § 69.

Bond for deed as color of title, see Adverse Possession, § 72.

Breach of oral agreement as creating a constructive trust, see Trusts, § 98.

Conclusion by judgment, see Judgment, § 682.

Conditional sale distinguished from mortgage, see Mortgages, § 6.

Contracts between husband and wife for conveyance of real property, see Husband and Wife, § 46.

Contracts for conveyance of real property between husband and wife, see Husband and Wife, § 46.

Contracts of infants for sale of realty, see Infants, § 25.

Contract of purchase construed as contract of lease, see Landlord and Tenant, § 9.

Conveyances and contracts to convey separate estate, see Husband and Wife, §§ 179–202.

Conveyances by corporations, see Corporations, § 439.

Covenants, see Covenants.

Damages for breach of covenant, see Covenants, § 123.

Damages for breach of covenant of warranty, see Covenants, § 130.

Double taxation as between vendor and purchaser, see Taxation, § 47.

Estoppel by permitting sale of property, see Estoppel, § 94.

Exchange of real property, see Exchange of Property, §§ 2–5.

Extinguishment of lien when debt barred, see Limitation of Actions, § 167.

Hostility as between, see Adverse Possession, § 63.

Implied authority of agent, see Principal and Agent, § 103.

Injunction to restrain collection for deficiency in quantity of land sold, see Injunction, § 36.

Liability of interest of vendee to execution, see Execution, § 33.

Liability of wife's separate estate for purchase money, see Husband and Wife, § 148.

Modification or rescission of contract for exchange of property, see Exchange of Property, § 5.

Mortgagees as *bona fide* purchasers, see Mortgages, §§ 152–155.

Necessity for appointment of administrator on death of vendee, see Executors and Administrators, § 3.

Oral agreements for sale of interest in lands, see Frauds, Statute of, § 71.

Part performance of contract of sale to satisfy statute of fraud, see Frauds, Statute of, § 129.

Power of attorney to sell land, see Principal and Agent, § 10.

Power of supervisors to sell public property, see Counties, § 110.

Priority between judgment and vendor's liens, see Judgment, § 785.

Priority between mechanics' and vendors' liens, see Mechanics' Liens, § 199.

Priority of mortgage for purchase money, see Mortgages, § 158.

Priority of widow's dower, see Dower, § 23.

Promise to reduce contract to writing, see Frauds, Statute of, § 126.

Purchase money mortgages, see Mortgages, § 115.

Rights and liabilities of purchasers as to party walls, see Party Walls, § 9.

Rights and liabilities of purchasers of separate estate, see Husband and Wife, § 202.

Sale and conveyance of internal improvement land grant, see Public Lands, § 66.

Sale and conveyance of ward's property under order of court, see Guardian and Ward, §§ 76–115.

Sale and conveyance of sixteenth section lands, see Public Lands, § 54.

Sale and conveyance of standing timber, see Logs and Logging, § 3.

Sale and conveyance of swamp lands by the state, see Public Lands, § 61.

Sale and conveyance of timber lands, see Logs and Logging, § 2.

Sale by life tenant, see Life Estates, § 23.

Sale by tenant in common, see Tenancy in Common, § 35.

Sale of homestead, see Homestead, § 112.

Sale of land at auction, see Frauds, Statute of, § 77.

Sale of real property by executor or administrator, see Executors and Administrators, § 136.

Sale of ward's property, see Guardian and Ward, §§ 40, 42.

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Sale or other disposition of municipal property, see MUNICIPAL CORPORATIONS, § 225.
Sale subject to dower, see DOWER, § 34.
Subrogation of purchasers of incumbered property, see SUBROGATION, §§ 13–16.
Specific performance of contract, see SPECIFIC PERFORMANCE, §§ 63–66.
Sufficiency of performance of covenants, see COVENANTS, § 91.
Title bond as evidence, see EJECTMENT, § 90.
Title bond subject to execution, see EXECUTION, § 33.
Title to fixtures as between, see FIXTURES, § 21.
Trust relation pending close of transaction, see TRUSTS, § 63¾.
Vendor's lien as defense to ejectment, see EJECTMENT, § 26.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 2. What law governs.

(1851). When land lying in Louisiana is sold in this state, and the notes taken for the purchase money are payable here, in a suit on these notes against the vendee, who resisted collection on the ground of a failure of title, it was held that the title to the land was to be adjudicated by the *lex rei sitæ*, and if by that law it was bad, then the defense of failure of consideration was to be regulated by the law of this state.—Glenn v. Thistle, 23 M. 42.

(1888). It cannot be doubted that title to, or interest in, land must be made and acquired according to the *lex rei sitæ*, and that each state or county may prescribe the manner in which title to real estate situate in its jurisdiction shall pass.—Sims v. Walden, 3 So. 457, not officially reported.

§ 4. Real property which may be subject of sale.

(1852). Where a part of the land sold is in the adverse possession of another, the sale is void as to that part.—Phipps v. Tarpley, 24 M. 597.

§ 8. —— After-acquired property.

(1839–43). It is now a well settled doctrine that even a mere possibility clothed with an interest in real estate may be made the subject of contract which a court in equity will enforce.—Anderson v. Lewis, Freem. Ch. 178.

(1854). A party who has an inchoate interest in public land, by donation from Spain, may sell the same; and if title be confirmed, it will inure to his vendee; and if such sale is not a mere quitclaim, but is intended as a valid and sufficient sale, it will prevent the vendor, or his heirs, from afterwards acquiring a title to the land adverse to the vendee.—Nixon v. Carco, 28 M. 414.

§ 9. Parties.

(1853). Where there is no vendee there is no sale, and a sale, alleged in a pleading to have been made to ——, will be treated by the court as non-existent.—Dennistoun v. Potts, 26 M. 13.

§ 11. Participation in and relation to transaction.

(1879). The releasor of any interest in land is a vendor to the extent of his interest. —Fry v. Prewett, 56 M. 783.

§ 12. Consideration.

(1852). The vendor and vendee of land situated in a town may lawfully stipulate for certain improvements to be made by the vendee in a specified time on the lot sold; and in case of failure to make the improvements, that an additional sum shall be paid by the vendee to the vendor for purchase money, and for liquidated damages. The interest which the vendor has in his remaining property would alone be a sufficient consideration for a stipulation to improve that which was sold.—Brewer v. Bessinger, 25 M. 86.

§ 16. Offer to sell, and acceptance thereof.

(1895). A written agreement for the sale of land is enforceable against the vendor who signed it, though neither the agreement nor any contract to pay the price was signed by the vendee, where such vendee afterward offers in writing to perform the contract. The offer makes the contract mutual, and it cannot be said there is a want of consideration. (Catlett v. Bacon, 33 M. 269, explained.)—Peevey v. Haughton, 72 M. 918, 17 So. 378, 18 So. 357, 48 Am. St. 592.

(1906). A letter from the complainant to the defendant read as follows: "We will withdraw (certain land) from the market until January 1, 1904, during which time you may send your men to look it over and if at the expiration of the time * * * you desire to take this land, we will sell you eight-ninths and give you warranty deed on the same at the rate of $20 per acre and in the meantime we will try to get the consent of the parties holding the other one-ninth at the same price but will not guaranty their consent." *Held*, to constitute a mere offer without consideration to sell the land and not an option and, in consequence, to be revocable by the complainant at any time before its acceptance by the defendant.—Comstock v. North, 88 M. 754, 41 So. 374.

§ 18. Options and exercise thereof.

(1903). A contract to convey a strip of land across certain sections along a railroad, 100 feet wide on either side of the track, as surveyed, located and staked, at any time within two years from date, when requested by the railroad company and upon the payment of a stipulated sum, is merely an option and does not convey any interest.—Louisville &c. R. Co. v. Gulf of Mexico Land &c. Co., 82 M. 180, 33 So. 845, 100 Am. St. 627.

(1903). The advance of a part of the consideration of a parol sale of land will not support a subsequent option in writing be-

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tween the parties naming a different consideration which was never paid.—Stigler v. Jaap, 83 M. 351, 35 So. 948.

(1906). A sufficient consideration is essential to the validity of a contract for an option.—Comstock v. North, 88 M. 754, 41 So. 374.

(1906). The complainants wrote the defendant that they would withdraw certain land from the market until a specified date, during which time the defendant might send his agents to examine it, and if at the expiration of a stated time, the defendant decided to take the land, the complainants would sell him a portion thereof at a price mentioned. The defendant thereupon incurred considerable expense in examining the land for the purpose of informing himself as to whether or not it would be a desirable purchase and he thereafter communicated the information by him so acquired to the complainants. *Held*, that the actions of the defendant which were entirely voluntary and for his personal benefit did not constitute a consideration upholding the letter which imposed no such condition as a contract for an option.—Comstock v. North, 88 M. 754, 41 So. 374.

(1911). Where the consideration for an option is the performance of certain acts, until the same are performed, the promise to convey is not binding upon the promisor and is revocable at his pleasure; but when acts designated are performed, the consideration arises and the promise to convey then becomes irrevocable.—Smith v. Cauthen, — M. —, 54 So. 844.

§ 19. Oral contracts.

(1849). An agreement to convey lands must be construed according to the terms used in it; it is not subject to be varied by parol; nor can an agreement be partly in writing and partly in parol. But this rule does not prevent a party to a written agreement from waiving provisions of such agreement by parol, so far as to enable the other party to the contract to defend on the ground of a waiver.—Stone v. Buckner, 12 S. & M. 73.

(1857). A parol agreement for the sale of land, is not a sufficient consideration to support a contract. For this reason, where a debtor, without the creditor's signing the same, executed a deed in trust on land belonging to his creditor in which it was recited, that upon payment of the debt the creditor was to convey the land to him; it was held that the deed was void, and that an agreement of a third party to pay the debt thus attempted to be secured, in consideration that the debtor should convey to him the land embraced in the deed, was also void.—Catlett v. Bacon, 33 M. 269.

(1879). Where a vendee goes into possession of land under a parol contract of purchase, with the agreement that if he fails to pay the purchase money at the end of the year, he will pay a stipulated rent, the contract is void as a contract of purchase.—Vick v. Ayers, 56 M. 670.

(1880). To entitle a vendee by parol (who fails to obtain from the vendor what his agreement induced him to expect) to recover for loss caused by the fraud of the vendor, in refusing to consummate the sale, the case must be such as would sustain an action for deceit.—Cain v. Kelly, 57 M. 830.

(1882). Where land is sold by title bond and a third person receives from the vendor a conveyance of the legal title under a verbal contract, stipulating that he shall stand as substituted vendor, the contract providing for interest greater than ten per cent., the maximum legal rate, equity, in enforcing the contract, will treat it as in writing and allow ten per cent.—Martin v. Kelly, 59 M. 652.

§ 20. Written contracts in general.

(1839–43). Every contract for the conveyance of land must define its identity and fix its locality or there must be such a description of the land that parol evidence will readily point to its locality and boundaries.—Wilkinson v. Davis, Freem. Ch. 53.

(1866). A contract to convey "the land in the town of B., on which the college is erected," is not void for uncertainty in the description of the land, parol evidence being admissible to show what land the college was located on.—Whitworth v. Harris, 40 M. 483.

(1879). A writing in relation to land described as "my land, the entire tract, 728 acres," without further designation or location, is void because of the patent ambiguity in the description.—Barnett v. Nichols, 56 M. 622.

(1904). A contract for the sale of the "tract of land adjoining section nine, and known as the Phil Allen place, containing eighty acres, more or less," does not contain a patent ambiguity, and is not void for uncertainty where it can, by extrinsic evidence, be shown with certainty what land such place embraced.—Raines v. Baird, 84 M. 807, 37 So. 458.

§ 27. Bonds for title or to convey.

(1843). The taking a bond for title implies either that the title is imperfect and time is required to perfect it, or else that the vendor retains the title for his own security.—Hall v. Thompson, 1 S. & M. 443.

(1845). The retention of title by the vendor upon a sale is in effect the same thing as conveying the title and taking a security by mortgage.—Tanner v. Hicks, 4 S. & M. 294.

(1875). A sale of land by means of a bond for title creates between the vendor and vendee a relation similar to that of mortgagor and mortgagee. The retention of the legal title by the vendor operates as an equitable mortgage. The debt is the princi-

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pal, the mortgage is the incident, and the vendor cannot assign any interest in the land except by assignment of the debt.—Strickland v. Kirk, 51 M. 795.

(1881). A bond for title to land containing the following description: "A certain lot of land in said county described as follows, to wit: Lot No. 1 on the east side and fronting the public road from Randall's store to Scranton, on which the said Freeman Jones has recently erected a dwelling house in which he now resides," is not void for uncertainty of description.—Payne v. Jones, 2 Miss. Dec. 183.

(1882). A bond for title is not a conveyance of the land but a mere contract to convey upon a certain contingency, usually the payment of the purchase money. The duty of the obligor and the right of the obligee are correlative and the bond is the measure of both.—Bacon v. Howell, 60 M. 362.

§ 30. Validity of assent in general.

(1848). Weakness of mind, short of legal incapacity, unconnected with fraud in the opposite party, is no ground to set aside a contract for the purchase of land; yet when combined with other circumstances, it is an important consideration, and has a material influence upon the validity of the contract.—Liddell v. Sims, 9 S. & M. 596.

§ 31. Mistake.

(1824). The vendee was in possession of land which the vendor represented as within a survey belonging to him. The vendor threatened to oust the vendee unless he purchased his interest, which the vendee did. It afterwards appeared that the land did not belong to the vendor. *Held*, that the vendee was entitled to a rescission, and to recover back the purchase money, upon the ground of mutual error of the parties as to the ownership; and this, though the vendee had purchased the land from the United States for one-half the purchase money he had paid to the vendor.—Harrison v. Stowers, W. 165.

(1843). Where one of the boundary lines of the tract was pointed out by the vendor, and a statement made that it was an "open" or unsurveyed line, and that its precise location was not known, this must be considered as a statement of opinion as to the boundary, and a mistake in it by which twenty-five acres of good land, which the vendee thought he was getting, was lost, though the whole quantity of good land was not decreased, is so immaterial, besides being a.so a matter of opinion, as not to justify a rescission.—Halls v. Thompson, 1 S. & M. 443.

(1849). Where a purchaser of the whole interest from one of two tenants in common knows at the time that the vendor has only a half interest, and is incompetent to convey the whole, except by consent of the other tenant, and the latter refuse to convey, then the agreement is to be considered as made by mistake.—Stone v. Buckner, 12 S. & M. 73.

§ 32. Misrepresentation and fraud by vendor.

See *post*, § 108.

The vendor who makes a statement which he knows to be untrue, is guilty of direct fraud, if the vendee be thereby deceived to his prejudice; and if he make a statement without knowing it to be true or false, but believing it to be true and it turns out to be untrue, this is a fraud in law, and he must make his statements good.—(1840) Parham v. Randolph, 4 H. 435, 35 Am. Dec. 403; (1841) Davidson v. Moss, 5 H. 673; (1843) Halls v. Thompson, 1 S. & M. 443; (1848) Gilpin v. Smith, 11 S. & M. 109; (1850) Clopton v. Cozart, 13 S. & M. 363; (1852) English v. Benedict, 25 M. 167; (1854) Oswald v. McGehee, 28 M. 340; (1857) Lindsey v. Lindsey, 34 M. 432.

(1843). A misrepresentation about a mere matter of judgment is no ground for relief.—Hall v. Thompson, 1 S. & M. 443.

(1844). As a general rule, when the vendor of land makes representations of material facts concerning the same, upon which another is induced to enter into a contract of purchase, the vendor is bound to make those representations good.—Mississippi Union Bank v. Wilkinson, 5 S. & M. 78.

(1870). A vendor who makes statements which he knows to be untrue, is guilty of a direct fraud on a vendee who is thereby deceived to his prejudice, and if he makes statements without knowing whether they are true or false, he is guilty of a fraud in law, and must make his statements good; and whether the party making a representation of a material fact, knew it to be false, or made it without knowing it to be true or false, is wholly immaterial. The affirmation of what is not known to be true, is equally unjustifiable with the affirmation of a positive known falsehood, and even the innocent misrepresentation of a material fact, is equally conclusive, for it is a surprise and imposition upon the other party.—Davis v. Heard, 44 M. 50.

§ 34. —— Quantity, boundaries, and location.

(1843). A vendor about to sell a tract of land pointed out to the vendee the probable western boundary, which had no marks to designate it, but was an "open line," and its definite position was not certainly known; after the purchase, upon a survey of the line, it was found farther east than was represented, cutting off twenty-five acres that the vendee thought he was buying, without however, diminishing the number of acres contracted for, or their quality. *Held*, it was not such misrepresentation as would entitle the vendee to cancel the contract. Such relief might be granted the vendee had the deception been gross.—Hall v. Thompson, 1 S. & M. 443.

(1844). Where the assignor of title bonds made to his assignee the representations of his own assignor as to the quantity of land embraced by them without in any way vouch-

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ing for the correctness of such representations, it was held that this was not fraudulent conduct and would not authorize a rescission of the contract.—Mississippi Union Bank v. Wilkinson, 3 S. & M. 78.

(1870). The vendee, who was a non-resident, bought lands in this state from the vendor, for which he gave three notes; the first note being paid at maturity. The vendee, being a stranger, relied on the representations of the vendor as to the title and boundaries, which afterwards turned out to be untrue. The lines shown by the vendor comprehended valuable land, which did not belong to the tract, including certain rich bottom land, which was well timbered, and excluding the lands so falsely represented to be in the tract, there was an insufficiency of timber left, and the tract was greatly depreciated by the exclusion. *Held*, that the vendee was entitled to a rescission.—Davis v. Heard, 44 M. 50.

§ 35. —— Title, estate, or interest.

Where there is a fraudulent misrepresentation as to the title of a part of the thing sold, if the part thus lost be essential to the perfect enjoyment of the remainder, in the manner intended, the contract will be rescinded. And in such a case it is not the quantity lost so much as its importance on the whole contract that is to be considered. —(1840) Parham v. Randolph, 4 H. 435, 35 Am. Dec. 403; (1870) Davis v. Heard, 44 M. 50.

(1841). When the subject of the representation or concealment is not equally open to the observation of both parties, and the vendee has not equal means of knowledge with the vendor, the latter is bound by the principles of good faith and common honesty to state nothing but what is true, and to conceal no material fact connected with the condition of the article. And if there be an intentional concealment of such material fact in cases where both parties have not equal means of information, it will be deemed fraudulent, and avoid the contract. And if the vendor sell an estate, knowing that he has no title, or that there are incumbrances on it, of which the vendee is ignorant, and he suppress such material fact, the vendee may compel a rescission of the contract; for the purchaser necessarily reposes a trust and confidence in the vendor, that no such defect exists.—Davidson v. Moss, 5 H. 673.

(1841). The vendor represented his title to be good, but there was an outstanding title in favor of his wife and children, which he did not mention. The vendor filed a bill on other grounds for a rescission, and afterwards discovered that incumbrance, and then filed an amended bill, seeking a rescission on the ground of a fraudulent concealment of that incumbrance. The vendor denied the fraud, stating that having been informed that the title was good, he forgot to mention the claim of his wife and children; but so soon as his attention was called to the matter, he procured a release from his wife and children, and tendered it to the vendee. It was not shown that the vendee had ever been injured by the incumbrance in any way. *Held*, that though the conduct of the vendor was fraudulent, yet it was without damage, and that as the title was completed in a reasonable time, the contract would not be rescinded.—Davidson v. Moss, 5 H. 673.

(1846). Where the vendor fully declares the nature of his title, and that there is an adverse claim, his confident expression of the opinion that his title is good, would not be such a misrepresentation in case he was mistaken as would be deemed fraudulent.—Vick v. Percy, 7 S. & M. 256, 45 Am. Dec. 303.

(1850). A vendor who represents that he is the purchaser of another's interest in land at a sale made under execution, and contracts to sell that interest by quitclaim deed, is guilty of a fraud, if, in stating the circumstances under which the sheriff made a deed to the land, to a third party, instead of the vendor, who was the highest bidder, he concealed the facts which make the transfer of his bid invalid; and if in such case the vendee can get nothing by virtue of the deed being so made, he will be entitled to a rescission.—Endicott v. Penny, 14 S. & M. 144.

(1860). The vendor had a tax title only, and so stated to the vendee, who consulted a lawyer about its validity, and was informed that it was good if the law had been complied with in making the sale. When the trade was being made, the vendee stated to vendor he would "rely upon his word about it," and vendor replied, his "title was as good as any man's, and if not he would make it so, and if the vendee found a better owner than he was, he would cancel papers without any law about it." *Held*, that the tax title being shown to be void, though without any proceedings threatened for eviction, the vendor was bound by his representation, and vendee was entitled to a rescission.—Rimer v. Dugan, 39 M. 477, 77 Am. Dec. 687.

(1886). Equity will not enforce payment of notes given for land if the vendee shows that the vendor intentionally concealed facts not of record, as to his title, which cast a cloud thereon, if the vendee has not waived objection therefor, even though such concealment may not have been made with fraudulent intent.—Watson v. Austin, 63 M. 469. See (1880) Evans v. Forstall, 58 M. 30.

§ 36. —— Quality or value.

(1844). The trustees of a small village promised in their public advertisement giving notice of the sale of lots in it, at auction, that they would build a male and female academy therein. They failed to do so, whereby the lots became worthless. *Held*, that this failure constituted a failure of consideration as to the purchasers of the lots, and they were not bound to pay for the lots purchased by them.—Brewer v. Harris, 2 S. & M. 84, 41 Am. Dec. 587.

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(1844). If the vendor of a lot in a small village represent to the purchaser that the Methodist Conference had determined to build a college there, and would build it, and the vendee, relying on the representation, make the purchase; and if the representations be untrue, and no college be built, the vendee cannot be compelled to pay the purchase money.—Ellis v. Martin, 2 S. & M. 187.

(1848). The vendor, in selling a tract of 1,200 acres of land, represented to the vendee that a particular eighth, on which was a very fine spring, situated near the dwelling house, was a part of the tract, after having been informed by the vendee that he would not purchase unless he could get a good spring of water. There was no other spring on the tract, and the eighth on which the spring was located was not a part of it, though sold as such. *Held*, that the vendee was entitled to a rescission upon discovering that the land on which the spring was located was not a part of the tract, whether the vendor knew of his want of title to it or not.—Gilpin v. Smith, 11 S. & M. 109.

(1854). The vendor represented that the land sold, which was near a river, was not subject to overflow only from extraordinary freshets, and then only through a bayou, and that the overflow remained only a few days, and that the land was "good land for farming." This statement was false and fraudulent, the land overflowing generally every year, whereby it was nearly useless for farming. The vendee was a stranger and trusted to the statement of the vendor, the examination being made at that season of the year when it was impossible to detect the falsity of the statement. *Held*, that the vendee was entitled to a rescission, and also that the above statement, though not made directly to vendee, but to another in his presence during the progress of the trade, was as fraudulent as if made to vendee himself.—Alexander v. Beresford, 27 M. 747, 61 Am. Dec. 538.

(1854). In this case the vendor represented that there was no coco grass on the estate sold, except in the garden and in one of the negro patches, and that it might be in some other spot, but he did not know it. It was, in fact, on the estate in many other places, and to such an extent as materially to reduce the value of the estate. The vendor, in answer to a bill to rescind, stated that he did not know of its existence beyond what he had stated. It was shown that the vendee rode over the plantation twice, but this was done with a view to ascertain how much it was worn, and not with a view to ascertain the extent of the coco grass, and that he relied on the representations of the vendor as to that. It was also shown that he examined the estate only during very cold weather, in winter, which rendered it impossible to discover the extent of the grass without a very minute examination, though ordinarily it was easily discoverable. It was further shown, that the vendor resided four or five miles from the estate, and cultivated it, and that he frequently visited it, and that he was a shrewd and attentive man to business, and that the existence of the grass on the estate to a larger extent than represented was notorious in the neighborhood. The court held that the vendor knew of the extent of the grass; that his statement was false; that vendee relied on it, and had no sufficient opportunity to detect its falsehood, and that the contract should be rescinded.—Oswald v. McGehee, 28 M. 340.

(1876). If the vendor is advised of the use to which the land is to be put, and warrants its adaptability therefor, he may fairly be held responsible for the damages consequent upon its unfitness. If he is guilty of fraud, the damages take a wider range than if his conduct had been honest.—Estell v. Myers, 54 M. 174.

(1876). Where a vendee of land, unacquainted with the surroundings, relies upon the declarations of the vendor, based upon long residence and observation, as to the comparative danger of overflow, the direction the water thereon will take and the like, and does not rely upon his own judgment, such declarations, if they are material and actually misled him, may be treated as inducements to the contract and as warranties, even though they were not knowingly false or made with fraudulent intent.—Estell v. Myers, 54 M. 174.

§ 37. —— Application of doctrine of caveat emptor.

(1837). A purchaser without covenants takes the risk of the title.—Smith v. Winston, 2 H. 601.

(1839-43). Where a party buys land and takes no covenants for title and there is no fraud, he has no relief at law or in equity even on a total failure of title.—Williamson v. Raney, Freem. Ch. 112.

Where the subject matter of representations is not equally open to the observation of both parties, or the vendee has not equal means of knowledge with the vendor, the latter is bound to state nothing but what is true, and to conceal no material fact connected with the condition of the estate sold. —(1840) Anderson v. Burnett, 5 H. 165, 35 Am. Dec. 425; (1841) Davidson v. Moss, 5 H. 673.

(1840). False representations in relation to the quality of the thing sold, are not fraudulent unless they deceive, and hence, are no ground of defense to the buyer if he knew the true condition of the thing sold, or the defect was so patent that it must have been discovered by prudent attention. Thus where, in an advertisement of town lots for sale, the town was represented, contrary to the fact, to be situated at the head of navigation of the river on which it was situated, and the vendee was well acquainted with that section of the country and the river, it was held that the false representation was not fraudulent.—Anderson v. Burnett, 5 H. 165, 35 Am. Dec. 425.

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(1840). Where there has been a false representation as to title, it is no answer to it to say that the outstanding title was on record, and might have been discovered by the vendee.—Parham v. Randolph, 4 H. 435, 35 Am. Dec. 403.

Fraud cannot be predicated of a representation in relation to a matter of a public and notorious character, as the situation and prospects of a town, which were open to the examination of the vendee; and if such representations are exaggerated, they are no ground for a rescission of the contract.—(1842) Bell v. Henderson, 6 H. 311; (1849) Anderson v. Hill, 12 S. & M. 679, 51 Am. Dec. 130.

(1843). As a general rule, the vendor must make every important disclosure of which the vendee is ignorant; but this rule is subject to some qualification, by limiting it to cases where there is an obligation to communicate the facts, or where there is a peculiar relation of trust and confidence between the vendor and vendee, which will justify the presumption that there has been undue concealment. This obligation to communicate ceases whenever there is an opportunity to the vendee to examine, and he does examine, and does not rely upon the statement of the vendor. It is not the mere opportunity of examination, but the examination itself, which relieves the vendor of the duty of making the disclosure. An examination shows that the vendee trusted to his own judgment and not to the statements of the vendor, and he is presumed to have discovered patent defects. The opportunity to examine and the failure to do so, shows he trusted to the statements of the vendor.—Hall v. Thompson, 1 S. & M. 443. See also (1844) Ayres v. Mitchell, 3 S. & M. 683.

(1843). Want of notice protects a purchaser against a latent equity only and not against the legal title. In the latter case the maxim *caveat emptor* applies.—Jenkins v. Bodley, Sm. & M. Ch. 338.

(1844). If the facts are unknown to either the vendor or the vendee, and each has an equal opportunity of ascertaining them, and representations concerning the land involved be not fraudulently made, the contract for the sale thereof will not be rescinded, even though the representations turn out to be untrue.—Mississippi Union Bank v. Wilkinson, 5 S. & M. 78.

(1853). Notice given to the agent whilst purchasing property, though sufficient to bind the principal as to all controversies connected with the rights of third persons which are affected by the purchase, is not to be treated as actual knowledge on the part of the principal (when he was in fact ignorant), so as to bind his conscience and make it his duty to communicate it where he makes by himself a future sale of the same property to another.—Ross v. Houston, 25 M. 591, 59 Am. Dec. 231.

(1853). Where the only notice that a purchaser has of a previous executory agreement by the vendor to sell the land to another is the statement of the vendor, who at the same time told him that the sale had been rescinded, he will be justified in acting on the statement as if the whole were true, the land being wild and unoccupied.—Curtis v. Blair, 26 M. 309, 59 Am. Dec. 257.

(1854). Although the purchaser may by close inspection detect a vice in the thing sold, yet if the vendor makes representations upon which the vendee relies, and which prevent him from making a proper examination and which prove to be unfounded, it is good ground to avoid the contract. In the absence of all representations of the vendor, the purchaser is held to strict diligence in examining and judging for himself; but where representations are made as to doubtful matters, material in the transaction, the purchaser may protect himself by relying on the good faith of the vendor, and in breach of that, he will not be bound by the contract.—Oswald v. McGehee, 28 M. 340.

(1860). Where one party to a contract knows that the other trusts to his representations, and not to his own judgment, in relation to a matter material to the contract, it makes no difference, if the representations be false, whether the party making them knew their falsity or not. In either case, he is bound to make the representations good.—Rimer v. Dugan, 39 M. 477.

(1870). Whatever puts a party on inquiry, is notice of whatever that inquiry, conducted with reasonable and ordinary diligence, would lead to knowledge of, and it is the duty of the purchaser to make the inquiry.—Parker v. Foy, 43 M. 260, 5 Am. Rep. 484.

(1886). Where the vendee sends an agent, and afterwards goes himself to examine land, he cannot, after his purchase thereof, rescind the same because of fraudulent misrepresentations of the vendor as to the character and location of the land, the truth as to which the most cursory examination would have disclosed.—Watson v. Austin, 63 M. 469.

§ 39. Illegality.

(1874). Where a vendee of land agrees to pay for the same when the first car of a projected railway then being constructed shall run through any part of the county, the contingency stated does not make the transaction a wagering or gambling contract.—Kimbrough v. Curtis, 50 M. 117.

§ 42. Estoppel or waiver as to defects or objections.

(1843). When a party having knowledge that he has been defrauded proceeds to do acts in confirmation of his contract by voluntarily entering into a new engagement concerning it, he will be held thereby to have waived the fraud and to have renounced that relief which he might otherwise have had in equity.—Pintard v. Martin, Sm. & M. Ch. 126.

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(1846). It is well settled, that if a party has knowledge that he has been defrauded, and subsequently confirms the original contract by making new agreements and engagements respecting it, he thereby waives the fraud and abandons his claim for relief. Hence, where a vendee was defrauded in the sale, both as to the quality and the title of the land sold to him, and he commenced an action on the title bond and then submitted the matter to arbitrators, who could not agree, and he then agreed with vendor that they should divide the difference in the amount which separated the arbitrators, and in pursuance thereof gave a new note and dismissed his action on the title bond, it was held that he had waived the original fraud, and was not entitled to relief on that account.—Edwards v. Roberts, 7 S. & M. 544.

(1868). If a party, with a knowledge that he has been defrauded, make new engagements, in affirmance of the original contract, he thereby waives the fraud, and loses his claim to relief.—Hanson v. Field, 41 M. 712.

(1868). The vendor sold land to the vendee and alleged that the vendee's conduct was fraudulent in this, that the vendee represented he had a claim against the United States government, and would get the money thereon soon, and would then pay for the land; it being understood that the sale was for cash, as the vendor wanted the money to go into business; that the vendee when he came to get possession, still represented that he would get the money in a few days, and that the vendor, relying thereon, made a deed and surrendered possession, and took from the vendee a note for the balance of the purchase money, payable out of the vendee's interest in the proceeds of a saw-mill; that the vendor objected to receiving this, but the vendee said he would make it all right. *Held*, that as it was not shown that the vendor did not understand the contents of the note given when he made a deed, the taking of it was a waiver of the previous fraud of the vendee about making the payment.—Hanson v. Field, 41 M. 712.

II. CONSTRUCTION AND OPERATION OF CONTRACT.

§ 49. Provisions of written contracts in general.

(1848). Technical rules are not so much to be considered in the construction of contracts as the real meaning of the parties, where it can be gathered from the whole instrument. The words are to be construed in that sense in which they were most probably understood by the promisee, and that construction should be favored which is obviously most just. Hence, a covenant by vendor to make a good and perfect deed should be construed to mean a covenant to make a good title, and not merely a good parchment deed.—Greenwood v. Ligon, 10 S. & M. 615, 48 Am. Dec. 775.

(1868). A grantor is one who gives, bestows, or concedes a thing, and in legal parlance is understood to be the party who makes and executes a deed or conveyance. A vendor is a seller, a person who disposes of a thing for money.—Russell v. Watt, 41 M. 602, 93 Am. Dec. 270.

(1889). In a contract for the sale of land the language, "possession shall be given," when used without qualification, means that actual possession shall be delivered, particularly when the dealings between the parties exclude any other construction.—Thurman v. Pointer, 67 M. 297, 7 So. 215.

(1898). A contract of sale of certain realty contained the following stipulation, "said lots and store houses being charged *in solido* with vendor's liens." The deed transferring the property provided that "this conveyance being made subject, however, to the vendor's lien *in solido* on the property herein conveyed." *Held*, that it cannot be assumed from the words quoted that the grantee agreed to pay the debt represented by such lien.—Maxwell v. Chamberlin, 23 So. 266, not officially reported.

§ 53. Executory or executed contracts.

(1868). A contract for the sale of land is executed when the deed is executed, delivered and acknowledged, the purchase money paid and possession given.—Frazer v. Robinson, 42 M. 121.

§ 54. Effect of executory contract on title to property.

(1899). A conditional agreement for the transfer of an interest in property, which has never been executed by the parties thereto beyond the mere fact that the vendees were permitted to use and occupy the property, conveys no title, either legal or equitable.—Liverpool &c. Ins. Co. v. Cochran, 77 M. 348, 26 So. 932, 78 Am. St. 524.

§ 59. Construction as to parties.

The relation between a vendor and vendee cannot be changed into that of landlord and tenant so as to defeat supervening rights.—(1884) Nobles v. McCarty, 61 M. 456; (1891) Wilczinski v. Lick, 68 M. 596, 10 So. 73.

§ 60. Subject matter.

(1887). A deed of trust executed by the holder of notes for the purchase money of land, and conveying the land on which the notes are an express lien, does not by the mere force of the conveyance of the land without mention of or reference to them, transfer the notes.—Bell v. Blair, 65 M. 191, 3 So. 373.

§ 74. Time of performance and payment.

(1841). The general rule, not unexceptional, however, is that contracts for the conveyance of land are to be considered mutual, so that the vendor shall not be compelled to part with his land without receiving the consideration agreed upon, nor the vendee to pay the money without the conveyance of the land. This doctrine yields in all cases to the agreement of the parties when such agreement establishes the fact

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that it was the intention of the parties to waive the benefit of the rule requiring mutuality of performance.—Coleman v. Rowe, 5 H. 460, 37 Am. Dec. 164.

(1846). A vendor who has given bond to make title without fixing any time in, or condition on, which a deed is to be made, may retain the title until the purchase money is paid or he may convey before that time, at his election.—Hazlip v. Noland, 6 S. & M. 294.

(1853). A applied to B, agent of C, to purchase certain land, and afterwards B wrote a letter to A, informing him that he could have the land, setting forth the terms of the sale and a description of the property; providing he came to close the sale in two weeks. *Held*, that the moment the terms should be accepted and complied with by the other party, the transaction became mutual as to all rights and liabilities resulting from it.—Curtis v. Blair, 26 M. 309, 59 Am. Dec. 257.

§ 77. —— Term of credit and deferred payments.

(1897). A vendee who had purchased land for $1,000, to be paid in yearly instalments of $200 for which he had given his notes, agreed "to pay" the vendor "or order the sum of $100, as rent for five years, * * * in case I fail to pay the notes * * * at maturity, together with the interest" thereon. *Held*, that the agreement was not to pay $100 annually but altogether.—Sample-Carter Co. v. Cox, 22 So. 801, not officially reported.

§ 78. —— Time as of the essence of the contract.

(1841). Time will not be held as essential when the vendee knew at the time he bought, the true condition of the title; and where the vendor has a complete equitable title, and the failure to procure the legal title according to the covenant was occasioned by necessary delay in legal proceedings instituted by the vendor to procure it.—Green v. Finucane, 5 H. 542.

§ 80. Evidence to aid construction.

(1884). Where land is bargained for by the acre and described in a bond for title as so many acres, and not by numbers, but the deed, subsequently made, describes it by numbers and not by acres, in a controversy as to the quantity purchased, the bond for title will control, and the purchaser is not bound by the recitals of the deed, but may show the real number of acres bargained for.—Frank v. Coltraine, 61 M. 606.

(1898). When the terms of an agreement to sell certain realty and the deed conveying the property were signed and executed and when, as must be presumed in the absence of any evidence of fraud or mistake in the drafting of the agreement and deed, the terms of the contract were all embraced in the same, these constitute the final contract, invariable by parol evidence.—Maxwell v. Chamberlin, 23 So. 266, not officially reported.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(A) BY AGREEMENT OF PARTIES.

§ 84. Option to rescind.

(1859). If a deed of conveyance provide that the vendee shall have a stipulated time in which to complete the contract, or rescind, and in case of rescission, that the land shall revert to the grantor, a rescission within the stipulated time may be proven by parol, and it will revest the title in the grantor without any formal act of conveyance.—Hughes v. Wilkinson, 37 M. 482.

§ 85. Agreement to rescind.

(1854). In a case where the covenants are mutual and dependent, if the vendee sell to another, a contract afterwards rescinded by the vendor and vendee alone, cannot defeat the rights of the sub-vendee; and in such a case, the vendor having notice of the sale, the vendee must make demand of, and offer to perform to the sub-vendee; and on a bill for a specific performance by the sub-vendee, the decree should provide for payment by him on a day named, and for a conveyance of the title to him.—Johnson v. Jackson, 27 M. 498, 61 Am. Dec. 522.

(1859). An agreement between the vendor and vendee, after a failure of the latter to pay the purchase money in pursuance of the stipulation of the title bond, to rescind the contract, according to the determination of the arbitrators, who were to assess the value of the improvements made by the vendee, and the amount of the rent to be charged to him, is not a valid rescission, if the arbitrators be not appointed, and the vendee still retain possession of the land, and the vendor keep the notes for the purchase money.—Jones v. Loggins, 37 M. 546.

§ 87. Operation and effect.

(1850). Where there has been a voluntary rescission by vendor and vendee, and one of the notes for the purchase money had been assigned, a stipulation in the agreement to rescind that the vendor shall "take up" said note, is a recognition by the vendee of its validity.—Wiggens v. McGimpsey, 13 S. & M. 532.

(B) RESCISSION BY VENDOR.

§ 88. Right to rescind.

(1844). A stipulation in an executory contract for the sale of land, that in case the vendor cannot convey, or the purchaser fail to pay at the appointed day, the contract shall be void, does not enable either party to avoid the contract against the consent of the other by a mere failure to perform his part of the contract. The right to avoid the contract exists only in favor of that party

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who is ready and willing to perform, and against the one who fails and is unwilling.—Beaty v. Harkey, 2 S. & M. 563.

§ 90. —— Invalidity of contract.

(1889). A grantor cannot have cancellation for the alleged fraud of his vendee in putting in form of an absolute deed that which was intended as an executory contract to convey, when otherwise the instrument fully embodies the terms of the agreement, and the vendee has complied with his part of the contract. Especially is this true where, by consent, the defendant has entered upon the land and made improvements.—Atkinson v. Sinnott, 67 M. 502, 7 So. 289.

§ 92. —— Breach of covenant or condition in general.

(1848). If land be conveyed to the vendee upon his promise to procure another to stand as his surety for the purchase money, which he fails to do, and the land be levied on for the vendee's debts, and he is insolvent, the vendor is entitled to a rescission of the contract.—Taylor v. Strong, 10 S. & M. 63.

§ 95. Estoppel or waiver.

See *post*, § 100.

(1854). In 1815, the vendor sold his possessory right, as a settler on land ceded by Spain to the United States, and in 1817, the land was confirmed to him. His vendee went into possession, and the original vendor never afterwards claimed the land. His vendee afterwards sold to a sub-vendee, who occupied the land until 1837, when he sold to another. The last two holders made valuable improvements on the land. The original vendor in his lifetime, and his heirs afterwards resided in the neighborhood. One of the heirs of the original vendor bought part of the land from one of the sub-vendees. The heirs acquiesced in the title of the occupants till 1843. The conveyance from the original vendor to his vendee was defective in not having a seal. *Held*, that under the circumstances, it was a *bona fide* purchase, and that the heirs of the original vendor were estopped by their silence and acquiescence.—Nixon v. Carco, 28 M. 414.

(1901). The right to claim a forfeiture provided for in a contract to purchase land, will be waived unless invoked at the time of its accrual.—Burroughs v. Jones, 79 M. 214, 30 So. 605.

§ 96. Conditions precedent.

(1846). Unless a complainant, seeking the rescission of a contract, has done all that he stipulated to do, or has placed himself in a position to be ready to do so, upon compliance on the other side, a court of chancery will not interpose in his behalf.—Hester v. Hooker, 7 S. & M. 768.

(1855). Where, by the terms of the title bond, the vendor binds himself to make title upon the payment of the purchase moey on a day specified, and that he will give the vendee another year in which to make payment, if he should be unable to pay on the day named, if the vendor, after the expiration of the additional year and the failure of the vendee then to pay, without any new agreement between the parties, voluntarily indulge the vendee for an indefinite period, he cannot then elect to consider the contract at an end on account of the previous default of the vendee; there must first be a demand made for the money and a refusal by the vendee. Such a stipulation for indulgence is for the benefit of the vendee, and his failure to pay at maturity will not operate as a forfeiture of his rights, under a clause in the contract which declares the obligation of the vendor to be void unless payment be made at maturity.—Stewart v. Gates, 30 M. 100.

(1856). A vendor who has executed a bond conditioned to make title on the payment of the purchase money, cannot elect to abandon the contract upon the mere failure of the vendee to pay the purchase money, without having made a valid offer to perform his part of the agreement.—Walton v. Wilson, 30 M. 576.

(1856). A vendor who covenants to make a conveyance to the vendee upon payment of the purchase money, reserving, however, the right to rescind in case a good title cannot be procured, and promising in that event to refund the purchase money which may have been paid, cannot maintain a bill for a rescission of the contract, upon the ground that a good title cannot be procured, without showing that he has used reasonable efforts to procure the title, and that his efforts have been fruitless.—Bibb v. Wilson, 31 M. 624.

(1856). A vendor who has executed a title bond, cannot rescind upon the failure of the vendee to pay the purchase money, by a mere notice to the vendee that the contract is at an end, without an offer to perform his part of the contract.—Arther v. Pearson, 32 M. 131.

(1860). The condition of a title bond, "that if the vendee complies promptly with his contract, that the vendor will execute a deed," does not make time the essence of the contract, and a failure by the vendee to comply by the payment of the purchase money, when it falls due, will not, therefore, authorize the vendor to rescind without an offer to perform on his part.—Jones v. Loggins, 37 M. 546.

§ 98. —— Restoration of consideration.

(1854). Where a vendor sells land, a part of the purchase money being paid at the time of the sale, and notes are executed for the balance, and the vendor executes a bond for title, to be conveyed "on the punctual payment of said notes," and the vendee goes into possession, the vendor cannot abandon the contract and treat it as at an end, without refunding to the vendee the money he has paid in part performance. In order to

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disaffirm a contract and entitle the party seeking to do so, to the rights resulting therefrom, both parties must be placed in *statu quo*.—Johnson v. Jackson, 27 M. 498.

§ 100. Time for rescission and laches.

See *ante*, § 95.

(1857). In applications for a rescission (as well as for specific performance), there must be no unnecessary delay. If there has been negligence in this respect, and there has been a change of circumstances affecting the contract in any material particulars, the court will not interfere, as it is the duty of the court, in decreeing a rescission, to restore the parties, as nearly as possible, to the situation they respectively occupied when the contract was made. And if, from the conduct of one of the parties, this *status quo* cannot be attained, the court will not interfere at his instance.—Jones v. Smith, 33 M. 215.

(1870). The vendee in this case was a married woman, and her note, with her sureties, was taken for the purchase money. Two years after the sale, vendor filed a bill to rescind, upon the ground that the sureties were insolvent, and that the vendee fraudulently represented to him that they were solvent. *Held*, that the right to rescind was much weakened by the delay.—Foxworth v. Bullock, 44 M. 457.

§ 102. Acts constituting rescission.

(1845). If a vendee who purchases land upon a credit, taking a bond conditioned that the title shall be conveyed when he pays the purchase money, fails to pay according to its terms and stipulations, the vendor may upon his mere failure to pay, consider the contract at an end, and convey a good title to another. In this case, however, it must be noted, that the party complaining was the second vendee, who was in possession under a deed, which he got without notice of the prior sale, and that the original vendee had died, and that his heirs had never made any offer to comply.—Holloway v. Moore, 4 S. & M. 594.

(1848). The vendor received a part of the purchase money, and covenanted to make title on payment of the balance. The person from whom he bought filed a bill against him to enforce the lien for the purchase money due to the complainant in that bill. The last vendor, for a consideration paid him by his vendor, made no defense, and allowed a decree to be entered under which the land was sold, and the purchaser put in possession. *Held*, that these acts of the vendor amounted to a rescission of the contract.—Sims v. Boaz, 11 S. & M. 318.

§ 104. Actions for rescission.

To entitle a party to have a contract rescinded, he must make out a clear and undoubted case.—(1843) Hall v. Thompson, 1 S. & M. 443; (1844) Ayres v. Mitchell, 3 S. & M. 683; (1852) Harris v. Ransom, 24 M. 504.

(1846). Bills for rescission are addressed to the sound discretion of the court. No infallible rules can be laid down which will, in all cases, determine whether a party is, or is not, entitled to relief.—Hester v. Hooker, 7 S. & M. 768.

(1870). The complainant represented to the defendant that he only sought by his bill a rescission of the contract, and a recovery of the land, and thereupon the defendant under the advice of counsel, declined to defend, and a *pro confesso* was entered, and thereupon the matter was referred to a master, who reported an amount due from the defendant to complainant for mesne profits, which report was confirmed without notice to defendant. *Held*, on these grounds, that the defendant was entitled to have the decree set aside.—Williams v. Duncan, 44 M. 375.

§ 105. Operation and effect.

(1846). Where a party had improperly obtained the legal title, and his deed was cancelled, and the property ordered to be restored to the true owner, it was held that he was entitled to the costs of valuable improvements made on the land by him, and also to what he had paid in removing legal incumbrances on the land.—Ellis v. Ward, 7 S. & M. 651.

(C) RESCISSION BY PURCHASER.

§ 106. Right to rescind.

(1844). A stipulation in an executory contract for the sale of land, that in case the vendor cannot convey, or the purchaser fail to pay at the appointed day, the contract shall be void, does not enable either party to avoid the contract against the consent of the other by a mere failure to perform his part of the contract. The right to avoid the contract exists only in favor of the party who is ready and willing to perform, and against the one who fails and is unwilling.—Beaty v. Harkey, 2 S. & M. 563.

(1903). A party to an equitable mutual contract in reference to land, fairly entered into, has the right to rescind the agreement when the other party has evinced his intention to abandon or repudiate the contract entirely.—Mortimer v. Hanna, 82 M. 645, 35 So. 159.

§ 108. —— Invalidity of contract.

See *ante*, §§ 32–37.

A misrepresentation on the part of a vendor, that is unaccompanied with injury to the vendee, is not sufficient ground to rescind the contract of sale; the deceit must work damage.—(1841) Davidson v. Moss, 5 H. 673; (1843) Hall v. Thompson, 1 S. & M. 443; (1852) Harris v. Ransom, 24 M. 504.

(1843). A court of equity will not cancel a contract on the ground of misrepresentation, unless that representation be in reference to some material thing unknown to the purchaser, either from not having examined,

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or for want of opportunity to be informed, or from entire confidence reposed in the vendor.—Hall v. Thompson, 1 S. & M. 443.

(1848). The general rule is that the vendee of land who has not been evicted must rely upon his covenants in the deed; but a fraudulent sale is always an exception to such rule.—Gilpin v. Smith, 11 S. & M. 109.

(1854). Where a vendee purchases property upon the faith of representations of the vendor, and not upon his own judgment, and these representations are material and made with or without an actual fraudulent intent, and really did mislead the purchaser, and induced him to make the bargain, relying upon them, the contract will be rescinded.—Oswald v. McGehee, 28 M. 340.

(1860). Where the vendee relies upon the representations of the vendor, in reference to the title of the land, and this is known to the vendor, the vendee is entitled, without previous eviction, to rescind, in case the title is bad, although the vendor honestly believed the representations to be true at the time he made them.—Rimer v. Dugan, 39 M. 477, 77 Am. Dec. 687.

(1870). Fraud vitiates every contract into which it enters, and a vendor who makes statements which he knows to be untrue is guilty of a direct fraud on a vendee who is thereby deceived to his prejudice; and if he makes statements without knowing whether they are true or false, he is guilty of a fraud in law and must make his statements good.—Davis v. Heard, 44 M. 50.

(1872). Fraud and misrepresentation of a vendor as to the situation, quality and title of land sold, if prejudicial in their extent and character, and if the vendor be insolvent, entitles the vendee to a rescission and to a decree charging the land for the purchase money paid.—Allen v. Bratton, 47 M. 119.

(1872). Where one of feeble understanding, though not an imbecile, is overreached in a land sale by one in whom he has confidence, and to whom he trusted, if there be any unfairness in the transaction there may be the inference that it was brought about by fraud or undue influence, and, in such case, if he does not acquire a good title, the contract will be rescinded and the parties placed in *statu quo*.—Bunch v. Shannon, 46 M. 525. See also (1873) Simonton v. Bacon, 49 M. 582.

(1876). In case of fraudulent representations as to the character of the land, the vendee may rescind, provided, that in doing so, he proceed within a reasonable time after he discovers the falsity of the representations.—Estell v. Myers, 54 M. 174.

§ 110. —— Breach of covenant or condition in general.

(1841). It is admitted in this case that where the covenants are mutual and independent, if the vendee offer to pay and demand title, he is entitled to it, or that the contract should be rescinded; but it was held, that inasmuch as the vendor had a complete equity, and as the state of the title was well known to the vendee when the purchase was made, and there being necessary delays in procuring the legal title, that the vendee could not rescind because the title was not made on his demand, and that the vendor should have a reasonable time to perfect it.—Green v. Finucane, 5 H. 542.

(1846). A vendor is in general only liable to the extent of his covenants; but there may be such misrepresentation as will give a purchaser a right to relief, to which the covenants do not extend.—Wilty v. Hightower, 6 S. & M. 345.

(1846). If the real owner of land, being in possession of it, purchase a claim to it from another, but which claim is invalid, and take a deed with covenants of warranty, he will not be entitled to relief if the vendor were not guilty of fraud.—Wilty v. Hightower, 6 S. & M. 345.

(1846). W had bought land and procured a good title to it, but there was a judgment against his vendor, which it was erroneously supposed was a lien on the land, and a sale was made under this judgment at which H became the purchaser. W afterwards ought from H and took a warranty deed, and then discovering that he had a good title, superior to the title under the sheriff's sale, he filed his bill to rescind his contract with H. *Held*, that he had not made out a case of plain and palpable mistake, or of raud, and was not entitled to relief.—Wilty v. Hightower, 6 S. & M. 345.

(1903). A party to an equitable mutual contract for the sale of land fairly entered into, may rescind the agreement when the other party has breached such contract in a matter which is vital to its existence, or is of its essence by the terms of the instrument or the evident intention of the parties.—Mortimer v. Hanna, 82 M. 645, 35 So. 159.

(1903). A party to an equitable mutual contract in reference to land may rescind when the other party has been guilty of a partial breach of performance which has inflicted damage upon the complainant for which no adequate redress can be had, or which inflicts irreparable injury, or which renders a final completion of the contract according to its terms impossible.—Mortimer v. Hanna, 82 M. 645, 35 So. 159.

§ 112. —— Defect in title of vendor.

(1840). It is a universal rule, that a purchaser buying with full notice of a defect in the title will not for that defect be relieved in equity.—Anderson v. Lincoln, 5 H. 279.

(1841). It seems to be generally settled that if there is no fraud, and the purchaser is not evicted, the insufficiency of the title is no ground for rescinding the purchase;

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the party is remitted to his remedies at law on his covenants to insure the title.—Coleman v. Rowe, 5 H. 460, 37 Am. Dec. 164.

(1843). Where a vendee takes from his vendor such title only as the vendor had, he cannot afterwards for mere defect in title obtain a rescission of the contract.—Pintard v. Martin, Sm. & M. Ch. 126.

(1843). The taking of a title bond is of itself evidence of one of two things—either, first, that the title is imperfect, and that time is required to perfect it, or that the vendor retains the title for his own security. But if it be manifest that the vendee never can make title, or that he never can make more than an equitable title, the contract will be rescinded.—Hall v. Thompson, 1 S. & M. 443.

(1843). If a purchaser at any time before the payment of the purchase money, receive notice of an outstanding title, which the party who holds it desires to enforce, he will be affected by it, and he may be relieved from his contract; but if the party in whom the outstanding title is alleged to be, not only disclaims any interest, but actually relinquishes all right to the property which the purchaser bought, a court of equity will not rescind the contract.—Moss v. Davidson, 1 S. & M. 112.

(1844). In this case it appeared that the purchase money was to be paid in three annual instalments, and a title was to be made upon payment of the last; that the vendor was one of six co-parceners entitled to the estate sold, four of whom were of full age, and two minors, and that the vendor could make title to the shares of four adults, but not to the shares of the others; that the vendee knew the condition of the title when he bought, and that the vendor was insolvent. This bill was filed by the vendee to enjoin the suit on the first note, and before the last instalment fell due, and the prayer was for specific performance; and in case vendor was unable to make title, then for a rescission. *Held*, that vendee was not entitled to any relief, as he was a purchaser with full notice, and had not performed, nor offered to perform, his part of the contract; and, moreover, that the bill was premature in being filed before the last instalment fell due.—Bird v. McLaurin, 4 S. & M. 50.

(1844). A vendee who has agreed to pay by instalments, and has taken a bond for title, on the payment of the purchase money, is not entitled, in the absence of fraud on the part of the vendor, to have the collection of the first instalment of the purchase money enjoined, where the vendor is insolvent, upon the ground that the vendee will be unable to make title at the time he agreed to do so, unless the defect in the vendor's title be clearly shown; for the taking of the bond to make title, might have been intended to give the opportunity to the vendor to procure the title by the time agreed on.—Hanna v. Harper, 3 S. & M. 793.

(1846). Where there is no fraud, and vendor had a good title when he sold, and also a good title when the bill to rescind was filed, the vendee will not be entitled to relief, merely on the ground that between the sale and the filing of the bill, the vendee was for a time entirely divested of title.—Jenkins v. Whitehead, 7 S. & M. 577.

A vendee in possession under a deed of warranty, with no fraud made manifest, and with nothing to show that the vendor is not able to pay any damages that may be recovered against him, has no right to call his vendor into a court of equity to litigate an adverse legal title: he must rely on his covenants if he should be evicted.—(1846) Vick v. Percy, 7 S. & M. 356; (1846) Walker v. Gilbert, 7 S. & M. 456.

(1846). It is a general rule that if there be a mere failure of consideration, arising from the sale of a defective legal title, unmingled with fraud or bad faith, the vendee will be left to the covenants and warranty in his deed.—Wilty v. Hightower, 6 S. & M. 345.

(1848). In November, 1837, the vendee bought a tract of land, the purchase money to be paid on the first days of January, 1839, 1840, and 1841, the vendor being secured by mortgage on other lands of the vendee. Vendor gave a bond to make title on the request of the vendee, after the 1st of January, 1839; and to surrender possession on that day. He represented his title as good. Vendee made a payment of about one-seventh of the purchase money, and requested title and possession, but the vendor declined to surrender possession, and did not make title. At the time of the sale, the vendor had only one-sixth undivided interest in the land, and did not procure any other, until the year 1842, after the bill for rescission had been filed, when he procured all but one-sixth interest. The vendee was weak minded, and easily imposed on. The land had greatly deteriorated in value. The vendee only discovered the defects in the title a short time before he filed his bill. *Held*, that the contract should be rescinded.—Liddell v. Sims, 9 S. & M. 596.

§ 114. Waiver or estoppel.

See *post*, § 119.

(1843). A vendee discovering a defect in his title should at once, if he designs doing so at all, surrender the possession of the property and demand a rescission, and his neglect to do so is a waiver of his right to a rescission.—Fletcher v. Wilson, Sm. & M. Ch. 376.

(1846). A vendee commenced an action on the title bond of his vendor for fraud in relation to the title; and subsequently thereto, the parties submitted the matter in dispute to arbitrators, who could not agree; the vendor and vendee then agreed to divide the sum which represented the difference in the judgment of the arbitrators, and, in pursuance of this agreement, the vendee executed

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a new note for the purchase money so ascertained, and dismissed his suit. *Held*, that this new engagement, after a knowledge of the fraud committed, was a waiver of it, and the vendee could not afterwards have relief.—Edwards v. Roberts, 7 S. & M. 544.

(1850). A mere renewal, by the vendee, of his note for the purchase money, will not debar him of the privilege of seeking a rescission; but if, being sued at law for the purchase money, he compromise the matter and give the notes of other persons in payment of his note, it will be a waiver, though he guarantee the transferred notes.—Johnson v. Jones, 13 S. & M. 580.

(1850). C purchased a tract of land, and J became his surety for the purchase money. The vendor transferred the notes, and C (the vendee) being insolvent, J, the surety, was sued for the purchase money, and the suit was compromised by J's giving the notes, guaranteed by him, of other persons in payment, and the holder surrendered the notes for the purchase money to J, who also took an indemnity from C, which, however failed. Judgment was obtained against J at law, on his guaranty, notwithstanding his plea of failure of consideration in the original sale to C. Eight years after the sale, J filed his bill for a rescission of the contract, setting up a failure of consideration as to the title, and in addition, fraud in the vendor, in concealing incumbrances, and misrepresenting the true state of the title. *Held*, the delay, and the impossibility of placing the vendor in *statu quo* (he having surrendered his claim against C), and the compromise, precluded J from getting relief.—Johnson v. Jones, 13 S. & M. 580.

(1875). Rescission of a deed for fraud must be claimed within a reasonable time after knowledge thereof, or the right will be lost by acquiescence. Complainant cannot remain silent and without protest permit the erection of buildings, &c., and afterwards allege these acts were a breach of conditions contained in a deed under which he claims. —Memphis &c. R. Co. v. Neighbors, 51 M. 412.

(1892). A bill to rescind a contract for the purchase of land and to enjoin the collection of the promissory notes given therefor will not lie after the rights of third persons have intervened.—Brill v. Merchants' & Planters' Bank, 12 So. 29, not officially reported.

§ 115. Conditions precedent.

(1824). Under a contract to convey title to land, accompanied with a tender of a deed, and possession taken and retained by the purchaser, he cannot rescind the contract, unless after eviction by title paramount to that of his vendor.—Gale v. Green, W. 159, 12 Am. Dec. 548.

In cases free from fraud, a purchaser of land who is in possession, cannot have relief in chancery against his contract to pay, on the mere ground of a defect of title, without a previous eviction.—(1840) Anderson v. Lincoln, 5 H. 279; (1846) Vick v. Percy, 7 S. & M. 256; (1873) Wofford v. Ashcraft, 47 M. 641.

(1842). Where the grantee in a deed is let into possession under his deed and no eviction, actual or threatened, is charged, the allegation of the insolvency of the grantor will not be sufficient to entitle the party to relief against a defective title to the property.—Latham v. Morgan, Sm. & M. Ch. 611.

(1844). Where a party buys land, and gives several notes for the payment of the purchase money, and takes a bond for title, when the last note is paid, he cannot come into a court of equity and ask for a rescission of the contract, without having paid, or offered to pay, the whole of the purchase money.—Bird v. McLaurin, 4 S. & M. 50.

(1846). Relief will not be granted when the complainant seeking a rescission has not done all that he stipulated to do, or has not placed himself in a situation to be ready to comply with his part of the agreement upon a compliance by the other side.—Hester v. Hooker, 7 S. & M. 768.

(1846). An eviction is unnecessary to entitle a vendee to relief in equity, from the consequences of a fraud practiced upon him. —Wilty v. Hightower, 6 S. & M. 345.

(1860). Where the vendee relies upon the representations of the vendor, in reference to the title of the land, and this is known to the vendor, the vendee is entitled without previous eviction, to rescind, in case the title is bad, and this although the vendor honestly believed the representations to be true at the time he made them.—Rimer v. Dugan, 39 M. 477.

(1873). Equity will not relieve a purchaser, in possession under warranty deed, from payment of the purchase money in the absence of fraud on the ground of defect of title, unless there has been an eviction, or unless the covenants of title afford no indemnity by reason of the insolvency of the vendor.—Wofford v. Ashcraft, 47 M. 641.

§ 117. —— Restoration of possession of land.

(1839-43). It is a well settled rule that a party who has bought land and been let into possession and who seeks to enjoin the payment of the purchase money on the ground of fraud or failure of title must pray a rescission of the contract, and for the very strict reason that he will not be permitted to both withhold the purchase money and at the same time keep and enjoy the land.—Williamson v. Raney, Freem. Ch. 112.

§ 119. Time for rescission, and laches.

See *ante*, § 114.

(1843). Rescission must be sought within good time after the injury is discovered. —Hall v. Thompson, 1 S. & M. 443.

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(1844). Generally, he who seeks a rescission should apply for it as soon as the defective title or fraud is discovered. But where the complaint is of a defective title, if the vendor be unable to make title at the hearing of the bill to rescind, the prayer for relief therein contained will be granted, notwithstanding an unreasonable delay.—Ayres v. Mitchell, 3 S. & M. 683.

(1850). In an application for rescission of a contract there must be no unreasonable delay. If the applicant has been negligent and there has been a change of circumstances affecting the contract in any material particulars, the court will not interfere.—Johnson v. Jones, 13 S. & M. 580.

(1870). In October, 1859, the vendee bought a tract of land. In September, 1860, he filed his bill, charging certain material misrepresentations on the part of the vendor as to the boundary and title to the land, and seeking compensation therefor. In December, 1860, the vendor answered, denying the fraud, and offering to rescind the contract, but there was no evidence in the record that his answer was filed till 1866. In March, 1866, the suit was revived against the administrator and heirs of the vendor, and on 19th April, the administrator answered, revoking the offer to rescind, in consequence of the change in the condition of things produced by the war. On 24th April, 1866, the vendee filed a supplemental bill, asking for a rescission of the contract, charging an additional misrepresentation as to boundary, which he alleged he did not discover till within two years before the filing of the bill. He gave as a reason for not accepting the offer of the vendor to rescind, that the counsel on both sides were engaged in the war, and the courts virtually closed, and that he did not know of the offer till after the war ended, when he promptly accepted it. *Held*, that under the circumstances, the bill to rescind was filed in due time.—Davis v. Heard, 44 M. 50.

(1876). A vendee, who elects to rescind a contract voidable on account of fraudulent misrepresentations on the part of the vendor, must proceed within a reasonable time after he discovers the falsity of the representations.—Estell v. Myers, 54 M. 174.

(1894). There is no fixed time within which a purchaser of land must exercise his right to rescind for fraud in the sale. It is only necessary that, after knowledge of the fraud, there be no unreasonable delay.—Bonner v. Bynum, 72 M. 442, 18 So. 82.

(1894). A purchaser of land in another state, after being informed of the falsity of representations by the vendor's agent as to its character, wrote parties acquainted with the land to ascertain the truth, and, after getting replies, wrote twice to the vendor demanding a rescission, and, receiving no reply, went in person to inspect the land, and then a third time wrote the vendor; and, when he refused to rescind, filed a bill therefor. All this occurred within six or eight months, and the condition of the title had not changed. *Held*, there was no unreasonable delay.—Bonner v. Bynum, 72 M. 442, 18 So. 82.

§ 120. Election to rescind, and notice.

(1876). A vendee who has become such by reason of the fraudulent misrepresentations of the vendor may elect to rescind, or he may abide by the contract and sue for the deceit, or recoup damages as against the purchase money.—Estell v. Myers, 54 M. 174.

§ 121. Acts constituting rescission.

(1853). Company P had in the year 1836, purchased from Company N a large amount of land, and in the year 1842, their respective agents agreed "that N would take back" thirty-five sections, and that the agent of P should give his note to N for $16,000, and that N should surrender P's notes, given for the purchase money of these thirty-five sections. Afterwards P filed a bill for a settlement, and claimed that the transaction of 1842, was, in fact, a rescission of the trade of 1836, as to the thirty-five sections, which N had then agreed "to take back," and that P was entitled to be credited on the amount due on the sales of the remaining land, the cash payments which had prior to 1842 been made on account of the purchase of the said thirty-five sections. But it was held, that the words "take back," in the agreement of 1842, did not, under the circumstances, mean a rescission as to the thirty-five sections as contended for by P, but that agreement was an adjustment by which N was to take the thirty-five sections, and the note of P's agent for $16,000, in satisfaction of P's liability for the original purchase money for the said thirty-five sections.—Coopwood v. Bolton, 26 M. 212.

§ 123. Actions for rescission.

(1839–43). The complainant purchased land of respondent and the latter gave the former a bond for title when the purchase money should be paid. Before all of the purchase money was paid the complainant ascertained that the respondent had no title or a defective title. Without offering to pay the balance of the purchase money or demanding a title, the complainant filed a bill to enjoin the collection of the balance of the purchase money, and it was held that the allegations of the bill were not sufficient to warrant an injunction. If the complainant had made a tender of the purchase money and demanded his deed and the defendant had refused or was unable to convey a good title, the court would enjoin the collection of the purchase money until the sufficiency of the defendant's title could be investigated and grant relief accordingly.—Mitchell v. Sherman, Freem. Ch. 120.

(1846). Since bills for rescission are addressed to the sound discretion of the court, no invariable rules can be laid down, which will, in all cases, determine whether a party is, or is not, entitled to relief.—Hester v. Hooker, 7 S. & M. 768.

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(1846). Where a vendor had given a bond for title, and had stipulated also to deliver possession of the land, upon payment of a part of the purchase money by a particular day, and the vendee failed to pay the money at the time, and asked for a rescission upon the ground of his inability to make payment; and soon thereafter the vendor resold and delivered possession to another, and after this the last sale was rescinded; it was held, that the bill of the vendee for a rescission, and the cross-bill of the vendor for specific performance, should be both dismissed, and the parties left to their remedies at law.—Hester v. Hooker, 75 S. & M. 768.

(1848). A bill for a specific performance, and one for a rescission, do not stand on the same ground in equity. A decree for performance will generally be granted, if the applicant has not been guilty of negligence, and there has been no change of circumstances during the delay, materially affecting the character and justice of the contract. On the other hand, a decree for a rescission will not be made unless there has been fraud practiced, or a plain and palpable mistake has occurred. Hence, it does not follow that because the one party is not entitled to a specific performance, the other is entitled to a rescission, or *vice versa;* but it may happen that relief will be denied to both parties, and they left to their remedies at law.—Liddell v. Sims, 9 S. & M. 596.

(1848). As a general rule, the vendee of land must rely upon his covenants, if he has not been evicted; but in cases of fraudulent representations as to title, he can claim a rescission without eviction.—Gilpin v. Smith, 11 S. & M. 109.

§ 123a. —— Persons entitled to file bill.

(1846). A contract of sale of land will not be rescinded on the complaint alone of the surety for the purchase money, for fraud committed in the sale, the vendee making no complaint, and not being even a party to the suit.—Walker v. Gilbert, 7 S. & M. 456.

(1850). Whether the surety can successfully complain when there is a defect in the title, the vendee being insolvent and taking no interest in the litigation. *Quære?*—Johnson v. Jones, 13 S. & M. 580.

§ 123b. —— Pleading.

A party who seeks a rescission of a contract upon the ground of fraud, is required not only to prove the existence of the alleged fraud, but that he has sustained an injury arising therefrom.—(1841) Davidson v. Moss, 5 H. 673; (1843) Moss v. Davidson, 1 S. & M. 112; (1843) Hall v. Thompson, 1 S. & M. 443; (1852) Harris v. Ransom, 24 M. 504.

(1842). Where a person is seeking relief in equity against his grantor in a deed on account of a failure in title to the property conveyed by the deed, a general charge of defect of title without stating in what particular that defect consists is not a sufficient charge to entitle him to any relief therefor.—Latham v. Morgan, Sm. & M. Ch. 611.

(1843). Where a vendee in a bill to rescind, alleges that the fraudulent concealment on the part of the vendor, of an incumbrance of $600 worked injury to him in that it prevented him from selling when property was high, but, on the trial, it appears that the complainant only had a bond for title, and owed $18,000 of the purchase money which was to be paid before a conveyance was made, the alleged fact of injury will not be regarded as sustained and rescission will not be decreed.—Hall v. Thompson, 1 S. & M. 443.

(1844). In this case, the sale being executory, and the complainant, seeking rescission, being indebted for the purchase money, the land had been sold under a judgment against the vendor for $154, the purchase money being $4,500; the complainant showed no other judgments, though he alleged large outstanding ones. The court notice this sale as one of the characteristics of unfairness and want of candor on the part of the complainant, and remark that he might have prevented it by paying the judgment out of the purchase money he owed. The court also animadvert on complainant's examination of his own witnesses in failing to propound questions necessary to bring out the whole transaction.—Ayres v. Mitchell, 3 S. & M. 683.

(1850). If there has been a recovery in ejectment against the vendee, he will not be entitled to rescind, unless he show that the recovery was not on a naked legal title, and that his vendor has not a complete equity which he can enforce.—Green v. McDonald, 13 S. & M. 445.

(1860). If a vendee seek a rescission upon the ground of a defect in the title, he must set out in his bill the nature of the defect complained of; a general allegation that the vendor has no title will not do.—Alexander v. Moye, 38 M. 640.

(1868). In a bill for a rescission, the complainant must offer to return what he has received under the contract.—Harrison v. Field, 41 M. 712.

§ 123c. —— Evidence.

(1843). A rescission of a contract of sale of land on account of alleged defect of title will not be granted where at the hearing of the case, it is apparent a perfect title may be had and no fraud is alleged or proved.—Fletcher v. Wilson, Sm. & M. Ch. 376.

To entitle a vendee to have a contract rescinded, he must make out a clear and undoubted case.—(1843) Hall v Thompson, 1 S. & M. 443; (1844) Ayres v. Mitchell, 3 S. & M. 683; (1852) Harris v. Ransom, 24 M. 504.

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A complainant who is in the undisturbed possession of the land under a conveyance, must show clearly the defect of the title, or the fraud complained of, or he will not be entitled to a rescission. He cannot compel the vendor to disclose his title, but must show the defect himself.—(1843) Moss v. Davidson, 1 S. & M. 112; (1844) Ayres v. Mitchell, 3 S. & M. 683; (1847) McDonald v. Green, 9 S. & M. 138; (1850) Green v. McDonald, 13 S. & M. 445.

(1847). If one necessary link in the chain of the vendor's title should be a conveyance by a deceased person, and it is alleged in the bill that this party sold by parol only, inasmuch as the executors of the vendor can find no evidence of any title to their testator, this will not be a sufficient showing of a defective title, it not appearing that any search had been made in the registration office for a conveyance, nor that the heirs of the decedent were setting up any claim to the land.—McDonald v. Green, 9 S. & M. 138.

§ 123d. —— Decree.

See *post*, § 124.

(1850). Upon a rescission of a contract, it is the duty of the court to restore the parties, as nearly as possible, to the situation they respectively occupied at the time of making the contract. If, from the conduct of one of the parties, they cannot be placed in their original condition, the court will not rescind in his favor and at his instance.—Johnson v. Jones, 13 S. & M. 580.

(1850). A court of equity will not rescind the sale *in toto*, so as to defeat the claims of a *bona fide* assignee of a note for one-half of the purchase money, the vendor-assignor being insolvent, if the vendee can get a good title to one-half the land, and still owes the vendor one-half the purchase money, in a case where the covenants are independent, and there was no fraud in the sale, as in that case the vendor has full indemnity to that extent.—Green v. McDonald, 13 S. & M. 425.

(1870). In this case the court, at the instance of the vendee, rescinded the contract on the ground of the fraud of the vendor in making false representations as to boundary and title, and on final decree, ordered that vendee hold a lien on all the land to which vendor had title for the return of the purchase money, and in default of the payment thereof, directed the land to be sold to pay the same.—Davis v. Heard, 44 M. 50.

§ 124. Operation and effect.

See *ante*, § 123d.

(1870). Where the vendee has paid money upon a contract for the purchase of land, which is rescinded on account of the fault of the vendor, he has an equitable lien on the land for the reimbursement of the money advanced, similar to that of the vendor for the unpaid purchase money. The natural equity and intrinsic justice of this lien, commends it to the favorable consideration of a court of equity.—Davis v. Heard, 44 M. 50.

IV. PERFORMANCE OF CONTRACT.

(A) TITLE AND ESTATE OF VENDOR.

§ 129. Sufficiency of title in general.

(1838). If the vendor has no title to part of the land sold, his mere offer to convey such title as he has, is no answer to an offer to perform by the vendee, and a demand of title according to the agreement. He must be able to make a valid title according to his bond.—Matthews v. Patterson, 2 H. 729.

(1846). A warranty does not pass title, but is indemnity merely against a defective title or incumbrance; and hence, when a vendor in a title bond has obligated himself to make a good title to the land sold, he has complied with his bond if he has made a deed actually conveying a good title, though it contain no covenant of warranty.—Hazlip v. Nolan, 6 S. & M. 294.

A covenant to "make a good and perfect deed," means to convey a good title, and is not complied with by making a good deed, with warranty of title, there being an outstanding incumbrance not extinguished.—(1848) Greenwood v. Ligon, 10 S. & M. 615, 48 Am. Dec. 775; (1850) Feemster v. May, 13 S. & M. 275, 53 Am. Dec. 83n.

§ 132. Sufficiency of record title.

(1893). In addition to the provision of a contract for the sale of realty, that the title of the lands sold should be verified by examination of the records and other official sources of information as to titles, the deed provided that if the title of any tract be found defective, and the vendor be unable to remove the defect after reasonable notice, the vendee could reconvey it by quitclaim, and take credit for the purchase price. *Held*, the purchaser could insist on a perfect record title, and, if it appeared that the vendor held through one not shown by the record to have title, the purchaser could avail of this provision, although no one had asserted an adverse title. Mere adverse occupancy by a stranger of one of the lots so purchased is not such failure of title as comes within the terms of the contract and authorizes allowance therefor.—Ragsdale v. Meridian Land &c. Co., 71 M. 284, 14 So. 193.

§ 141. Objections to title.

(1839). If the vendor tender a deed which on its face appears to conform to his contract, objections on account of incumbrances, as an excuse for not receiving it, must be pointed out by the vendee.—Bright v. Rowland, 3 H. 398.

§ 142. Effect of insufficiency.

(1874). Where one contracting to sell land, with warranty, is unable to make title as to part, the purchaser has an election to

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abandon the contract and recover what he has advanced, or to compel the vendor to convey what he has, and make compensation for the residue.—Wilson v. Cox, 50 M. 133.

§ 143. Waiver of defects and objections.

(1875). Although a deed in good faith tendered by the vendor to the vendee does not conform to the terms of the contract, if the vendee does not examine it and makes no objection to it, but merely announces his inability to pay, he waives all objections to the deed.—Moak v. Bryant, 51 M. 560.

§ 144. Curing defects and perfecting title.

The vendor will be in no default if he be able to make title at the time his covenant obliges him to make it.—(1836) Gibson v. Newman, 1 H. 341; (1850) Wiggins v. McGimpsey, 13 S. & M. 532.

(1841). Where the covenant to pay and the covenant to convey are mutual and independent, and the payment is to be made before the conveyance, if the vendee tender the whole purchase money, and demand a title, he is entitled to have a title; and in cases of inability to make it, he may sue on the covenants, or demand a rescission. But this rule does not apply where the failure is simply to convey the legal title—the vendor having a complete equitable title, and the vendee being fully aware of its condition when he bought, and there being some necessary delay in procuring the legal title by judicial proceedings. In such a case, time is not required as essential, and the vendor will be allowed a reasonable time in which to procure the legal title.—Green v. Finucane, 5 H. 542.

(1844). In the absence of fraud, the vendor is not in default for a failure to have a complete title before the time he has contracted to convey, for the taking of the time may have been intended to enable him to procure it in the interim.—Hanna v. Harper, 3 S. & M. 793.

(1852). The vendee will not be relieved in a case free from fraud, when the vendor can make title at the hearing.—McLaurin v. Parker, 24 M. 509.

(B) CONVEYANCE.

§ 145. Obligation to convey in general.

(1846). In New York, the rule is, that when a party covenants to convey, he is not in default until the party, who is to receive the conveyance, being entitled thereto by the terms of the contract, has demanded it of the vendor, and having waited a reasonable time to have it drawn and executed, has made a second demand. In England, the vendee must prepare the deed and present it for execution. The court, in this case, did not decide which of these was the correct rule here, but held, that a vendor who had given a bond to convey title on payment of the purchase money, was not in default, where the vendee had merely paid the purchase money and had not complied with either rule.—Johnston v. Beard, 7 S. & M. 214.

(1849). Unless in pursuance of a clearly expressed intention of the parties, a court of equity will not compel a vendor to part with his title till he has received the purchase money. Hence, where the vendor executed an agreement, in which he stated that in consideration of $24,000, to be paid by the vendee in four equal annual instalments due on the first days of January in each of several years named, he bound himself to convey to the vendee and another in fee simple, certain land, it was held that the vendor was not bound to convey until all the purchase money was paid.—Stone v. Buckner, 12 S. & M. 73.

§ 147. Demand.

(1853). Where a vendor executes a bond to make title to land upon the payment of the purchase money by the vendee, it is necessary, in such case, that the vendee should make demand of the deed from the vendor, who is entitled to a reasonable time thereafter to have the deed executed, after which time the vendee should make a second demand, and in default thereof, the right of action to the vendee becomes complete.—Hudson v. Watson, 26 M. 357.

(1853). What is a reasonable time for the preparation of the deed must be determined from all the circumstances attending the transaction. The sickness of the vendor when the demand is made, and his consequent inability to attend to the preparation of the deed, is a matter also to be considered in determining upon the reasonableness of the delay.—Hudson v. Watson, 26 M. 357.

(1853). The demand for such a deed must be positive and unequivocal, so as to give the vendor notice that it is intended for a demand. A conversation between the parties, in which the vendor proffers to make a deed, and the vendee says it is immaterial that it be then made, and in which it was finally agreed that the parties should meet at a place named, on a specified day, when and where the deed should be delivered, is not a demand.—Hudson v. Watson, 26 M. 357.

(1857). It seems that the administrator, and not the heir, of a deceased vendor, is the proper party from whom a demand should be made for a deed.—Herndon v. Harrisson, 34 M. 486, 69 Am. Dec. 399.

§ 148. Tender.

(1875). Under an executory contract for the purchase of land, covenants are mutual, and contemplate contemporaneous performance. If the vendor desires to put the vendee in default, he must perform his covenant and deliver or tender a deed when payment is demanded.—Moak v. Bryant, 51 M. 560.

(1876). A vendor by title bond is excused from tendering a deed where the vendee is beyond the jurisdiction.—Watson v. Sawyers, 54 M. 64.

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§ 149. Sufficiency.

(1856). The signing by one of two joint vendors of land, of a deed drawn up in their joint names, is not sufficient to bind him unless it be signed by the other; it is incomplete until signed by the other. Thus, where a husband signed a joint deed drawn up in the name of himself and wife, and delivered it to a justice of the peace to procure the signature and acknowledgment of the wife, it was held that he was not bound by the deed until it was executed by the wife.—Johnson v. Brooks, 31 M. 17, 66 Am. Dec. 547.

§ 153. —— Covenants.

(1855). The condition of a title bond, which binds the vendor to make, or cause to be made, a good and sufficient title to the land, "with the usual covenants of warranty," is not complied with by the execution of a deed with a special warranty against the claim of the grantor and his heirs and those claiming under him.—McAllister v. Moye, 30 M. 258.

§ 157. Delivery of possession of property.

(1882). Unless possession is delivered under, or the right to it provided for, by the contract of sale, the vendor may retain it until the purchaser, by compliance with his contract, entitles himself to the title and, as incident thereto, to the possession.—Bacon v. Howell, 60 M. 362.

(C) QUANTITY OF LAND AND APPURTENANCES.

§ 161. Specific quantity or measurement.

Six hundred and forty acres is the strict complement of a section of land; but it is a matter of notoriety, that not one section in ten contains that number of acres; yet a tract of land surveyed by the United States as a section and so marked and sold, is a section, though it contain more or less than six hundred and forty acres.—(1841) Fulton v. McAfee, 5 H. 751; (1870) Kerr v. Kuykendall, 44 M. 137.

§ 165. Effect of deficiency.

(1870). The bond for title contained this description of the land: "The grantee has this day purchased of the obligor section 32, T. 8, R. 2, west, and agreed to pay therefor $1,920." *Held*, that this was a sale of said section 32, as a tract or designated parcel of land, and in the absence of all fraud on the part of the vendor, the fact that the section only contained 458 acres, did not entitle the vendee to an abatement of the price.—Kerr v. Kuykendall, 44 M. 137.

(1893). A contract of sale stipulated that a schedule of the several tracts sold and their prices should be the basis of the contract, and that "the money value" of any errors as to title, amount, or description should be determined by arbitrators according to the price agreed upon in the schedule, and be deducted from the purchase price. The deed conveyed 320 acres less "what has been heretofore sold, * * * leaving remaining a tract of 300 acres, thereabouts." It was ascertained that 60 acres had been sold instead of 20, as was thought, thus causing a shortage of 40 acres. *Held*, the value of the shortage is not to be proportioned to the price of the whole tract, treating the whole as of uniform value, but, to give effect to the agreement, the shortage is to be distributed among the parcels previously sold, according to their size, and the value of the shortage apportioned to each parcel determined by the average value of each, taking the whole tract to be worth the price agreed on in the schedule.—Ragsdale v. Meridian Land &c. Co., 71 M. 284, 14 So. 193.

(1893). Said deed provided that where the terms "about," or "thereabouts," are used in connection with a definite number of acres, the variance from the number stated should not vary more than four acres, and if there should be a variance to a greater amount, it should be allowed for. *Held*, that if the deficiency exceeded four acres, the entire deficiency should be allowed for, not merely the excess over four acres.—Ragsdale v. Meridian Land &c. Co., 71 M. 284, 14 So. 193.

(1893). Where said contract of sale describes a designated quarter section, "except twelve acres, more or less, already sold other parties," the purchaser is not entitled to allowance for a block, or lots therein, merely because the deed abandoned the description by sections, and described the tract by lots and blocks, and listed among those conveyed the block and lots in question, it appearing that it was known to the purchaser, before the contract of sale, that the tract had been platted into lots and blocks, and it further appearing that the blocks and lots previously sold did not exceed twelve acres.—Ragsdale v. Meridian Land &c. Co., 71 M. 284, 14 So. 193.

(D) PAYMENT OF PURCHASE MONEY.

§ 170. Tender.

(1857). It seems that the administrator, and not the heir, of a deceased vendor, is the proper party to whom the purchase money should be tendered, *sed quære?*—Herndon v. Harrison, 34 M. 486, 69 Am. Dec. 399.

§ 173. Abatement or deductions.

(1852). Where a part of the land sold is in the adverse possession of another, the sale is void as to that part, and the vendor will be entitled to a deduction of the purchase money for that part.—Phipps v. Tarpley, 24 M. 597.

§ 176. —— Deficiency in quantity of land.

(1852). Where, in a deed or bond for title, the number of acres is specified, with the superadded words, "more or less," no deduction will be made from the price for an inconsiderable deficiency. These words mean, that the parties will mutually risk the number stated to be the true amount, unless

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the variation be considerable. And a deficiency of eighty acres in a tract stated to contain one thousand acres, was held to be inconsiderable, the deficiency being only about one-twelfth of the amount sold.—Phipps v. Tarpley, 24 M. 597.

§ 178. Mode and sufficiency of payment.

(1873). Where a vendee by title bond in possession, pays off an incumbrance, or buys an outstanding title, he will be considered as having done so for the protection of the vendor's title, and will only be entitled to be credited on the purchase money for what he has actually paid.—Aston v. Robinson, 49 M. 348. See also (1876) Morgan v. Hazlehurst Lodge, 53 M. 665.

(1893). A purchaser is entitled to credit for taxes paid by him on lands assessed to the vendor, the title to which proves defective.—Ragsdale v. Meridian Land &c. Co., 71 M. 284, 14 So. 193.

§ 186. Excuses for default or delay.

(1856). It is a sufficient excuse for the vendee's failure to pay the purchase money at maturity, in a case of mutual and dependent covenants, that the vendor was unable to convey according to his covenant, and his failure under such circumstances, will not prevent him from afterwards insisting upon the vendor performing his contract.—Walton v. Wilson, 30 M. 576.

§ 187. Waiver of default or delay.

(1908). In a suit to cancel the title of the defendants it was charged that the ancestor, from whom the defendants acquired the land, as a part consideration for his purchase thereof, had undertaken to pay a large sum to discharge the debts of his vendor, but had failed to pay a part thereof, and the proof showed that there was a failure of title to one-half the lands and that the vendor had made no effort to make good his broken warranty. *Held*, that it was too late after thirty years' acquiescence to allege default on the part of the ancestor of the defendants.—Whitfield v. Lyon, 93 M. 443, 46 So. 545.

V. RIGHTS AND LIABILITIES OF PARTIES.

(A) AS TO EACH OTHER.

§ 188. Nature of the relation.

(1846). The doctrine is well established that, from the time of a sale of land the vendor becomes a trustee of the title for the vendee, as the latter is a trustee of the purchase money for the former.—Money v. Dorsey, 7 S. & M. 15.

(1868). In equity, the vendee is not the owner adversely to the lien of the vendor, but is treated as a trustee for him until the payment of the purchase money.—Walton v. Hargroves, 42 M. 18, 97 Am. Dec. 429n.

(1871). Where the purchase money of land has not been paid, the vendee and those claiming under him, become trustees for the vendor, if the sub-purchaser had notice.—Dodge v. Evans, 43 M. 570.

§ 190. Acquisition or assertion of adverse title or claim.

The rule is well settled, that where a purchaser has been put in possession, he cannot afterwards acquire a title and set it up against the vendor, and if he extinguish an incumbrance, or buy in an outstanding title, all he can require is the repayment of the money he has so paid out.—(1848) Taylor v. Eckford, 11 S. & M. 21; (1850) Champlin v. Dotson, 13 S. & M. 553, 53 Am. Dec. 102; (1856) Hill v. Samuel, 31 M. 307.

(1848). The rule is well established that where a purchaser has been put into possession, he cannot afterwards acquire a title, and set it up against his vendor. If he extinguish an incumbrance, or buy in an outstanding title, all he can require is the repayment of the money he has paid out; and this rule applies where the vendee's wife purchases an outstanding title, or extinguishes an incumbrance. In such a case the husband and wife are regarded as identical; and to allow the wife to purchase where the husband is forbidden, would be a mere evasion of the rule. And so if a third person purchases with his own means, but in reality for the wife, and to give her the benefit of it.—Hardeman v. Cowan, 10 S. & M. 486.

(1850). Where a purchaser has been put in possession, he cannot afterwards acquire a title and set it up against the vendor, and this rule applies where another party buys in the title and substitutes the vendee to his contract.—Champlin v. Dotson, 13 S. & M. 553, 53 Am. Dec. 102.

(1853). A vendor or mortgagor will not be permitted to purchase in and set up an outstanding title, in derogation of the title conveyed by the deed and the assurances contained in it, and if he buy such title, it will inure to the benefit of the vendee or mortgagee; and this rule is the same, though the mortgagor has been discharged from the mortgage debt by the Bankrupt Act of 1841; for, by the terms of the act, the mortgage is considered in force after the discharge; and the covenants of warranty of title and quiet enjoyment, and against incumbrances, remain still binding on the vendor, since they are not provable against his estate under that act.—Bush v. Cooper, 26 M. 599, 59 Am. Dec. 270.

(1855). A defendant in ejectment, who is in possession under a contract of purchase which has been rescinded and the purchase money refunded, cannot set up an outstanding title acquired by him against the vendor; nor can he dispute the vendor's title.—Walker v. Williams, 30 M. 165.

(1856). The vendee in a title bond, may elect to abandon the contract if the vendor should be unable to convey according to the terms of the bond, but he cannot abandon it

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so as to enable him to purchase the land from another party, and hold it adversely to vendor, without having first put the vendor in default, by a demand for a title, and without a return of the possession of the land to the vendor, when he has received possession from him, although by the terms of the bond, the vendor was bound to make title within a limited time.—Hill v. Samuel, 31 M. 307.

(1859). A covenant to convey, with warranty of title, deprives the covenantor of the right to acquire an interest in the premises, in derogation of the rights of the covenantee. But the rule is otherwise, where the covenant is to convey, by quitclaim deed, the interest which the covenantor has at the time of making the covenant.—Mitchell v. Woodson, 37 M. 567.

(1867). Where one holds possession under a void deed from his vendor, his possession is not adverse to his vendor, but he is a tenant by sufferance or at will of the vendor, and neither at law nor in equity can he be heard to dispute the landlord's title.—Ezelle v. Parker, 41 M. 520.

§ 191. Possession or control of property.

(1853). Where a sale of land is made by the bond of the vendor, conditioned to make title on the payment of the purchase money, if nothing be said in the contract as to when vendee shall have possession, the vendor is entitled to retain the possession until all the purchase money is paid.—Scales v. Anderson, 26 M. 94.

§ 193. Trees and timber.

(1900). A vendor, who retained possession of the land, stipulated in a written contract of sale thereof, that he would cut no wood therefrom except for fuel and necessary repairs upon the property. *Held*, that the plaintiff acquired no title to cross-ties cut by him on the land under an agreement with the vendor, such latter having no title which he could confer.—Lesser v. Dame, 77 M. 798, 26 So. 961.

(1906). Under Code 1892, § 4412, imposing penalties for cutting down trees on land not belonging to the feller, a vendee may recover such penalties from his vendor who, after the sale but before surrendering possession, cut trees from the land sold.—Smith v. Forbes, 89 M. 141, 42 So. 382.

§ 198. Taxes and assessments.

(1876). Ordinarily, a vendee by title bond in possession must pay taxes on the land.—Watson v. Sawyers, 54 M. 64.

(1902). A contract entered into after the first of February, to sell property free from all liability, requires the vendor to discharge the taxes for the current year.—Vicksburg Water Works Co. v. Vicksburg Water Supply Co., 80 M. 68, 31 So. 535.

(B) AS TO THIRD PERSONS IN GENERAL.

§ 212. Subsequent purchasers from vendor.

(1842). Where the owner of land, having sold it to a party and given bond for title, afterwards sold and conveyed it to another who had knowledge of the prior sale, the legal title was in the second purchaser as trustee for the first.—Hines v. Baine, Sm. & M. Ch. 530.

(1846). It seems that the purchase money lien of the vendee will not prevail against a *bona fide* purchaser from the vendor, for a valuable consideration and without notice.—Money v. Dorsey, 7 S. & M. 15.

(1899). Estoppel of a vendee to assert priority as against the purchaser under a subsequent decree of sale against the vendor cannot be predicated of the vendee's failure to pay the purchase price.—Lyle v. Clark, 24 So. 966, not officially reported.

§ 213. Creditors of vendor.

(1846). The purchase money lien of a vendee under title bond, will prevail against a judgment creditor of the vendor, intervening between the time of the agreement to convey and the receipt of the consideration money, and the actual conveyance.—Money v. Dorsey, 7 S. & M. 15.

(1873). Where land is sold on credit and the vendee takes possession, the vendor making a deed, which is delivered to a third party as an escrow, to be held until payment of the purchase money, which is paid, but after this and before final delivery to the vendee, judgment is obtained against the vendor, and enrolled, the rights of the vendee are superior to those of the judgment creditor.—Whitfield v. Harris, 48 M. 710.

The general lien of a judgment does not *per se* constitute a right of property, but it confers a right to levy to the exclusion of adverse interests subsequently acquired; and when a levy is made it relates back to the date of the judgment (or the commencement of the lien) and cuts out intermediate encumbrances. Subject to this, the debtor may sell the property, or it may be levied on by any other creditor, who is entitled to hold it against every other person, except such judgment creditor, and even against him, unless he consummate his title by a levy and sale under his judgment.—(1842) Commercial Bank v. Yazoo County, 6 H. 530, 38 Am. Dec. 447; (1868) Walton v. Hargroves, 42 M. 18.

(1881). While a conveyance taken in good faith from one who knowingly held the property incumbered by a secret lien, will always defeat the lien, a judgment confessed or recovered will not, except where the secret lien has been created by the judgment debtor and is of such character as is required by the registry laws to be recorded and has not been recorded.—Mississippi Valley Co. v. Chicago &c. R. Co., 58 M. 846.

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§ 214. Assignees of contract or bond for title.

(1844). The assignment of a bond by which the obligor is bound to make title, conveys an equitable title to the assignee, and is a good consideration to support a promise.—Montgomery v. Dillingham, 3 S. & M. 647.

§ 219. Actions between vendor or purchaser and third persons.

(1842). Where the owner of land having sold it to a party and given bond for title, afterwards sold and conveyed it to another who had knowledge of the prior sale, it was held that the original vendor was not a necessary party to a bill by the first purchaser to obtain the title, since the legal title was in the second purchaser as trustee for the first.—Hines v. Baine, Sm. & M. Ch. 530.

(C) BONA FIDE PURCHASERS.

§ 220. Nature and grounds of protection in general.

(1842). A purchaser cannot set up the defense of a *bona fide* purchaser for value, if he be a mere volunteer; he must have paid a valuable consideration.—Doss v. Armstrong, 6 H. 258.

(1846). To constitute a *bona fide* purchaser without notice, the party must have advanced a new consideration or have relinquished some security for a pre-existing debt.—Upshaw v. Hargrove, 6 S. & M. 286.

(1851). A *bona fide* purchaser is one who, at the time of his purchase, advances a new consideration, surrenders some security, or does some other act which, if his purchase was set aside, would leave him in a worse than his original position.—Boon v. Barnes, 23 M. 136.

(1852). If notice be given before payment, though after a purchase in good faith, the purchaser cannot claim the protection of a *bona fide* purchaser.—Lisloff v. Hart, 25 M. 245, 57 Am. Dec. 203.

(1852). A father bought land, and took a deed in the name of an infant son; but resided on it, claiming title and ownership, the son being a member of his family. The deed to the son was not recorded. The father sold the land to another, and received payment. When the conveyance was to be made, he stated to the vendee, that the deed to his son had been made to him (the son) by mistake; and he destroyed that deed, and caused another to be made, so as to convey title to the vendee, who afterwards, in opposition to the son's claim, set up as a defense, that he was a *bona fide* purchaser for value. *Held*, that the defense could not avail him, as the father had no title whatever; that if he did not pay the money, until he knew the deed was made to the son, then he had notice; if he paid before, he should have asked for the father's title deed, and this would have led to notice. Having trusted to the father's word, he could not claim the protection of a *bona fide* purchaser.—Lisloff v. Hart, 25 M. 245, 57 Am. Dec. 203.

The words "purchasers for a valuable consideration without notice," in our statute of registration, mean that class of persons whom the courts have declared to be *bona fide* purchasers for value without notice, and the statute protects that class, and no others. It is well settled that none can claim that protection except purchasers of the legal title, and that in all cases where the purchaser gets a mere equity, then, as to other equities even, which are prior in time to his equity, he will be postponed according to the maxim *qui prior est in tempore potior est in jure*.—(1852) Wailes v. Cooper, 24 M. 208; (1868) Walton v. Hargroves, 42 M. 18, 97 Am. Dec. 429n.

(1884). Until payment of the price and receipt of the conveyance of the legal title, one buying land does not occupy the attitude of a *bona fide* purchaser thereof.—Wilbourn v. Bishop, 62 M. 341.

(1894). The protection granted a *bona fide* purchaser, will not be accorded one who, being dissatisfied with the title offered by the vendor, has the same examined by an attorney in order to ascertain certainly the force and value of it.—Wilson v. Parker, 14 So. 264, not officially reported.

(1894). A wife whose husband has had the title to property, purchased by him with embezzled funds, placed in her name, cannot be considered an innocent purchaser of the same.—Grouch v. Hazelhurst Lumber Co., 16 So. 496, not officially reported.

§ 225. Notice.

(1897). The basis of the doctrine of notice is that it is unconscientious and fraudulent to permit a junior purchaser to defeat a prior conveyance of which he has knowledge.—Stovall v. Judah, 74 M. 747, 21 So. 614.

§ 227. —— Actual notice.

(1852). Notice given by the vendor to the vendee, of an outstanding unregistered incumbrance is good, though the vendee did not believe the communication, and thought that it was made by the vendor as a pretext for breaking up the trade.—Wailes v. Cooper, 24 M. 208.

Actual notice of a deed is as effective as notice by record.—(1872) Myers v. Buchanan, 46 M. 397; (1874) Buck v. Paine, 50 M. 648.

§ 228. —— Effect of notice.

(1839-43). A man who buys a defective title knowing it to be so must abide the consequences.—Williamson v. Raney, Freem. Ch. 112.

(1839-43). A party purchasing a defective title with full knowledge of the defects cannot afterwards avail himself of such defects

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as a ground for relief against the payment of the purchase money.—Allen v. Hopsom, Freem. Ch. 276.

(1839-43). If a purchaser without notice at the time of purchase receive notice before he makes payment of the purchase money, the land in his hands becomes bound from that time by the prior equitable title to the extent at least of the purchase money that then remains unpaid.—Harper v. Reno, Freem. Ch. 323.

(1841). Where the vendee knew that the legal title was outstanding, and that judicial proceedings were necessary to enable the vendor to get it, and the vendee has a complete equity, the vendor will not be in default in not having the legal title which he is bound to convey, if his failure was occasioned by necessary delay in the judicial proceedings.—Green v. Finucane, 5 H. 542.

(1849). A purchaser who has taken a conveyance is entitled to no relief in equity against incumbrances of which he had notice. His remedy is on his covenant of warranty of title.—Stone v. Buckner, 12 S. & M. 73.

(1850). Incumbrances of which the vendee had notice at the time of the sale, and which have not been enforced, do not constitute a failure of the consideration of the promise to pay. And the vendee is bound to take notice of judgment liens duly enrolled. Hence, the existence of such a lien, even where the covenants are mutual and dependent, cannot be set up as a defense to an action for the purchase money. But it seems if a sale of the land had been made under it, whereby the title had passed out of the vendor, the rule would be different.—Wiggins v. McGimpsey, 13 S. & M. 532.

A party who does not get an apparent good legal title cannot set up the protection of a *bona fide* purchaser.—(1852) Lisloff v. Hart, 25 M. 245, 57 Am. Dec. 203; (1871) Perkins v. Swank, 43 M. 349.

(1853). Where the only notice that a purchaser of land has of a prior executory agreement of the vendor to sell to another, is the statement of the vendor, who at the same time states that such agreement has been rescinded, the purchaser is justified in acting on this last information as to the rescission, without applying to the prior purchaser—the land being unoccupied.—Curtis v. Blair, 26 M. 309, 59 Am. Dec. 257.

If the vendee receive notice of an outstanding incumbrance on the land either before he has paid the purchase money or completed the purchase by taking a conveyance, he cannot avail himself of the defense of a *bona fide* purchase for value without notice. —(1858) Kilcrease v. Lum, 36 M. 569; (1870) Parker v. Foy, 43 M. 260, 5 Am. Rep. 484.

(1903). The purchaser of land, with knowledge, takes it subject to a conveyance of the standing timber made before the title from the government was perfected.—Sanford v. Eastabutchie Lumber Co., 83 M. 478, 36 So. 10.

(1905). A grantee with actual knowledge of the existence and contents of a prior lease, cannot avail himself of the fact that the same by reason of a defective acknowledgment was improperly placed of record.—Ladnier v. Stewart, 38 So. 748, not officially reported.

§ 229. —— Constructive notice, and facts putting on inquiry.

(1839-43). A denial of notice is insufficient which merely states that the purchaser had "no actual knowledge" nor any "detailed information" relative to a prior lien. It is not necessary that a subsequent purchaser should have actual knowledge or detailed information in order to charge him with notice. If he has such information as gave notice of the substance of the transaction or would have led him to actual notice or detailed information on the subject, it was sufficient.—Harper v. Reno, Freem. Ch. 323.

(1843). One about to purchase a tract of land was informed that another had "some sort of claim to it." This was held sufficient to put the purchaser upon inquiry.—Rowan v. Adams, Sm. & M. Ch. 45.

(1848). When the deed made by an administrator shows that the purchase money was to be paid at a future day, this will be notice of the existence of the lien, to a subvendee purchasing before the day of payment fixed by the deed.—Hoggatt v. Wade, 10 S. & M. 143.

(1856). Where a party cannot make out his title, but by a deed which leads him to another fact, he shall be presumed to have notice of that fact. Hence the purchaser of land, at sheriff's sale, under execution against the original enterer from the United States government, will be held to have had notice of the assignment by the judgment debtor, of his certificate of entry, made in the land office, whence it was issued, and before the rendition of the judgment, the law not requiring either the certificate of entry or the assignment to be registered.—Martin v. Nash, 31 M. 324.

(1870). Whatever is enough to excite attention, or put a party on inquiry, is notice of everything to which such attention or inquiry might reasonably lead. Sufficient information to lead to the knowledge of a fact, shall be sufficient to charge a person with the knowledge of that fact.—Parker v. Foy, 43 M. 260, 5 Am. Rep. 484.

(1876). While mere rumor or suspicion is not notice, whatever puts a party on inquiry amounts to notice, provided the inquiry be a duty and by the exercise of ordinary diligence would lead to knowledge.—Loughridge v. Bowland, 52 M. 546.

(1896). Where defendant purchased growing timber after the recording of a deed to

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the plaintiff for ground on which it stood and pending a suit by plaintiff against defendant's vendor, governed, as to the *lis pendens* notice, by the law in force prior to the Code of 1892, the defendant had constructive notice of the plaintiff's claim and the want of actual notice was non-effective.—Alliance Trust Co. v. Nettleton Hardwood Co., 74 M. 584, 21 So. 396.

(1908). Where a contract for a spur track on milling property was not recorded and an assignee of the property had no knowledge of the contract, but knew of the existence of the track, he was thereby put on inquiry as to the rights of the railroad company, and was chargeable with knowledge of the terms of the contract which an inquiry would have disclosed.—Illinois Cent. R. Co. v. Sanders, 93 M. 107, 46 So. 241.

(1910). A deed, the acknowledgment of which is fatally defective so that it is not entitled to record, does not impart constructive notice to subsequent purchasers.—Tinnin v. Brown, — M. —, 53 So. 780.

§ 230. —— Recitals in conveyance.

A purchaser is presumed to have notice of every fact disclosed by any recital, in any deed essential to his title.—(1818) Chew v. Calvert, W. 54; (1863) Gordon v. Sizer, 39 M. 805.

A vendee is bound to take notice of all incumbrances which are recited in the title deeds of his vendor, and under which he derives title, and he cannot insist on want of notice of such recitals, by denying that he read them.—(1818) Chew v. Calvert, W. 54; (1852) Wailes v. Cooper, 24 M. 208; (1863) Gordon v. Sizer, 39 M. 805.

(1863). A recital in a deed that the grantor may have previously conveyed an alley on a part of the demised premises, is sufficient to put the grantee on inquiry as to the nature and character of the title of the person who is then using the alley as a passway.—Gordon v. Sizer, 39 M. 805.

(1870). If the deed recite that the purchase money is paid, this authorizes a subvendee to purchase, if he have no other notice.—Gordon v. Manning, 44 M. 756.

(1874). Where one who has purchased land on credit, but under a deed reciting payment of the purchase money, conveys it to another, though in satisfaction of an existing debt, if his vendee buys and receives a deed without notice that the purchase money is unpaid, he is a *bona fide* purchaser.—Newell v. Crider, 50 M. 539.

(1876). The purchaser of real estate is bound to take notice of all recitals in the chain of title through which his own title is derived. Not only is he bound by everything stated in the several conveyances constituting that chain, but he is bound fully to investigate and explore everything to which his attention is thereby directed.—Deason v. Taylor, 53 M. 697.

(1876). When the deed to land recites that the sale is made on credit, a subsequent purchaser is bound to inquire whether the purchase money has been paid. That the time for the payment of the purchase money, as stated in the deed, has elapsed, does not authorize him to presume that it was paid.—Deason v. Taylor, 53 M. 697.

(1888). A purchaser of land is conclusively presumed to know what appears on the face of the title-papers under which he claims.—Stewart v. Matheny, 66 M. 21, 5 So. 387, 14 Am. St. 538. See also (1876) Deason v. Taylor, 53 M. 697; (1877) Allen v. Poole, 54 M. 323; (1885) Plant v. Shryock, 62 M. 821; (1886) Bowmar v. Peine, 64 M. 99, 8 So. 166.

(1889). In a conveyance of land duly recorded, the recital of payment of the consideration is to be taken as *prima facie* true, and the deed itself is competent evidence of such payment. A purchaser from the vendee may rely upon the truth of the recital, and it devolves upon one who questions his title to show that he had notice of facts inconsistent with the statements in the recorded deed.—Hiller v. Jones, 66 M. 636, 6 So. 465.

(1896). A deed which conveys all the lands within the state owned by the grantor, who is the widow and devisee of a former owner, except such as had been previously conveyed by her deceased husband or herself, by deeds "which are of record, and none others," affects the grantee by its terms, with notice that some of the deeds to lands which once belonged to her husband or herself are unrecorded, and, despite the words quoted, the grantee takes subject to a prior unrecorded deed.—Henderson v. Cameron, 73 M. 843, 20 So. 2.

(1909). A deed to land covering improvements, "party wall agreements and party ownership agreements" thereunto appertaining, is sufficient to put the grantee on notice of the existence of agreements, the extent of which he could ascertain by making inquiries of the owner of the adjoining property.—Binder v. Weinberg, 94 M. 817, 48 So. 1013.

(1910). In order to impute constructive notice to a purchaser by reason of recitals in instruments affecting his title, the recitals relied upon must be so clear and distinct as to put an ordinarily prudent person upon inquiry. It follows that a recital in the deed that the consideration was a certain amount "and other considerations," was not sufficient to impute to the vendee constructive notice that the entire purchase money on the premises had not been paid by the vendor.—Spellman v. McKeen, 96 M. 693, 51 So. 914.

§ 231. —— Records.

(1839-43). The registration of a deed conveying a mere equitable title is not notice to the subsequent purchasers; the statute

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operates upon none other than deeds conveying the legal estate.—Walker v. Gilbert, Freem. Ch. 85.

The registration of a deed not properly acknowledged or proven, is a nullity, and conveys no notice of it.—(1849) Tillman v. Cowand, 12 S. & M. 262; (1852) Work v. Harper, 24 M. 517.

(1850). In a case of an executory agreement to sell, and where no representation is made in relation to the title, the vendee is bound to take notice of a judgment lien on the estate, which is duly enrolled.—Wiggins v. McGimpsey, 13 S. & M. 532.

(1852). A person taking a deed from an agent whose power of attorney is of record, is, nevertheless, bound to notice a deed made by the principal directly, and put on record subsequent to the recording of the power of attorney.—Skipwith v. Robinson, 24 M. 688.

(1854). The filing of the contract, creating the lien, in the clerk's office for record is notice to a purchaser or incumbrancer.—Bill v. Cooper, 26 M. 650.

(1857). The purchaser of the legal title is not bound to take notice of a registered lien or incumbrance on the estate, created by any person other than those through whom he is compelled to deraign title. S purchased the land in controversy from the state, and received a certificate which entitled him to a patent when the purchase money was paid; a judgment was recovered against S, and after the purchase money was paid his equity in the land was sold thereunder. S after the judgment became a lien on the land, sold it to M, who procured a patent from the state directly to himself. B & H purchased the land from M for a valuable consideration, without any actual notice of the judgment lien. *Held*, that as B & H could make out their title through the patent from the state to M—the name of S not being connected therewith—they were not chargeable with notice of the registered lien of the judgment against S.—Harper v. Bibb, 34 M. 472, 69 Am. Dec. 397.

(1871). The registration of a deed or other paper authorized and required by law to be registered is notice to all subsequent purchasers and to all the world, of the rights thereby secured. All persons are bound to take notice of it; and a person buying afterwards from the grantor, cannot be a *bona fide* purchaser without notice.—Learned v. Corley, 43 M. 687.

(1874). The purchaser of a legal title is not bound to take notice of a registered lien or an incumbrance given by any other than those through whom he is compelled to deraign title. Where one sells land partially on credit, executing a deed reciting full payment, and the purchaser sells a part, executing a like deed to his vendee, who has actual notice that part of the original purchase money is unpaid, and consents that a trust deed to secure the same shall be given by the first purchaser on all the land, but afterwards, while holding an absolute deed, sells and conveys his part of the land to one who has no notice of the unpaid purchase money, such person is a *bona fide* purchaser, having a good legal title, and his right will prevail as against the trust deed.—Baker v. Griffin, 50 M. 158.

(1883). Code 1880, § 1212, requiring registration, puts creditors without notice and subsequent purchasers for value without notice, upon the same footing and protects them to the same extent.—Nugent v. Priebatsch, 61 M. 402.

(1884). A grantee has only to lodge his deed with the proper officer for record. It thereupon becomes notice to all persons. Redress for any neglect or mistake in recording the deed is against the clerk. Hence, a misdescription of land in recording a trust deed will not cause a subsequent trust deed on the same land, though taken without notice, to have priority.—Mangold v. Barlow, 61 M. 593, 48 Am. Rep. 84.

Recording a deed, which is neither acknowledged nor proved, is invalid under the statute, and does not give constructive notice to creditors or purchasers.—(1874) Bass v. Estill, 50 M. 300; (1876) Loughridge v. Bowland, 52 M. 546; (1877) Wasson v. Connor, 54 M. 351; (1894) Woods v. Garnett, 72 M. 78, 16 So. 390.

(1896). The record of a deed is not invalidated nor its effect as constructive notice impaired because the acknowledgment is erroneously dated on Sunday.—Horne v. Nugent, 74 M. 102, 20 So. 159.

(1897). Where a vendee of land fails to record his deed, but the vendor duly records a deed of trust executed by the purchaser as security for the purchase money, the record of the latter is constructive notice to the trustee and beneficiaries therein of the rights of the vendee.—Stovall v. Judah, 74 M. 747, 21 So. 614.

(1900). An administratrix's deed of land to her husband's brother was followed two months later by the brother's deed to the husband, and both deeds were recorded at the same time. *Held*, that the circumstances were insufficient to put a subsequent purchaser on inquiry for fraud on, or coercion of, the administratrix.—Equitable Securities Co. v. Sheppard, 78 M. 217, 28 So. 842.

(1902). While a bond for title to land is recordable under Code 1892, § 2459, and its record is necessary to the protection of the obligee's interest in the land from the creditors of, and *bona fide* purchasers from, the obligor, it is not necessary to record an assignment of such bond by the obligee to another.—Macrae v. Goodbar, 80 M. 315, 31 So. 812.

(1902). The record of a trust deed conveying land to secure a note, with nothing on its face to show that the note was a pur-

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chase money note, does not constitute constructive notice of an unrecorded deed by which the beneficiary acquired the land.—Hart v. Gardner, 81 M. 650, 33 So. 442.

(1904). Where the draftsman of a deed, supposing a certain person was to execute the conveyance, wrote such latter's name therein as the grantor, but it was signed, acknowledged and delivered by another individual not mentioned in the instrument, its record is not constructive notice to a subsequent purchaser that it was the deed of the person who signed it.—Marx v. Jordan, 84 M. 334, 36 So. 386, 105 Am. St. 457.

(1906). The record of a deed conveys no constructive notice where the acknowledgment omits the word "delivered."—Ligon v. Barton, 88 M. 135, 40 So. 555.

(1907). Notice cannot be predicated of a recorded but unsigned deed.—Rainey v. Lamb Hardwood Lumber Co., 91 M. 690, 45 So. 367.

§ 232. —— Possession.

(1839-43). The possession of land by the vendee under an unregistered deed is such evidence of title as amounts to constructive or implied notice to creditors or subsequent purchasers.—Walker v. Gilbert, Freem. Ch. 85.

Possession of land is notice of title in the possessor.—(1843) Jenkins v. Bodley, S. & M. Ch. 338; (1843) Dixon v. Lacoste, 1 S. & M. 70; (1843) Hall v. Thompson, 1 S. & M. 443; (1846) Wilty v. Hightower, 6 S. & M. 345; (1846) Walker v. Gilbert, 7 S. & M. 456; (1848) Humphries v. Bartee, 10 S. & M. 282; (1849) Edmondson v. Orr, 12 S. & M. 541; (1859) Jones v. Loggins, 37 M. 546; (1871) Perkins v. Swank, 43 M. 349; (1874) Taylor v. Lowenstein, 50 M. 278; (1875) Strickland v. Kirk, 51 M. 795.

(1863). The use as a passway of an uninclosed alley in a city, by one owning an adjoining lot, is not notice to the world, that the party so using it claims exclusive title to the alley, if it be so situated, that the occupants of the other adjoining lots might also use it. The right of way is a mere incorporeal hereditament, of which the actual and visible possession requisite in law to constitute notice, is not predicable.—Gordon v. Sizer, 39 M. 805.

(1871). Possession of the vendee under an unrecorded bond for title is notice of such vendee's claim to the land.—Bell v. Flaherty, 45 M. 694.

(1875). Where evidence is introduced to fix notice inferentially, the circumstances must be positive, distinct and emphatic; and while possession of lands is a fact from which notice of title may be inferred, it is not sufficient to put a purchaser on inquiry and charge him with notice, where possession was begun as a tenant and was such when the title was acquired, and there was, as to the public, no visible change in the character of the possession. In such case occupancy can be naturally referred to the title under which the original entry was made.—Claiborne v. Holmes, 51 M. 146.

(1876). Where a vendor of land delivers possession, and the purchaser retains the same tenant, the title passes, but the actual occupancy remains the same. This is not a change of possession sufficient to put a creditor or purchaser on inquiry. To affect such person with notice, it must be such as that *mala fides* will be imputed to him if he takes against a prior vendee.—Loughridge v. Bowland, 52 M. 546.

(1877). Where one's possession of land was tortious in its inception, but subsequently a title is devolved on him, he will be presumed as thereafter holding under it.—Wathen v. Glass, 54 M. 382.

(1880). A possessor of land may, under certain circumstances, be estopped from asserting that his possession is notice of his claim to the property.—Taylor v. Mosely, 57 M. 544.

(1880). Open, notorious and exclusive possession of realty, under an apparent claim of ownership, is, under the law of this state, notice to all who subsequently deal with the title, of whatever interest the one in possession has in the fee, whether such interest be of a legal or an equitable character.—Taylor v. Mosely, 57 M. 544.

(1884). Where, at the time one purchases land from the holder of the legal title, a third person having an equity in the land is in possession by his tenant, such purchaser is chargeable with notice of the equitable claim.—Bratton v. Rogers, 62 M. 281.

(1884). Possession of land by one under claim of title, is notice to the world of his claim.—Money v. Ricketts, 62 M. 209.

(1887). Where the occupant conveys land by a deed which is duly recorded, his subsequent possession, though under a claim of title, is not notice to an innocent purchaser for value from the grantee of such adverse claim of title, the deed being the equivalent of an assertion by the grantor that the title is in the grantee.—Hafter v. Strange, 65 M. 323, 3 So. 190, 7 Am. St. 659.

(1887). In such case, where the grantor continues in possession after his conveyance, the fact that he was deceived and defrauded by the grantee in obtaining the deed may be sufficient to entitle him to relief against the grantee and those holding under him as volunteers, or with notice of the fraud, because the equity of the grantor is superior to the right asserted against it; but this principle finds no place in a controversy with others whose equities are as great as his, and who have acquired their rights upon the faith of his deed.—Hafter v. Strange, 65 M. 323, 3 So. 190, 7 Am. St. 659.

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(1889). Possession of land under an unrecorded deed is equivalent to registration while the possession under it lasts. But a purchaser of land, where the record shows a good title, is not bound to look beyond the record to a former occupancy of it under a deed of which he is not shown to have had notice.—Hiller v. Jones, 66 M. 636, 6 So. 465.

(1890). Possession of land, to be notice of an unrecorded title of the owner, need not be by his personal occupancy; possession by his tenant will be as effectual. (Bratton v. Rogers, 62 M. 281, cited.)—Levy v. Holberg, 67 M. 526, 7 So. 431.

(1897). The occupancy and open possession of land under an unregistered deed of conveyance or bond for title or other contract of sale imparts notice to creditors and subsequent purchasers and gives them the same protection as though the aforesaid instruments had been recorded.—Stovall v. Judah, 74 M. 747, 21 So. 614.

§ 233. Failure to record deed or other instrument.

(1846). The statute of the Mississippi territory providing for the registration of deeds, which declared that a deed which was not registered within twelve months from its date, should be void as to subsequent purchasers and mortgagees without notice, makes the unregistered deed void only as to purchasers and mortgagees from the same grantor; and the statute does not at all affect the validity of the deed, as against purchasers and incumbrancers from a distinct and independent source. Hence, the failure to register a deed made in the year 1806 (by a grantee under a Spanish grant), until the year 1841, does not at all affect its validity as against a patent granted by the United States government in 1823. The object of registration laws is to require deeds to be put on record, so that the same grantor may not have the power to commit a fraud on another purchaser, by making a new sale, and a new deed.—Sessions v. Reynolds, 7 S. & M. 130.

(1866). The registry act makes void all conveyances of his property, by a debtor grantor, as against all creditors and subsequent purchasers for a valuable consideration without notice, unless such conveyance shall be duly proved or acknowledged, and lodged for record as required by the act.—Kelly v. Mills, 41 M. 267.

(1866). The conveyance of a trustee, created such by implication of law, is not embraced within the spirit and object of the registry act, which declares all conveyance made by a debtor grantor, and not recorded as therein required, void as to creditors and subsequent purchasers.—Kelly v. Mills, 41 M. 267.

(1894). Under Code 1892, § 2457, providing that conveyances shall be void as to creditors and purchasers for value unless acknowledged and lodged for record, and § 2458, providing that they shall take effect as to such persons only from the time when so delivered, where a trust deed is made to one who fails to record it, until after another has received and recorded a trust deed on the same land, but with knowledge of the first deed, a purchaser under the last, though having no actual knowledge of the facts, is not protected as against the prior deed if, at the time of his purchase, it has been recorded.—Woods v. Garnett, 72 M. 78, 16 So. 390.

§ 234. Consideration.

(1848). The right of a maker of a note to make a defense of partial failure of consideration, even against the assignee of the note, is not affected by his (the maker's) assignment of his interest in the consideration; hence, where vendee bought land, with a stipulation in the deed that he was to have a remission of the price at a stated sum per acre for all the land the vendor could not show a clear title to when the purchase money became due, and vendee afterwards assigned the deed and all his interest in the land to another, it was held that this did not deprive him of his right to claim the remission, and this right existed against the assignee of the note.—Chaplain v. Briscoe, 11 S. & M. 372.

§ 236. —— Payment of value.

(1910). No one can claim the protection afforded an innocent purchaser for value, who has not paid value within the meaning of the law on that subject.—Tinnin v. Brown, — M. —, 53 So. 780.

§ 237. —— Pre-existing debt.

(1871). If the purchaser takes the property as a mere security for a pre-existing debt, which remains unsatisfied and in full force, he is not a purchaser for value.—Perkins v. Swank, 43 M. 349.

§ 238. Purchasers from bona fide purchaser.

One, though a volunteer and with notice, who derives title from a *bona fide* purchaser, is unaffected by fraud in the original transaction.—(1872) Price v. Martin, 46 M. 489; (1873) Harrington v. Allen, 48 M. 492; (1876) Fulton v. Woodman, 54 M. 158.

(1887). If a complainant, not being himself an innocent purchaser, claims under and through one who is, this fact must be averred and proved as the foundation of his right.—Yeates v. Mead, 65 M. 89, 3 So. 651.

(1900). An innocent purchaser of land, the title to which was fraudulently obtained by his vendor, can convey a good title to one who has notice of the fraud.—Equitable Sureties Co. v. Sheppard, 78 M. 217, 28 So. 842.

§ 239. Title and rights acquired by bona fide purchasers and equities and defenses against them.

(1844). A good faith purchaser for a valuable consideration and without notice ac-

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quires no title from a vendor who had no title to convey.—Williamson v. Williamson, 3 S. & M. 715, 41 Am. Dec. 636.

(1851). A vendor's lien cannot be sustained against a *bona fide* purchaser, without notice, from the original vendor.—Boon v. Barnes, 23 M. 136.

(1857). Equity will not grant relief against a *bona fide* purchaser of the legal title, without notice and for a valuable consideration.—Harper v. Bibb, 34 M. 472, 69 Am. Dec. 397.

(1879). The purchaser of a mere equity is bound by all prior equities, though he has paid for and acquired his title in good faith, but, under such circumstances, he can defeat prior equities by a subsequent acquisition in good faith of the legal title.—Flynt v. Hubbard, 57 M. 471.

(1894). A *bona fide* purchaser of land from one in whom the record shows the title to be, will prevail as against another having an undisclosed trust.—Clark v. Rainey, 72 M. 151, 16 So. 499.

§ 240. Pleading purchase in good faith.

(1843). A vendee who would protect himself against a prior equity upon the ground of being a *bona fide* purchaser without notice must deny notice fully, positively and precisely, even though it be not charged on the other side.—Jenkins v. Bodley, Sm. & M. Ch. 338.

(1839-43). A purchaser who rests his defense in equity upon the fact of being a *bona fide* purchaser without notice must deny notice fully, positively and precisely, although notice is not charged on the other side, and must also deny all knowledge of the facts charged from which notice may be inferred.—Harper v. Reno, Freem. Ch. 323.

(1857). In order to entitle a party to protection as a purchaser without notice, he must deny notice fully and particularly, whether the defense be set up by plea or answer.—Stanton v. Green, 34 M. 576.

(1858). An answer setting up the defense of a *bona fide* purchase for a valuable consideration, which avers that the defendant purchased and paid for the property in good faith, without any notice in fact or in law, of the claim of complainant, or of the claim or interest of any person in conflict with the absolute ownership of his vendor, is sufficiently explicit and full.—Wyse v. Dandridge, 35 M. 672, 72 Am. Dec. 149.

§ 241. Evidence as to purchase in good faith.

(1892). Though the defense of a *bona fide* purchaser is affirmative, and must be pleaded and proved by one who relies upon it, proof of payment of the consideration is *prima facie* evidence of the want of notice, and devolves upon the opposite party the burden of showing notice.—Atkinson v. Greaves, 70 M. 42, 11 So. 688.

§ 243. —— Admissibility.

(1840). The declarations of a vendor made after the conveyance, are not admissible to impeach the *bona fides* of the transaction.—Ferriday v. Selzer, 4 H. 506.

(1905). A grantee's actual knowledge, at the time of his purchase of certain land, of the existence of a "turpentine lease" thereof, may be established by oral testimony of the grantor of such land.—Ladnier v. Stewart, 38 So. 748, not officially reported.

VI. REMEDIES OF VENDOR.

(A) LIEN AND RECOVERY OF LAND.

§ 246. Nature of lien in general.

(1847). There can be no lien if there be no vendor and vendee, or if the sale be void by the statute of frauds; and hence, if the writing be so uncertain as to the interest conveyed, that the sale is a nullity, there will be no lien.—Allen v. Bennett, 8 S. & M. 672.

§ 251. Creation of lien in general.

(1876). No particular words in a deed is necessary to reserve a vendor's lien. If it recites that the "land shall be bound for the note," or "be security for it," or any other words expressing an intention that the land shall be pledged, this sufficiently reserves the lien. Such security operates as an equitable mortgage.—Moore v. Lackey, 53 M. 85.

§ 253. Lien reserved in contract or conveyance.

(1870). The mere recital in the note for the purchase money that it was given for land, does not create an express lien thereon; its effect is simply proof of the consideration of the note.—Pitts v. Parker, 44 M. 247.

§ 254. Equitable lien.

(1842). It seems to be admitted, that the vendor, if he takes up the assigned note, may maintain his original lien, and that his indorsee by joining his name in a suit in equity, might enforce the lien.—Briggs v. Hill, 6 H. 362, 38 Am. Dec. 441.

(1843). Where there is an express lien reserved by the vendor for part of the consideration money of real estate sold, it excludes the idea of an implied lien on the land for the residue of the unpaid purchase money.—Phillips v. Saunderson, Sm. & M. Ch. 462.

(1843). Where by a contract of sale of real estate part of the purchase money was to be paid down and the remainder in instalments secured by deed of trust, before the property is to be delivered, and only a portion of the cash payment is made and the property is delivered and the deed of trust for the instalments taken, it was held that the vendor had no equitable lien upon the land sold for an unpaid portion of the purchase money agreed to be paid in cash.—Phillips v. Saunderson, Sm. & M. Ch. 462.

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(1846). From the time of the sale the vendor has a lien on the property for the unpaid purchase money, and the vendee for the money paid or for the title.—Money v. Dorsey, 7 S. & M. 15.

(1856). If the vendor die and by fraud and collusion between his administrator and the vendee, the latter execute a deed under the order of probate court, when the purchase money is not paid, the deed, not being absolutely void, but only voidable at the election of the parties interested, vests a *de facto* title in the vendee upon which the vendor's lien will attach.—Servis v. Beatty, 32 M. 52.

In a sale of realty, payment constitutes a part of the contract, and therefore when the whole or any part of the purchase money remains unpaid, it is a rule derived from the Roman law, that the vendor has a lien on the estate for the payment of the unpaid price. The lien is a part of the contract of sale (raised by implication of law), and constitutes the vendor's security, and it subsists against the vendor and his heirs, and all who claim under him with notice.—(1847) Clower v. Rawlings, 9 S. & M. 122, 47 Am. Dec. 108; (1870) Pitts v. Parker, 44 M. 247.

The vendor's lien is founded upon an implied trust between vendor and vendee, and exists between them alone, being incapable of assignment, and incapable of existence, except where the relation of vendor and vendee is created by the contract. It is not created by express agreement, but is implied from a sale on a credit. Where, therefore, a third party pays the purchase money at the request of the vendee, with the understanding and agreement that the vendee's debt to him thus created, shall be considered as for the purchase money of the land, and that the lien shall exist as if he were vendor, no lien will be created. The creditor in such a case is not a vendor, which is necessary to the creation of the lien, and the parol agreement, that he should have the lien, is void by the statute of frauds.—(1852) Skaggs v. Nelson, 25 M. 88; (1874) Pitts v. Parker, 44 M. 247.

(1855). In order to create the vendor's lien, there must be a debt for unpaid purchase money to a fixed amount due directly to the vendor. If the obligation of the vendee, though given in consideration of the sale of land to him by vendor, be a collateral covenant, or be for the discharge of a liability of the vendor to a third party, there is no lien, unless one be expressly reserved; for, in that case, the obligation of the vendee appears to be taken as a substitute for the purchase money.—Patterson v. Edwards, 29 M. 67.

(1866). The vendor's lien exists as well in the sale of leasehold, as in case of freehold.—Richardson v. Bowman, 40 M. 782.

(1869). An implied vendor's lien exists only as an inseparable equitable incident of the contract of purchase, and is raised by construction of equity in favor of the vendor only.—Lindsey v. Bates, 42 M. 397.

(1871). Retention of the title by the vendor does not destroy his right to a lien for the purchase money.—Dodge v. Evans, 43 M. 570.

(1871). Where the negotiations for the purchase of land on credit are by one person, but, at his instance, the deed is made to another by way of gift or advancement, the latter is a volunteer taking without consideration, and the vendor's lien will arise; but otherwise, if the obligation of such third person is taken for the purchase money.—Campbell v. Henry, 45 M. 326.

(1875). The law recognizes the distinction between vendor and grantor, and where one, to secure a debt, gives to his creditor the sale of a tract of land, and the latter sells it to one who executes his note therefor to the creditor, and at his request the debtor conveys the land, the creditor will, in equity, be deemed the vendor, and the vendor's lien arises in his favor. Equity in such case looks through the form to the substance of the agreement.—Perkins v. Gibson, 51 M. 699, 24 Am. Rep. 644. See also (1875) Doyle v. Orr, 51 M. 229.

(1876). One may contract to convey land to which he has no title, and when he procures a deed from the owner to his vendee, he has a lien for the unpaid purchase money.—Rutland v. Brister, 53 M. 683.

(1876). The fact that a note for the purchase of land is payable in certificates of indebtedness, known as Alcorn money, does not deprive it of the protection of the vendor's lien.—Deason v. Taylor, 53 M. 697.

(1879). Where, on rescinding a land sale, the vendee writes an informal quitclaim deed on the original conveyance, he has a vendor's lien for purchase money due him; and parol evidence is admissible to show that a note given him was in consideration of this release, although the release recites, as a reason for its execution, "the true owner not having complied with the within deed."—Fry v. Prewett, 56 M. 783.

(1879). The releasor of any interest in land, may, to the extent of his interest, enforce a lien upon the property for the unpaid consideration of his release, where no other security has been taken.—Fry v. Prewett, 56 M. 783.

(1896). An equitable lien is only raised when there is "a fixed sum of money due from the vendee to the vendor as purchase money for the land conveyed."—Griffin v. Byrd, 74 M. 32, 19 So. 717.

(1896). No vendor's lien (as distinguished from a lien reserved by contract) exists in favor of a complainant when it appears that the note sued on was the price of the land sought to be subjected and certain personal

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property, in gross, or that the land was sold for one sum and the personalty for another, the later being evidenced by said note, for in neither case is there a fixed sum due from the vendee to the vendor as the purchase money of the realty.—Griffin v. Byrd, 74 M. 32, 19 So. 717.

(1907). A vendor conveying land, by a deed reciting a nominal consideration, pursuant to the promise of a representative of the grantee to pay a stipulated sum, has a lien on the same for the agreed price.—Matthews v. Delta Southern R. Co., 90 M. 429, 43 So. 475.

§ 254a. —— Under bond for title.

The vendor's lien is not founded upon matter of record or express contract, but is merely implied from the presumed intention of the parties; and whether it be treated as a trust or natural equity, its very nature implies the existence of a title, either legal or equitable, in the vendee, on which it may attach; and hence, where the vendor executes only a bond to make the title on payment of the purchase money, retaining the title in himself, there is no vendor's lien. —(1842) Burke v. Gray, 6 H. 527; (1856) Servis v. Beatty, 32 M. 52.

(1846). When a bond is given to make title on payment of the purchase money, the vendor has a lien on the land for the payment thereof.—Money v. Dorsey, 7 S. & M. 15.

(1848). B & W bought land on a credit and took a bond for title on payment of the purchase money. W sold his interest to one N by indorsing on the title bond a direction to the vendor to make title to N for his one-half interest, whenever N should discharge to the vendor the liability of W for the purchase money. The vendor recovered judgment against B & W for the purchase money, and N then made a verbal sale of his interest to T, who, through B, prevailed on the vendor to make him a deed of W's interest, $1,000 of the purchase money, however, still remaining unpaid. B & W filed this bill to enforce the vendor's lien for that amount against T and the heirs of N. *Held*, that B & W had no lien, as they had never paid the amount claimed, to the vendor.—Thompson v. Williams, 10 S. & M. 173.

(1852). In this case, the vendor made a sale by title bond to the vendee, but the title being in the grantor, the latter, at the vendor's request, made the deed directly to the vendee; and on this state of facts, the vendor's lien was enforced in favor of the vendor without question.—Holloway v. Ellis, 25 M. 103.

(1876). The holder of a title bond who sells the land and assigns the bond, has a lien for the purchase money due him as if he had conveyed the land by deed.—Anderson v. Spencer, 51 M. 869. See (1884) Louisiana Nat. Bank v. Knapp, 61 M. 485.

§ 254b. —— Duration.

The vendor who takes no security for the payment of the purchase money, has a lien on the land for its payment, and this lien remains, unless waived, as long as the land remains in the hands of the original purchaser.—(1843) Stewart v. Ives, 1 S. & M. 197; (1846) Upshaw v. Hargrove, 6 S. & M. 286.

(1870). The vendor's lien subsists so long as the vendor occupies the relation of creditor to the vendee and to purchasers from him with notice, and when this relation of creditor is gone the lien ceases.—Pitts v. Parker, 44 M. 247.

(1870). If the vendor has parted with the debt, for the purchase money, so that he cannot rightfully collect and appropriate it, he is no longer virtually the creditor of the vendee, and the vendor's lien ceases.—Pitts v. Parker, 44 M. 247.

§ 257. Operation and effect of lien in general.

The vendor's lien, where it exists, may be enforced against the vendee, his heirs, volunteers under him, and purchasers from him with notice.—(1843) Stewart v. Ives, 1 S. & M. 197; (1846) Dunlap v. Burnett, 5 S. & M. 702, 45 Am. Dec. 269; (1847) Clower v. Rawlings, 9 S. & M. 122, 47 Am. Dec. 108; (1868) Walton v. Hargroves, 42 M. 18, 97 Am. Dec. 429n; (1870) Parker v. Foy, 43 M. 260, 5 Am. Rep. 484.

(1869). Where the vendor has merely given a bond for title, the lien he has upon the land for the purchase money is treated as a mortgage, which shall inure to the benefit of the assignee of the debt secured by it.—Lindsey v. Bates, 42 M. 397.

(1876). Where a deed stipulates that if the purchaser fails to pay the notes for the purchase money the sheriff of the county shall sell the land, make title to the purchaser, and pay the amount due to the vendor or any holder of the notes, this confers a mere power on him to sell and pay the notes, but the title to the land, subject to the lien, is in the purchaser and not the sheriff.—Moore v. Lackey, 53 M. 85.

§ 259. Property or interest subject to lien.

(1852). The vendor gave a bond for title, and after recovering two judgments against the vendee, each for one-half the purchase money, the vendee sold a half interest in the land to A, and the other half to B, each of these purchasers agreeing to pay one of these judgments as the price of his purchase. Accordingly, A and B each executed a forthcoming bond, as the surety of the vendee on the judgment which he had agreed to pay. Both A and B were unable to pay when the forthcoming bonds were collectible, and each of them applied to H to advance him the money and to take an assignment of the judgments on the forthcoming bonds as security, which H did, on being assured that he would retain a lien on the land. A paid his judgment to H, but

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B failing, this bill was filed by H to subject the whole land to the payment of the judgment against B, as surety on the forthcoming bond for the vendee. *Held*, that under the circumstances, it was fairly inferable that there was an agreement with H (the complainant), when he made the advances to A and B, severally, that he was only to hold the share of each in the land for the judgment for which he was liable, and that H could only enforce his lien against B's share in the land.—Wilkins v. Humphreys, 23 M. 311.

§ 260. Priority of lien.

The lien of the vendor is superior to the lien of a judgment creditor of the vendee, or purchasers under the judgment, and general assignees for the payment of debts. They are volunteers, and get only the actual interest of the debtor, and are not *bona fide* purchasers for a valuable consideration.—(1846) Dunlap v. Burnett, 5 S. & M. 702, 45 Am. Dec. 269; (1848) Parker v. Kelly, 10 S. & M. 184; (1852) Holloway v. Ellis, 25 M. 103; (1868) Walton v. Hargroves, 42 M. 18, 97 Am. Dec. 429n.

A vendor's lien as to creditors, will not be protected against a mortgage given by the vendee, to secure a debt created since the conveyance to him, when the creditor had no notice of the existence of the lien. A mortgage is something more than a lien on the mortgaged estate; it is a transfer of the property itself, and differs from a general lien or assignment created by operation of law; against these the vendor's lien will prevail.—(1846) Dunlap v. Burnett, 5 S. & M. 702, 45 Am. Dec. 269; (1852) Holloway v. Ellis, 25 M. 103.

(1848). How far the vendor's lien will prevail against a judgment against the vendee before his purchase. *Quære?*—Taylor v. Strong, 10 S. & M. 63.

(1852). When a purchaser had notice of an outstanding unregistered mortgage at the time of the purchase, whereby he only acquired the equitable title remaining in the mortgagor, he will be postponed to a second outstanding unregistered mortgage of which he had no notice, this mortgagor being prior in time to the purchase.—Wailes v. Cooper, 24 M. 208.

(1866). The vendor's lien will prevail against judgment creditors.—Kelly v. Mills, 41 M. 267.

(1868). The wife's right of dower is an emanation from the ownership of the husband, and subject to all its burdens and qualifications, and subordinate to the lien of the vendor of the husband for unpaid purchase money.—Cocke v. Bailey, 42 M. 81.

(1868). The vendor's lien will prevail against the vendee, volunteers, purchasers with notice, or having an equitable title only, assignees claiming by general assignment under bankrupt or insolvent laws, assignees claiming by general assignment made by a failing creditor, the claim of dower by the wife of the purchaser and against a judgment creditor of the vendee.—Walton v. Hargroves 42 M. 18, 97 Am. Dec. 429n.

(1868). The vendor's lien will be enforced against a subsequent purchaser or mortgagee without notice, of an equitable estate, and on the principle, that the vendor and purchaser and mortgagee each have an equity and *qui prior est in tempore, potior est in jure.*—Walton v. Hargroves, 42 M. 18, 97 Am. Dec. 429n.

(1871). Where, from the face of a recorded deed, the presumption arises that from long lapse of time (in this case seventeen years), the vendor's lien has become barred, such lien, though it has been, in fact, kept alive by secret renewals, will, in equity, be postponed to supervening judgment liens against the vendee.—Avent v. McCorkle, 45 M. 221.

(1874). Where one who has purchased land on credit, but under a deed reciting payment of the purchase money, conveys it to another, though in satisfaction of an existing debt, if his vendee buys and receives a deed without notice that the purchase money is unpaid, he will prevail as against the original vendor.—Newell v. Crider, 50 M. 539.

(1876). A vendor's lien will prevail over a title acquired by sale under execution against the vendee. It will also prevail against a subsequent purchaser who has paid nothing.—Tucker v. Hadley, 52 M. 414.

(1876). Where a guardian holding a mortgage on land in favor of her ward, buys the land from the mortgagor in her own name, in consideration of the mortgage debt and a balance to be paid evidenced by the notes of the guardian this is a diversion of the trust fund, and, being participated in by the seller, equity will treat the mortgage as still subsisting, and it will have priority over the vendor's lien sought to be enforced against the guardian.—Eustice v. Holmes, 52 M. 305.

(1877). Where one sells land by deed reciting payment, but takes notes therefor, with a trust deed on the land to secure some of the notes, although the trust deed recites that the "vendor's lien for the other notes is to be unimpaired," if the notes secured by the trust deed are paid, and satisfaction thereof is entered of record, one who subsequently takes a mortgage on the land from the vendee, without notice of the nonpayment of the other notes, acquires a lien superior to that of the vendor.—Mairs v. Bank, 58 M. 919.

§ 261. Assignment of lien or claim for purchase money.

(1839-43). Where a promissory note expressed on its face that the same was given to secure the purchase money of land and that the land was also bound for its pay-

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ment, it was held that the express lien created thereby on the land was assignable in equity and that the same might be enforced against any subsequent incumbrancer having notice of its existence.—Briggs v. Planters' Bank, Freem. Ch. 574.

(1842). An equitable vendor's lien is an incumbrance upon land which can only be held by the vendor thereof; the assignment of the note to secure the purchase money of land does not transfer the implied vendor's lien thereon.—Briggs v. Hill, 6 H. 362, 38 Am. Dec. 441.

(1845). A vendor of land who has taken the notes of the purchaser, and given bond to convey the title when the purchase money is paid, can, by an assignment of the notes, pass his lien for the purchase money.—Tanner v. Hicks, 4 S. & M. 294.

(1848). Where, after a vendor who had given a bond for title, and assigned one of the notes for the purchase money, has also subsequently given his vendee a deed for the land, a judgment creditor of the vendee, who has recovered his judgment since the conveyance was made to the purchaser, will be postponed in his right to satisfaction of his judgment out of the land, to the equitable right of the assignee of the note for the purchase money. Such judgment will be a lien on the legal title of the vendee, subject to the equitable lien of the assignee, and when the latter is satisfied, the judgment will hold.—Parker v. Kelly, 10 S. & M. 184.

(1852). Where the vendor makes the purchaser a deed, an assignee of a note for the purchase money has no lien upon the land for the payment of the note.—Skaggs v. Nelson, 25 M. 88.

(1852). Where the vendor has transferred the note for the purchase money to an innocent holder for value, and he has recovered a judgment at law on it, as he certainly has a right to do in all cases where a deed has been made and there is no eviction or fraud, the vendee cannot on the ground of the insolvency of the vendor get relief against the judgment in equity; for the equity of the innocent holder is at least equal to the equity of the vendee, and in such cases the rule is always that the law shall prevail, and that equity will not interfere.—Wailes v. Cooper, 24 M. 208.

(1855). The assignee of a promissory note given by the vendee of land, who has received a deed, to secure the payment of the purchase money, has no lien or equity on the land whatever.—Walker v. Williams, 30 M. 165.

(1858). When the vendor assigns a portion of the purchase money, to which his lien attaches, and retains the balance, the proceeds of the land, if insufficient to pay all, will be distributed *pro rata* between the vendor and his assignee.—Davidson v. Allen, 36 M. 419.

(1858). The indorsement by the vendor of a note given for a portion of or for all the purchase money, "without recourse in law or equity," will not prevent the vendor's lien passing to the assignee, in cases where the lien is otherwise assignable.—Davidson v. Allen, 36 M. 419.

The vendor's lien, raised by mere implication of law, in favor of the vendor, where there has been an absolute conveyance, is a mere personal right of the vendor, and does not pass to the assignee of the security given for the purchase money; but where, in the deed, the vendor expressly reserves a lien for the payment of the purchase money, this is an express lien, and is equivalent to an equitable mortgage, and the lien will pass to the assignee of the note. And, if the deed reserve the "statutory lien" for the purchase money, it will be understood to mean the "vendor's lien," and will be good as an equitable mortgage. — (1866) Stratton v. Gold, 40 M. 778; (1867) Harvey v. Kelly, 41 M. 490, 93 Am. Dec. 267.

(1869). The assignment of the note does not carry with it the implied lien of the vendor on the land for the purchase money. This lien is an incumbrance upon the land, which can only be held by the vendor, and assets may be marshalled so as to put a vendor altogether upon his equitable lien for the benefit of other creditors; yet no third person can, as an assignee of the vendor, derive any benefit from such lien.—Lindsey v. Bates, 42 M. 397.

(1869). Upon the assignment of the note for the purchase money, the implied vendor's lien ceases to exist. So long as the assignee remains the owner of the note, neither he nor his assignor has any lien on the property which could be enforced by them, either jointly or severally. But in case the assignor is compelled to take up his note, the lien revives, and as owner of the note he may enforce it in a court of equity as though the assignment had never been made.—Lindsey v. Bates, 42 M. 397.

(1870). The mere fact that the vendor retains the legal title to the purchase money note assigned, will not support the lien for the benefit of the equitable assignee thereof, nor, coupled, with the additional fact, that it was so retained, on the agreement that it should be exerted for that purpose, create an equity, or give such further merit as to make it recognizable in a court of chancery.—Pitts v. Parker, 44 M. 247.

(1870). Where the vendor sold land, retaining title until the payment of the purchase money, and assigned the notes, and afterwards, and before the payment of the notes, conveyed the title to his vendee, the lien of the assignee is superior to that of a judgment creditor of the vendee. Upon the assignment, the equity of the assignee became complete, and no subsequent act of the assignor could impair it.—Pitts v. Parker, 44 M. 247.

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A lien for the purchase money expressly reserved in a conveyance of land is in effect an equitable mortgage, and an assignment of the debt carries with it the lien.—(1872) Kausler v. Ford, 47 M. 289; (1876) Moore v. Lackey, 53 M. 85.

(1873). Where the vendor of land by title bond assigns the debt for the purchase money, the lien passes to the assignee, and the vendor cannot afterwards do any act which will defeat or impair it.—Mhoon v. Wilkerson, 47 M. 633.

(1874). The assignment of one of several notes by a vendor of land transfers *pro tanto* the security which the vendor had for its payment. If after such assignment the vendor, knowing that the assigned note is unpaid, executes a deed to the vendee, and he conveys the property to a *bona fide* purchaser, the vendor is liable as a trustee to the holder of the assigned note.—Cummings v. Oglesby, 50 M. 153.

(1876). Payment by the assignor of the purchase money due to the original vendor, is not necessary to the existence of the lien in favor of such assignor; it merely affects the value of his claim as being subordinate to that of the first vendor. And if the assignee pays the balance due to the first vendor, and receives a deed from him, the land, as to him or a remote vendee with notice, remains bound for the amount due the assignor.—Anderson v. Spencer, 51 M. 869.

(1879). Where an express lien on land is reserved in a note for the purchase money, though the deed recites payment thereof, the lien will pass by assignment of the note.—Hobson v. Edwards, 57 M. 128.

(1883). Where the vendor, holding land as trustee, takes notes payable to himself for the purchase money thereof, his indorsement in blank and delivery of them to the *cestui que trust* for collection, is not such an assignment thereof as will destroy the vendor's lien.—Parker v. McBee, 61 M. 134.

(1909). Code 1892, § 2444, deals with an estate in lands, and the right which a vendor has to subject the land sold to the payment of the purchase money is not such a "right or estate in the lands" as the statute contemplates.—Howell v. Hill, 94 M. 566, 48 So. 177.

§ 262. Transfer of property by purchaser.

(1842). In those general cases in which there would be an implied lien, as between vendor and vendee, the vendor will have a lien against a third person, who had notice that the purchase money was not paid.—Briggs v. Hill, 6 H. 362, 38 Am. Dec. 441.

(1844). The vendor's lien passes with the land, into the hands of a sub-vendee, who purchases with notice of such lien. In case of a re-sale, the lien will extend to the purchase money in the hands of the sub-vendee, as well as to the land itself; but the lien on the fund cannot be more extensive than on the land. The lien cannot attach to the land, in the hands of a purchaser, for valuable consideration, without notice, neither can the money be reached when it has been paid over, or when the second purchaser has become bound to pay to third persons before notice.—Stewart v. Ives, 1 S. & M. 197.

The vendor's lien will not be enforced against a subsequent purchaser of the legal title, for a valuable consideration, and without notice.—(1846) Dunlap v. Burnett, 5 S. & M. 702, 45 Am. Dec. 269; (1846) Upshaw v. Hargrove, 6 S. & M. 286; (1852) Holloway v. Ellis, 25 M. 103; (1868) Walton v. Hargroves, 42 M. 18, 97 Am. Dec. 429n.

(1866). The vendor's lien will not be retained against a *bona fide* grantee nor against subsequent purchasers without notice.—Kelly v. Mills, 41 M. 267.

(1870). If the vendor gives notice of his lien after a partial payment of the purchase money, the lien will attach, as to the unpaid balance, in which case, if the land be sold, the sub-vendee has a paramount equity to be reimbursed for the payments made before notice.—Parker v. Foy, 43 M. 260, 5 Am. Rep. 484.

(1870). The vendor's equitable right to subject the land conveyed, to the payment of the purchase money, will be enforced in chancery against subsequent purchasers of the same land, if such purchasers had, or by the exercise of proper precaution could have had, notice of the original vendor's right in the premises.—Parker v. Foy, 43 M. 260, 5 Am. Rep. 484.

(1872). Where one, at different times, makes sales of incumbered land, it will be liable to the lien in the inverse order of alienation, and the first purchaser may, in equity, remit the lien creditor to the lands subsequently purchased, and he will be compelled to obtain satisfaction, beginning with the last land sold.—Kausler v. Ford, 47 M. 289.

(1910). In a suit to foreclose a vendor's lien purchased by the defendant and another, where such other had misrepresented the amount necessary to make the purchase and had fraudulently appropriated part of the consideration turned over to him by the defendant, the court condemned the interest of such other person in the land to be sold first to satisfy his indebtedness, and decreed that if his interest should bring more than his debts, the surplus should be credited on the note of the defendant given in the transaction, and that her interest should be sold for only such balance as might remain thereafter.—Hays v. Bostick, 96 M. 794, 51 So. 462.

§ 266. Waiver, loss, or discharge of lien.

(1851) If, under the order of the probate court, the administrator of the vendor make title to the vendee without payment of the

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purchase money, and afterwards recover a judgment at law against the vendee for the purchase money, and cause the land to be sold thereunder, this, it seems, is a waiver of the right to file a bill to enforce the vendor's lien. But, however this may be, the administrator cannot, as against a *bona fide* purchaser from the vendee at the sheriff's sale, enforce the lien.—Boon v. Barnes, 23 M. 136.

(1852). The vendor's lien may be waived or modified by parol, even in a case where there is only a bond given to make title on payment of the purchase money.—Wilkins v. Humphreys, 23 M. 311.

(1855). The vendor sold and conveyed the title to his vendee, who died without paying the purchase money. The vendor then, being administrator of the vendee, by consent of the heirs, sold the land to S for the balance of the purchase money then unpaid, and took S's note therefor. Afterwards, the heirs of the vendee procured an annulment of the sale to S, by a decree in chancery, the heirs of the vendor (who was then dead), but not his administrators, being made parties. The present bill was filed by the administrator of vendor against the administrator *de bonis non* and the heirs of the vendee, and against S, to enforce the vendor's lien for the unpaid purchase money. *Held*, that in the sale to S and the taking of his notes, the lien which was on the land before, still remained, S being but a substituted purchaser for the original vendee.—Pouns v. Gartman, 29 M. 133.

(1871). Where the deed does not show when the credit for the purchase money was to expire, and the vendor delayed seventeen years to enforce his lien, and relied on a renewal note given ten years after such sale, there being no other evidence, the inference will be indulged in favor of a judgment creditor of the vendee that the original debt was barred before the renewal, and if it be also shown that such renewal was by a note bearing a much greater rate of interest, the vendor's intent being to get a reinvestment at a better rate of interest, it will be presumed that the vendor's lien was waived.—Avent v. McCorkle, 45 M. 221. But see (1876) Deason v. Taylor, 53 M. 697; (1877) Allen v. Poole, 54 M. 323; (1885) Plant v. Shryock, 62 M. 821.

(1872). The novation of a debt secured by an express lien upon real estate, or any part of such debt, by the substitution of a new note of the vendee, does not discharge the lien. To have this effect it must be shown that such was the intent of the parties.—Kausler v. Ford, 47 M. 289. See also (1877) Cansler v. Sallis, 54 M. 446.

(1872). So long as the vendee by title bond retains the land, he may, by a new note, waive the statute of limitations and keep alive the debt and the vendor's lien, but where his interest in the land has passed to third persons, he cannot waive the bar so as to affect their rights.—Adams v. Harris, 47 M. 144.

(1887). Where, after a note for the purchase money of realty has been assigned, it is found that the title to the land is in a third person, and the vendor and the assignee of the note agree that the sale may be treated as rescinded, and that the assignee may buy the land from such person, which he does, the first vendor is estopped to assert any lien on the land, or to object that such vendee was disabled to buy in the outstanding title.—Harper v. Wilkings, 65 M. 215, 3 So. 455.

(1907). A provision in the deed that payment is to be made out of the gross receipts of a prospective venture on the part of the vendee, never in fact entered upon, is of no consequence as regards the creation and existence of the vendor's lien.—Burroughs v. Gilliland, 90 M. 127, 43 So. 301.

§ 266a. —— By taking security.

The vendor of land, who takes a note with personal security for the purchase money, thereby waives the vendor's equitable lien therefor.—(1842) Burke v. Gray, 6 H. 527; (1850) Johnson v. Sugg, 13 S. & M. 346.

(1847). The vendor's lien may be waived or relinquished. The court inclines to favor the rule that where an absolute deed is made, and independent security taken for the purchase money, that this is *per se* a waiver of the lien—the vendor having carved out his own security. But it was held, that if the true rule were that the taking of independent security was a waiver or not, according as the circumstances would show, or not show, an intention of the parties to waive the lien, that then, if after a sale with security, but without a deed, the vendor make a deed in order to enable the vendee to mortgage the estate to raise money to pay for it, this would be a waiver of the lien.—Clower v. Rawlings, 9 S. & M. 122, 47 Am. Dec. 108.

(1859). The vendor executed a title bond to the vendee, obligating himself to make a deed when the purchase money was paid; after the death of the vendee, his administrator transferred to the vendor, in discharge of the purchase money, a note on a third party, and guaranteed its payment; and, at the same time, received a deed from the vendor, which he promised not to place on record until the vendor was satisfied as to the payment of the note so transferred to him. The collection of this last mentioned note was afterwards defeated by reason of a failure in the consideration thereof, and the vendor thereupon filed this bill to enforce his lien for the unpaid purchase money. *Held*, that the reception of the note, and the guaranty of the administrator, in discharge of the purchase money, was a waiver of the vendor's lien, the court saying, it is too well settled to admit of con-

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troversy that where a distinct and independent security is taken for the purchase money, the lien is discharged.—Johnston v. Union Bank of Tennessee, 37 M. 526.

(1867). The vendor's lien exists, notwithstanding an agreement appended to the note for the purchase money (it being for money) that it might be discharged by the delivery of specific articles. Patterson v. Edwards, 29 M. 67, is not contrary to this That case held only that where the vendor took from the vendee a covenant to pay the vendor's notes to a third party, no lien existed as a security for the damage resulting from a breach of the covenant.—Harvey v. Kelley, 41 M. 490, 93 Am. Dec. 267.

(1869). The rule is, to sustain the vendor's lien whenever the vendor has taken the mere personal security of the vendee only, unless there is an express agreement between the parties to waive the lien; and, on the other hand, to consider the lien as waived, whenever any security is taken on the land or otherwise, for the whole or any part of the purchase money, unless there is an express agreement, that the equitable lien shall be retained.—Fonda v. Jones, 42 M. 792, 2 Am. Rep. 669.

(1870). The husband negotiated for lands, took the deed in the name of the wife, and gave his own note for the purchase money. *Held*, that the vendor's lien was not waived. —Davis v. Pearson, 44 M. 508.

(1873). Where a vendor takes a trust deed upon a two-thirds interest in land, to secure the balance of purchase money due upon the whole, this raises a strong presumption of abandonment of the vendor's lien as to the other one-third interest, which can only be overcome by the clearest and most satisfactory proof.—Myers v. Estelle, 48 M. 372.

(1875). None but a *bona fide* purchaser can successfully resist a vendor's lien. Hence, where a conveyance is made to a wife at the request of the husband, who is the real purchaser, she being a mere recipient of the title, the lien of the vendor exists; and it will not be waived by taking her note with that of the husband, she being incapable of binding herself for the price.—Doyle v. Orr, 51 M. 229. See also (1875) Perkins v. Gibson, 51 M. 699, 24 Am. Rep. 644.

(1875). If the vendor, instead of relying on his lien, takes the note of the vendee, and another as surety, he waives his lien.—Doyle v. Orr. 51 M. 229.

(1876). Taking of an invalid trust deed as security for the purchase money is not a waiver of the implied vendor's lien.—Champlin v. McLeod, 53 M. 484.

(1877). A recital in a trust deed that it is to secure a debt for purchase money and that the vendor's lien exists, is not an independent contract, within the meaning of Code 1871, § 2307, providing that every "contract in relation to land," when acknowledged and recorded, shall be notice to the world, &c., but is merely a stipulation that the vendor's lien is not waived by taking the trust deed. It grants nothing, and falls with the cancellation of the deed.—Mairs v. Bank, 58 M. 919.

(1883). The lien is not lost by taking the note of the vendee and her husband. This is not taking security in such sense as by implication indicates an intention to waive the vendor's lien.—Parker v. McBee, 61 M. 134.

(1883). Acceptance of a note of a subvendee of land in substitution of that of his vendor, does not discharge the lien of the first vendor.—Cummings v. Moore, 61 M. 184.

§ 266b. —— By executing conveyance.

(1846). A vendor, who in the first instance executed a bond to convey on payment of the purchase money, does not waive his lien by afterwards executing a conveyance, upon the promise of the vendee to give security, if the latter fail to comply with his promise.—Dunlap v. Burnett, 5 S. & M. 702, 45 Am. Dec. 269.

§ 266c. —— Persons entitled to assert.

(1846). None but a *bona fide* purchaser for value can set up an implied waiver of the vendor's lien; and to constitute such purchaser with the privilege of setting up the waiver, he must have advanced some new consideration or relinquished some security for a pre-existing debt.—Upshaw v. Hargroves, 6 S. & M. 286.

(1846). The husband, by written agreement, bought land, which was, in pursuance of that agreement, conveyed by the vendor to the wife. The price of the land was, by the agreement, to be paid by the conveyance of other lands claimed by the husband, if the titles could be perfected, and if not, then to be paid by the husband in money. The titles were not perfected, and the vendor filed his bill to enforce his lien on the lands conveyed to the wife, and it was insisted by her that the lien was waived or lost. *Held*, that the lien could be enforced. —Upshaw v. Hargroves, 6 S. & M. 286.

§ 267. Payment, release, or satisfaction of lien.

(1877). Whenever the note comes back to the vendor, whether by honoring his own indorsement or by purchase where unindorsed, his lien revives.—Cotten v. McGehee, 54 M. 510.

(1894). Where land is subject to a judgment lien and to a prior vendor's lien, which has been assigned, and a person buys the judgment on the mistaken assurance of the vendor that the purchase money is paid, and procures him to satisfy the lien of rec-

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ord, such unauthorized cancellation will not release the vendor's lien outstanding in the assignee. Nor will a purchase of the land at execution sale under his judgment, though without notice of the assignment of the vendor's lien, give such person any higher right, since he gets only the interest of the defendant in execution.—Bramlett v. Wetlin, 71 M. 902, 15 So. 934.

§ 268. Enforcement of lien.

(1842). In the instant case, the vendor gave his bond for title when the purchase money should be paid and the vendee executed his notes, the same being indorsed by a surety. The vendor transferred one of the notes, and the transferee thereof filed his bill in chancery to subject the lot to the payment of the purchase money, alleging the insolvency of the vendee and his surety. *Held*, that the only way to subject the lot was by bill for specific performance.—Burke v. Gray, 6 H. 527.

(1847). A bill to enforce a vendor's lien bears a strong resemblance to a bill to foreclose, and to a bill to enforce specific performance, neither of which can be maintained, where it is utterly uncertain what interest in the land has been sold.—Allen v. Bennett, 8 S. & M. 672.

(1851). In this case, the court expressed the opinion, that so far as the right of a vendor to a lien for his purchase money, was already engrafted on our jurisprudence, they were willing to sustain it; but they were rather inclined to limit than extend it. That it may be consistent with the principles of natural equity, that a vendee should not be permitted to hold the land without paying for it; but it is inconsistent with those principles, that the vendor should invest his vendee with the highest evidence of unconditional right on which the public may be supposed to confide and act, and at the same time hold a secret and invisible lien, arising by implication, against the purchaser, even at sheriff's sale; and that it is the fault of the vendor that he does not take an express lien.—Kilpatrick v. Kilpatrick, 23 M. 124, 55 Am. Dec. 79.

(1853). A bill in equity may be maintained to enforce the vendor's lien, and at the same time an action at law may be maintained to collect the same debt.—Speight v. Porter, 26 M. 286.

(1866). The vendor may sue the vendee at law, and proceed in equity against him to enforce the lien for the purchase money. The remedies are separate and distinct, the one being *in personam* and the other *in rem*.—Payne v. Harrell, 40 M. 498.

(1870). A vendor who retains the legal title to the land but gives bond to convey when the money is paid, can resort to chancery to compel the vendee to submit to a sale of the land to raise the money.—Pitts v. Parker, 44 M. 247.

(1871). Where a vendor conveys property to a third person to be held in trust, to secure payment by the purchaser of a named sum annually, and the purchaser, under this arrangement, goes into possession and becoming insolvent, fails to pay the annuity, the remedy at law is inadequate and equity has jurisdiction to enforce payment by subjecting the property.—Brandon v. Brandon, 46 M. 222.

§ 272. —— Restraining enforcement.

(1872). A purchaser at execution sale of the equitable interest of the vendee, who has received a bond for title and has paid part of the price, may maintain an injunction against an administrator who, without an order of court, has made a void sale of the land on credit and obtained a decree foreclosing the vendor's lien, and is about to enforce the same, the only effect of which would be to embarrass the equitable title of complainant.—Adams v. Harris, 47 M. 144.

§ 273. —— Conditions precedent.

(1847). Though, as a general rule, a complainant seeking a specific performance must be able and willing to comply with his part of the agreement, yet this rule does not mean a literal, but a substantial compliance, and such party is entitled to a decree, if he has been guilty of no default, and has taken all proper steps for performance. In consequence, the inability of a complainant seeking the enforcement of his vendor's lien to perform, which arises not from his fault, but from an attempt to carry out an agreement between the vendees will not defeat his right to a decree, his being placed in *statu quo* having been rendered otherwise impossible by reason of the acts of the purchasers.—McCorkle v. Brown, 9 S. & M. 167.

(1869). A bill was filed in the joint names of the vendor and his assignee by indorsement of the note for the purchase money, to enforce the vendor's lien, and the vendee demurred to the bill. *Held*, that the demurrer should be sustained, the court recognizing the doctrine that where the vendor is compelled by his indorsement to take up the note, he is remitted to his lien; but stating, that, if the vendor, having parted with his entire interest in the note (and not having transferred it merely as collateral security) still had such lien in virtue of his mere liability as indorser, yet it was necessary to show that the proper steps had been taken to hold him liable as indorser.—Lindsay v. Bates, 42 M. 398.

(1869). When performance is a condition precedent to the right of recovery an averment that the party bringing the action is ready and willing to perform is not sufficient.—Robinson v. Harbour, 42 M. 795, 97 Am. Dec. 501, 2 Am. Rep. 671.

§ 274. —— Defenses.

(1849). To a bill filed by the vendor of land to enforce his lien for the purchase money against the widow and heirs of the vendee, the widow set up in her answer the

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following defenses: 1. That the vendor had no title, and the vendee, in consequence thereof, had abandoned the land. 2. That vendee had paid the purchase money. 3. That she had acquired the property by purchase under a deed of trust executed by her husband. *Held*, that the defenses were inconsistent, and constituted no defense to the bill.—Glasscock v. Robinson, 13 S. & M. 85.

(1856). The rule that payment of a part of the purchase money, before notice, although not sufficient to invest the vendee with the character of a *bona fide* purchaser, as it regards the estate purchased, yet gives him the right to require reimbursement from the owner, as the condition of giving way to his title, seems to accord with the principles of justice and reason, and should, therefore, be recognized by the courts of this state. And when such partial payment, so made before notice, is equal to the value of the estate purchased,, at the time of the final decree, a bill to enforce the incumbrance, which is a mere lien on the land, will be dismissed.—Servis v. Beatty, 32 M. 52.

(1873). A purchaser of land in possession under a warranty deed, when proceeded against for the enforcement of the vendor's lien may show a breach of the warranty in that a part of the land was subject to prior incumbrances, provided the vendor be insolvent and his covenants for that reason afford no indemnity for the threatened loss. in such case the incumbrance will be treated as a failure of consideration *pro tanto*.—Wofford v. Ashcraft, 47 M. 641.

(1874). Where one having a judgment lien and also a prior express lien on land, has the same sold under the judgment, but the purchaser delays until after the return term of the execution and then pays his bid, receiving a deed, and the amount so paid is voluntarily received by the plaintiff, on a bill subsequently filed by him to enforce his lien, which is expressly reserved, the full extent of the right of the purchaser at the execution sale is to have the decree for sale of the land direct that he shall be first reimbursed to the amount irregularly paid by him to the sheriff and received by the plaintiff.—Davis v. Hamilton, 50 M. 213.

(1877). Where a vendor having a lien assigns the note, and after his death his executrix, who is sole legatee, receives it for a debt due the testator, and then seeks to enforce the vendor's lien, the maker of the note cannot complain that the executrix committed a *devastavit* in taking the paper. —Cotten v. McGehee, 54 M. 510.

(1892). Where the widow and adult children of an intestate, who died before the Code of 1880, joined in selling and conveying land of the estate, and took as part payment a note payable to the widow, which note was given her, in distribution of the estate, in lieu of her dower, the purchaser cannot defeat the vendor's lien which her heirs seek to enforce, on the ground that it only bound her dower interest, and that this terminated at her death. The purchaser, having obtained the fee, and given the note in part payment, has no concern with the distribution of the estate.—Oglesby v. Bingham, 69 M. 795, 13 So. 852.

§ 275. —— Persons entitled to enforce.

The giving of a title bond is in effect the same, so far as relates to the securing of the purchase money, as a conveyance of the title, and taking a mortgage for the purchase money; and hence, the assignee of the purchase money, may, either jointly with vendor as co-complainant, or by making him a co-defendant with the vendee, maintain a bill for a specific performance, and compel a sale of the land for the payment of the purchase money.—(1845) Tanner v. Hicks, 4 S. & M. 294; (1848) Parker v. Kelley, 10 S. & M. 184; (1852) Wilkins v. Humphreys, 23 M. 311; (1858) Davidson v. Allen, 36 M. 419; (1869) Robinson v. Harbour, 42 M. 795, 97 Am. Dec. 501, 2 Am. Rep. 671; (1870) Pitts v. Parker, 44 M. 247.

(1868). A father made a parol gift of land to his daughter, who afterwards sold it by parol, the father, at her request, making the deed. *Held*, that the daughter was vendor, and could enforce the lien.—Russell v. Watt, 41 M. 602, 93 Am. Dec. 270.

(1868). The vendor's lien will be enforced in favor of a vendor who is not the grantor of the land, and where the conveyance of the land is executed by a third person to the vendee.—Russell v. Watt, 41 M. 602, 93 Am. Dec. 270.

(1873). The executor of the assignee of a vendor by title bond will be entitled to the benefits of a lien if the vendee refuses payment.—Mhoon v. Wilkerson, 47 M. 633.

(1876). The vendor sold land to the vendee, but made no deed. The vendee resold to a sub-vendee, who paid a part of the price and gave his note for the balance. By agreement the original vendor conveyed the land to the wife of the sub-vendee, the original vendee claiming a vendor's lien. She took up her husband's note and gave her note for a balance due. *Held*, that she stands in the place of her husband, and that the original vendor, being the real vendor, is entitled to enforce his lien on the land.—McLain v. Thompson, 52 M. 418.

(1876). A vendor of land who has procured one note for the purchase money to be made to himself and another to his wife, may enforce the lien for the note payable to himself, but not for that payable to his wife.—Rutland v. Brister, 53 M. 683.

(1877). Where a purchaser of land, a part of which is incumbered by a trust deed to another, verbally promises to pay, as part of the price, the debt due to such other, and this is recited in the deed, the latter may, in his own name, enforce a lien for the

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debt so assumed, and such lien will extend to the whole land and not merely to that part embraced in the trust deed.—Lee v. Newman, 55 M. 365.

(1877). The widow and heirs alone of the holder of a note for the purchase money of land sold by title bond, cannot maintain a bill to enforce the lien except on a showing that there is no administration and no necessity for one.—Kitchins v. Harrall, 54 M. 474.

(1881). Where a vendee is in possession under an executory contract by the vendor to convey on payment of the purchase money, and by agreement, the claim for the purchase money is assigned to a third person, who satisfies the vendor, and the vendee executes his note for the purchase money, payable to such third person, and the vendor, by agreement, conveys the land to the vendee, such third person, as against the vendee, may enforce a lien for the purchase money. (Skaggs v. Nelson, 25 M. 88, distinguished.)—Murphree v. Countiss, 58 M. 712.

(1884). Under Code 1880, § 1124, providing that the assignee of a claim for the purchase money of land may enforce the vendor's lien as the vendor could, where by the contract it is agreed that payment of the purchase price shall be made to another than the vendor, such other becomes the payee of the purchase price, and may enforce the lien.—Louisiana Nat. Bank v. Knapp, 61 M. 485.

(1884). One who purchases land on credit and conveys it with the understanding that his vendee shall pay the amount due the original vendor, may fasten a lien upon it for such amount, so long as it remains in possession of his vendee or volunteers under him.—Louisiana Nat. Bank v. Knapp, 61 M. 485. See (1876) Anderson v. Spencer, 51 M. 869; (1886) Lissa v. Posey, 64 M. 352, 1 So. 500.

(1892). Although the will of a deceased husband professed to give the wife only a life estate in the testator's property, the wife can convey a fee simple in the land and enforce a vendor's lien thereon for the purchase price, since she would as heir at law of her husband take the property in fee and no less estate would be taken under the will and the law, than by the law alone.—Lemon v. Rogge, 11 So. 470, not officially reported.

(1895). A vendee gave a note in part payment for land, reselling the same for cash and certain notes, all the notes being secured by vendor's lien. Having collected one of the notes, he transferred the others to his vendors to enable them to borrow money equal to the amount he owed them, and they, instead of borrowing, indorsed them to their creditors to secure an indebtedness which, however, did not exceed said amount, said creditors being ignorant of the agreement by which the notes were held. *Held*, the transfer to said creditors was valid, and it is error to dismiss a bill filed by them to subject the land to the amount of their debt, and also error to dismiss the cross-bill of the first vendee whose rights in said notes are subject only to those of the complaining creditors.—Oliver Finnie Grocery Co. v. Sumner, 73 M. 248, 18 So. 572.

(1905). The assignee of purchase-money notes is entitled to have the land sold in order to enforce the vendor's lien to the same extent as the vendor.—Elmslie v. Thurman, 87 M. 537, 40 So. 67.

§ 278. —— Time to sue, limitations, and laches.

(1877). The holder of notes maturing at different times may enforce his lien to satisfy one or more of the past due notes, without waiting until all have matured.—Furr v. Morgan, 55 M. 389.

§ 279. —— Parties.

(1845). A bill to enforce the vendor's lien is maintainable when filed in the names of a vendor under title bond, and the assignee of the purchase-money notes.—Tanner v. Hicks, 4 S. & M. 294.

(1855). All the heirs of a deceased vendee are necessary parties to a bill to enforce the vendor's lien; and their liability being joint, and not several, it will be error to take a decree against a part of the heirs to sell their share to pay the whole debt.—Pouns v. Gartman, 29 M. 133.

(1856). In a bill to enforce a vendor's lien the administrator of a deceased vendee is a necessary party.—Reedy v. Armistead, 31 M. 353.

(1870). In a bill by the vendor to enforce his lien, where there is a sub-vendee, who has died, the heirs and administrator of the sub-vendee, and also the original vendee, should all be made defendants.—Mullins v. Sparks, 43 M. 129.

(1872). Where a non-resident vendee of land dies without personal property, and has no personal representative in this state, a bill to enforce a vendor's lien is maintainable against his heirs alone.—Reed v. Gregory, 46 M. 740.

The heirs of a vendor who had not parted with the legal title are necessary parties to a suit by his administrator to enforce the vendor's lien.—(1872) Adams v. Harris, 47 M. 144; (1873) Mitchell v. Shell, 49 M. 118; (1874) Kimbrough v. Curtis, 50 M. 117; (1876) Clayton v. Merrett, 52 M. 353.

(1873). Where two notes are secured by the same vendor's lien, in a bill by the holder of one note to enforce the lien, the holder of the other note should, if practicable, be made a party.—Harding v. Cobb, 47 M. 599.

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(1873). Where a vendor by title bond assigns the purchase-money notes and subsequently to the assignee's death, his executor sues to enforce the vendor's lien upon the land, the vendee, and the administrator and heirs of the vendor are proper parties defendant.—Mhoon v. Wilkerson, 47 M. 633.

(1880). After the trustee in a deed of trust, has sold the land and thus divested himself of the title, he is not a necessary party to a bill against the purchaser to subject the land to a vendor's lien for purchase money, which was secured by the trust deed.—Osborne v. Crump, 57 M. 622.

(1882). In a suit to enforce a vendor's lien against a vendee for unpaid purchase money, a purchaser at a sale for taxes made subsequent to the sale by the vendor to the vendee is improperly joined with the latter as a party defendant.—Dogget v. Tinsley, 2 Miss. Dec. 573.

(1882). On a bill to enforce a vendor's lien on land, sub-vendees must be made parties or they will not be bound by the decree.—Rowe v. Beers, 59 M. 371.

§ 280. —— Pleading.

(1843). Where a bill was filed to enforce a vendor's lien against sub-vendees, and the bill attacked an agreement, which was set up as a satisfaction of the debt, upon the ground that it was only conditional, and did not amount to satisfaction, the complainant cannot recover by showing that the agreement was absolute and unconditional, yet was fraudulent and void.—Carnes v. Hubbard, 2 S. & M. 108.

(1871). It is always good pleading to make a *prima facie* case, and leave matters of defense to come from the other side. Hence, in a bill to enforce a vendor's lien, it is not necessary to aver that the vendor took no security for the purchase money.—Dodge v. Evans, 43 M. 570.

(1871). It is error to render a decree against minors except upon proof of the material allegations. Hence, where a bill to enforce a vendor's lien alleges a sale upon credit and execution of a note, but the deed filed as an exhibit recites payment of the price, the recital in the deed is *prima facie* evidence that no debt is due, and in the absence of other evidence a decree against the minors is erroneous.—McIlvoy v. Alsop, 45 M. 365.

(1876). Where a bill to foreclose a vendor's lien for two notes avers that one is paid, and the answer denies that it is paid, but states that it is assigned, the denial of payment is responsive, and is evidence; but the averment that the note has been assigned is not, and must be proved.—Rodd v. Durbridge, 53 M. 694.

(1877). On a bill to enforce a lien reserved in a deed, the grantee, claiming title and holding the land under the deed, without having filed a bill or cross-bill to reform it, cannot contradict recitals therein imposing obligations on him.—Lee v. Newman, 55 M. 365.

(1884). Where joint owners of separate plantations buy land contiguous to one of them, giving their joint note therefor, and after a bill is filed against them by their vendor to foreclose a lien for the price, they execute partition deeds, one taking the plantation containing the added land and assuming in writing the debt therefor, the other, by cross-bill in such suit, may, if necessary, have a sale of the land so purchased by them. Such a cross-bill contains matter of equity cognizance. (Wright v. Frank, 61 M. 32, distinguished.)—Wright v. Brander, 62 M. 82.

(1891). A bill to have a vendor's lien declared in the complainant's favor must contain a direct allegation that the purchase-money note, by reason of which the lien is sought, was at the time of the institution of the action owned by the plaintiff in the bill.—Sharman v. Staten, 8 So. 851, not officially reported.

(1901). The complainant conveyed his entire interest in his father's estate to his brother, the defendant herein, and retained a vendor's lien for the purchase price, and in pursuance of the agreement, the father of the parties thereto deeded the defendant the O. and Q. plantations. The complainant's bill alleged that the subject of the conveyance and the property understood by the persons interested as the interest of the complainant was the O. plantation. *Held*, that such bill stated a cause of action for the enforcement of a lien.—Miles v. Miles, 78 M. 904, 30 So. 2.

(1905). In a suit by the assignee of purchase-money notes to foreclose the lien, the complainant is not required to produce the deed on account of which the notes were given, where the execution of the deed is in effect admitted by the defendant's answer.—Elmslie v. Thurman, 87 M. 537, 40 So. 67.

§ 281. —— Evidence.

(1843). Where the original notes given by the mortgagor of a tract of land for the purchase money are taken up and new ones substituted instead by the vendee, and the vendor files his bill to enforce his equitable lien, the answer of the vendee that the new notes were received in satisfaction and discharge of that lien is not evidence.—Planters' Bank v. Courtney, Sm. & M. Ch. 40.

(1849). In a bill to enforce a vendor's lien, proof that the notes held by complainant were given for the purchase of land in this state, and as witness thinks, in the county in which the land sought to be subjected to the lien lies, and that these lands were sold by vendor to vendee, is, in the absence of all proof showing that the vendee bought other lands lying in this state from

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the vendor, sufficient to show that the notes were given for the purchase money of the land as claimed in the bill.—Glasscock v. Robinson, 13 S. & M. 85.

(1869). A note of the vendee given for the purchase money of land, with the security of a third person, is *prima facie* evidence that the vendor intended to waive and abandon his lien on the estate for the payment of such money, but this evidence may be rebutted by satisfactory proof that it was intended that the vendor should retain his lien.—Fonda v. Jones, 42 M. 792, 2 Am. Rep. 669.

(1870). The recital in a deed of conveyance that the purchase money has been paid, is not conclusive proof of payment, nor an absolute estoppel to a denial of this recital, but such recital is only *prima facie* evidence of such payment.—Parker v. Foy, 43 M. 260, 5 Am. Rep. 484.

(1870). In a sale of land, the vendor having taken a note with personal security, it will be inferred that the vendor's lien was waived.—Foxworth v. Bullock, 44 M. 457.

(1873). Where a vendor takes a trust deed upon a two-thirds interest in a tract of land to secure the balance of purchase money due upon the whole, this raises a strong presumption of abandonment of the vendor's lien as to the other one-third interest, which can only be overcome by the clearest and most satisfactory proof.—Myers v. Estelle, 48 M. 372.

(1879). It is always competent, and frequently essential, in bills to enforce a vendor's lien, to show by parol that the note sued on was given for the land sought to be subjected; and unless such testimony contradicts a recital of some other consideration, contained in the instrument of conveyance, there can be no objection to the proof. —Fry v. Prewett, 56 M. 783.

(1879). Where, on rescinding a sale of land, the vendee writes an informal quitclaim on the unrecorded original conveyance, and takes a note from the original vendor as, according to allegation, part of the consideration for the reconveyance, parol evidence is admissible to establish that such note was actually part of the consideration for the release, and this, although the latter recites as the reason for its execution, "the proper owner not having complied with the within deed."—Fry v. Prewett, 56 M. 783.

§ 282. —— Injunction.

(1901). The contract of a purchaser of land in default, permitted forfeiture in such event. *Held*, that the vendor might enjoin a sale of the land under a deed of trust made by the purchaser without incurring liability on his injunction bond.—Burroughs v. Jones, 79 M. 214, 30 So. 605.

§ 284. —— Trial or hearing.

(1876). In a suit to enforce a vendor's lien or an express lien reserved in the deed of conveyance, no notice by the commissioner of stating his account or motion to confirm his report is required to be given the parties. The course provided by Code 1871, § 1027, for foreclosing mortgages may be followed.—Brooks v. Robinson, 54 M. 272.

§ 285. —— Judgment or decree.

(1851). A decree for specific performance by enforcing the vendor's lien, establishes no personal responsibility on an alleged vendee, who is made defendant to the bill, and who disclaims all interest in the land, and such disclaimer is therefore no reason for reversing a decree of sale.—Mosby v. Wall, 23 M. 81, 55 Am. Dec. 71.

A final decree on *pro confesso* on a bill to enforce a vendor's lien, without first an order of reference to a master to state an account, showing the amount due, is erroneous.—(1867) Beville v. McIntosh, 41 M. 516; (1870) Freeman v. Ledbetter, 43 M. 165.

(1871). Where the record in a suit to enforce a vendor's lien shows a note for the purchase money, and a deed conveying the land, as exhibits to the bill, and a final decree which recites that the cause came on for hearing upon the bill, exhibits, proofs, *pro confesso*, and answers of minors by their guardian, and that the court looked into the same, and was satisfied that the allegations were true, and that the balance due was ascertained by reference to a master, this is sufficient to uphold the decree as against infant as well as adult defendants.—Smith v. Pattison, 45 M. 619.

(1876). In an action to subject certain land to the payment of the note of the vendee thereof, the irregularity of making a reference to a commissioner for statement of the amount due the complainant on the note before there has been an adjudication in favor of such complainant declaring the note to be due, or to constitute a lien upon the land, is cured by a decree establishing these things on the coming in of the report.—Tucker v. Hadley, 52 M. 414. See also (1886) Hambrick v. Jones, 64 M. 240, 8 So. 176.

(1876). In a suit to enforce a vendor's lien or an express lien reserved in the deed of conveyance, it is sufficient to recite in the final decree a reference to a commissioner, his report and confirmation of the same. Separate orders are not necessary. —Brooks v. Robinson, 54 M. 272.

(1878). Where a note, secured by vendor's lien, is reduced to judgment against the vendee, which includes interest, and afterwards a bill is filed to enforce the lien, it is error, as against a sub-vendee, to render a decree which includes interest on the judgment. It should charge the land with the principal of the debt and simple interest thereon.—Stricklin v. Cooper, 55 M. 624.

(1881). Where one sells mortgaged land and the vendee undertakes, as a part of the consideration, to pay the mortgage, on a bill

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cree the whole amount due, including the mortgage debt, to be paid to the vendor, leaving the mortgage unsatisfied. The complainant may make the mortgagee a party, and, if he refuses to consent to a sale to pay the mortgage debt, the same not being due, to enforce the vendor's lien, it is error to decomplainant may either have a decree for the sale of the equity of redemption to satisfy his debt, or he may foreclose both for this purpose and to pay the mortgage debt. In the latter event, while an amount arising from the sale sufficient to satisfy the mortgage will be paid to the mortgagee, the effect will not be to discharge the same, but it will be impressed with the same equity in favor of complainant to secure the balance due him as was the fund appropriated to its payment.—Waters v. Bossel, 58 M. 602.

(1884). It is error to embrace in a decree on a suit to enforce a purchase money lien, the amount of any payment not then matured.—Hays v. Mercer, 1 Miss. Dec. 185.

§ 287. —— Sale.

(1881). A commissioner's sale of land, under a decree to enforce a vendor's lien, will be set aside at the instance of the complainant upon good cause shown.—Rimmer v. Davis, 2 Miss. Dec. 531.

§ 292. —— Proceeds and surplus.

(1858). Where the vendor assigns a portion of the purchase money, and retains the balance, in cases where the right to resort to the land passes to the assignee, the proceeds of the sale of the land, if insufficient to pay all, will be distributed *pro rata* among the holders of the securities for the purchase money.—Davidson v. Allen, 36 M. 419.

(1872). All the notes given for the purchase of the same land, and secured by an express lien thereon, stand upon an equal footing, regardless of when they fall due, or whether they have been assigned or are retained by the vendor. The holder of each note has an interest in the lien, proportioned to the amount of his note.—Kausler v. Ford, 47 M. 289.

(1873). Where there are several notes secured by a vendor's lien, and all are due, the money arising from foreclosure should be applied ratably to the several notes, and this although there has been a judgment at law upon one of them.—Wooten v. Buchanan, 49 M. 386.

(1884). Where several notes, evidencing a vendor's lien on land, are held by different persons, who obtain judgments against the maker, under one of which the land is sold, the judgments are entitled to share ratably in the proceeds, regardless of the date of their rendition, and if the debtor be insolvent, the creditor having the last enrolled judgment may in equity compel such *pro rata* distribution.—Aaron v. Warner, 62 M. 370.

§ 294. —— Fees and costs.

(1881). A complainant in a bill to enforce a vendor's lien, who files exceptions to the report of the commissioner appointed by the court to make the sale, and procures an order setting the sale aside, will be taxed with the costs accruing after the sale which has been set aside, and if the purchaser appeals to the Supreme Court from the decree setting aside the sale, the costs in that court will be divided equally between the parties when the decree is affirmed.—Rimmer v. Davis, 2 Miss. Dec. 531.

§ 295. —— Operation and effect.

(1882). A decree enforcing a vendor's lien is not binding on a sub-vendee not made a party, and a purchaser under the decree cannot recover thereon in ejectment against those holding in right of such sub-vendee.—Rowe v. Beers, 59 M. 371.

§ 296. Right to recover possession in general.

(1853). A vendor by title bond who has received two of the three instalments of the purchase money, will not be permitted to assert rights, except to accomplish the object of retaining the title, viz.: to secure the purchase money. He will not be permitted to use the title retained in himself for the unconscientious purpose of possessing himself of the land and retaining the instalments already paid.—Bellamy v. Shelton, 26 M. 250.

(1906). Where a contract of sale recited that the purchaser agreed to pay a specified sum by a designated date and that the vendor should thereupon convey the property described, but the former on his part did not bind himself by signing the instrument or in any other way and no part of the price was paid, and the widow of the vendee, his statutory heir, who was in possession after the date fixed for the payment of the price refused to restore the land, to pay the price thereof, or rent therefor, without any intimation that her refusal was because no conveyance was tendered to her, the failure of the vendor to tender the conveyance did not cost him the right to recover the premises contracted to be sold.—Bowling v. Bowling, 88 M. 144, 40 So. 871.

§ 298. Summary remedies for recovery of possession.

(1859). The owner of land who has let another into possession under a parol contract of sale is entitled to the statutory remedy of unlawful detainer to recover possession on refusal of the grantee to complete the purchase.—McKissick v. Bullington, 37 M. 535.

(1875). Where the purchaser is in default and the vendor sues for possession of the land by unlawful detainer, the possessory action does not affect equities between the parties.—Moak v. Bryant, 51 M. 560. See also (1879) Clymer v. Powell, 56 M. 672.

(1901). A contract for the sale of land provided for a forfeiture by the purchaser of all his rights at the election of the vendor on

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the former's failure to make payments at specified dates. *Held*, that such forfeiture, to be upheld, must be invoked at the time specified.—Burroughs v. Jones, 79 M. 214, 30 So. 605.

(1908). Where the purchase money has been paid in whole or in part it is incumbent on the plaintiff to tender a deed before he brings unlawful detainer proceedings.—Bowling v. Bowling, 47 So. 802, not officially reported.

§ 299. Actions for recovery of possession.

(1854). Where the sale is by bond to make title on payment of the purchase money, for which the vendee has given his note, due on a day named in it, a mere tender of a deed after the maturity of the note and demand of the money, without notice to the vendee that the vendor considers the contract at an end, do not of themselves avoid the contract, so as to enable the vendor to recover possession. To enable him to do this he must put an end to the contract, by a distinct notice to the vendee to that effect.—Johnson v. Tuggle, 27 M. 836.

(1857). If the vendor decline the offer of the vendee to surrender possession of the land, in accordance with a right secured to the vendor by the conract, it will be a waiver on his part of the previous default of the vendee in making payment of the purchase money, and he cannot afterwards insist on the right, without having first demanded payment.—Prophit v. Robinson, 34 M. 141.

(1875). Objections, waived at the time of the tender of the deed, cannot thereafter be raised by the vendee when sued for possession.—Moak v. Bryant, 51 M. 560.

(1876). Ordinarily the remedy for a grantor to regain his estate for breach of condition subsequent is entry or ejectment, not a bill in chancery; but the mere fact that the forfeiture is insisted on will not deprive equity of power to relieve where the remedy at law is not full and complete.—Vicksburg &c R. Co. v. Ragsdale, 54 M. 200.

(B) ACTIONS FOR PURCHASE MONEY.

§ 301. Nature and form.

The vendor may sue at law to enforce the personal responsibility of the vendee for the purchase money, and in equity to enforce the lien, at the same time, the remedies being separate and distinct.—(1866) Payne v. Harrell, 40 M. 498; (1866) Stratton v. Gold, 40 M. 778.

(1896). Where the vendor has made a conveyance of land to the vendee, who has executed no written promise to pay the purchase price, the courts, while uniformly affording relief, are not very well agreed upon what precise ground the right is rested.—Washington v. Soria, 73 M. 665, 19 So. 485.

(1896). When a vendee of land has taken possession under a conveyance reciting a consideration of a certain amount paid in cash, and a balance to be paid in instalments at specified dates, to secure which a lien is reserved in the deed, the vendor, although the vendee may have signed no written promise to pay, may maintain his action on the case. (Code 1892, § 671.)—Washington v. Soria, 73 M. 665, 19 So. 485.

§ 303. Conditions precedent.

Where the purchase money is to be paid first, though on the same day, the vendor is not bound to tender a title to enable him to sue; it is sufficient if he were ready and able to make title.—(1839) Bright v. Rowland, 3 H. 398; (1869) Robinson v. Harbour, 42 M. 795, 97 Am. Dec. 501, 2 Am. Rep. 671.

(1867). When the vendee takes a title bond from the vendor conditioned to make title upon the payment of the purchase money and the same is to be paid in a lump sum and not in instalments, the covenants to pay and to make title are dependent, and the vendor must show performance, or a tender and offer of performance, before he can enforce payment from the vendee.—McMath v. Johnson, 41 M. 439.

(1867). When the vendee of land executes his notes in instalments to secure the payment of the purchase money, and takes a bond from the vendor, conditioned to make title when the last instalment is paid, the covenants are independent, and the vendor may enforce payment without performance, or an offer and tender of performance of his part of the agreement.—McMath v. Johnson, 41 M. 439.

(1873). The executor of the assignee of a vendor by title bond, having no connection with the contract, and no act to perform in respect to it need not tender a deed as a condition precedent to suing for the purchase money of the land.—Mhoon v. Wilkerson, 47 M. 633.

§ 304. Defenses.

Though a vendee having a deed and in possession cannot defend an action for the purchase money, upon the ground of failure of consideration arising from a defect of title, yet he may defend for any fraud arising in the contract independent of and apart from any defect in the title.—(1849) Anderson v. Hill, 12 S. & M. 679, 51 Am. Dec. 130; (1850) Johnson v. Jones, 13 S. & M. 580.

(1850). A resale of the land by the vendee to the vendor, and an agreement between the parties that the purchase money owing the original vendor should not be paid is no bar to an action by the assignee of one of the purchase money notes, assigned by the original vendor, when the rescission by mutual agreement was made subsequently to the vendee's receiving notice of the assignment.—Wiggins v. McGimpsey, 13 S. & M. 532.

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(1879). A note given in consideration of a deed, though a quitclaim, conveying to one in possession land for which suit had been brought against him, cannot be defeated on the ground that no title passed by the deed, and that if the suit had been contested it would have been defeated.—Billingsley v. Niblett, 56 M. 537.

§ 307. —— Breach of covenant or condition in general.

(1848). The maker of a note secured by mortgage, having an equitable defense to it, promised an assignee, that if he would give him one, two and three years on the principal part of the debt, he would pay it. The assignee assented to this, and thereupon released his immediate assignor from liability to him on account of these notes, but soon after, without waiting for the expiration of the three years, filed his bill to foreclose the original mortgage and note, without offering to perform his part of the agreement for the extension of the time. *Held*, that the maker of the note was not precluded from setting up his equitable defense to it; his conditional promise not having been acted upon by the holder of the note, he was not himself bound by it.—Gilpin v. Smith, 11 S. & M. 109.

(1873). A purchaser in possession under a warranty deed, when sued for the price, may show a breach of the warranty in that a part of the land was subject to prior incumbrances, provided the vendor be insolvent and his covenants for that reason afford no indemnity for the threatened loss. In such case, the incumbrance will be treated as a failure of consideration *pro tanto*.—Wofford v. Ashcraft, 47 M. 641. See also (1893) Waddell v. Latham, 71 M. 351, 15 So. 32, 42 Am. St. 467.

§ 308. —— Defect in title of vendor.

(1845). Where the vendor of land makes a deed with a general covenant of warranty of title, and stipulates in it that he will deduct a named sum per acre for all the land sold, to which he cannot show a clear title when the purchase money becomes due, the vendee can show as a failure of consideration in an action for purchase money, the want of title to any part of land.—Chaplain v. Briscoe, 5 S. & M. 198.

(1845). When the vendor is insolvent, and there is a lien or incumbrance, the vendee may be relieved of the purchase money to the extent of the lien; and if the notes for the purchase money have been assigned, each assignee must lose *pro rata*. And in this case the decree of the court was, that a commissioner should be appointed to ascertain the value of the land, and if it did not exceed the liens, the assignees were to have nothing, and if the valuation exceeded the liens, then the excess was to be divided *pro rata*.—Kilpatrick v. Dye, 4 S. & M. 289.

(1846). A vendor who has given a bond to make title without fixing any time in, or condition on, which a deed is to be made, may retain the title till the purchase money is paid, or he may convey before that time at his election. And if he make an imperfect deed before payment of the purchase money, this will not release him from his obligation in the bond to make a good deed; and hence, the execution of such imperfect deed is no defense to an action for the purchase money.—Hazlip v. Noland, 6 S. & M. 294.

(1846). If there be a mere failure of consideration, arising from the sale of a defective legal title, unmingled with fraud or bad faith, the vendee will be left to the covenants and warranty in his deed.—Wilty v. Hightower, 6 S. & M. 345.

(1846). Even where the purchase money is payable in instalments, the vendor cannot recover the purchase money, if he be unable to make the title. The right to enforce payment is not distinct and independent of the ability to convey title. A party is not to be forced to pay out his money unless he can get that for which he stipulated; and hence, when the vendee is sued for the purchase money he may (even as to instalments prior to the last) set up an inability of the vendor to make title according to his covenant in the title bond, to make title on payment of the purchase money.—Peques v. Mosby, 7 S. & M. 340.

(1846). Parol evidence to show a mistake in a deed and to correct that mistake, is not admissible in a court of law. The remedy is in chancery. Hence, where the vendee upon being sued for the purchase money showed as a defense, that the vendor had no title to the land which he had sold him by bond for title, it was held incompetent for the vendor in answer to this, to show that there was a mistake in the description of the land in the title bond, and that vendee was actually in possession under his purchase, of the land intended to be sold, and that as to this he had a good title.—Peques v. Mosby, 7 S. & M. 340.

The rule which requires eviction, before defense can be made for defective title, does not apply where the sale itself is void, and for that reason confers no title. But this defense of illegality in the sale, can only be made when the action is against the purchaser, on the contract of sale itself, and is not available where a vendee or sub-vendee, from the purchaser at the illegal sale, resells with a general covenant of warranty of title; for in that case the action is not on the illegal contract, but on a subsequent contract between other parties, and the illegality of the precedent sale, when shown, is but a mere defect in the title. And this rule was applied when the administrator had purchased from his vendee (the sale to the vendee being illegal), and then, as an individual, resold to another, who undertook to set up the defense.—(1847) Duncan v. Lane, 8 S. & M. 744; (1852) Green v. McCarroll, 24 M. 427.

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(1850). It seems that where a bond for title to land is given, even if the contract of the vendee to pay be independent of that of the vendor to make title, yet if the vendee, at the time stipulated for his payment, tender the money to the vendor and demand a title according to the latter's bond, and the vendor is incapable of making it, it will be a good defense on the part of the vendee, to an action against him for the purchase money.—Mobley v. Keys, 13 S. & M. 677.

(1850). A vendor gave a bond conditioned to make title to the land sold the vendee "so soon as" the purchase money stipulated in the bond should be paid. To an action by the assignee of the vendor against the vendee upon the latter's note for the purchase money, the vendee plead that the vendor did not have and never had had such title to the land as, by the terms of his bond he was bound to convey, and that neither the plaintiff nor the vendor could make such a title as the defendant was entitled to demand. *Held*, that the covenants between the vendor and the vendee in this case, were concurrent and dependent and that the plea presented a good bar to the action.—Mobley v. Keys, 13 S. & M. 677.

(1851). The government of the United States is always considered as in possession of its own land, and a sale of it carries possession. Hence, a vendee may defeat a recovery of the purchase money by showing that the land was public land, and has, since the sale to him, been sold by the government to another.—Glenn v. Thistle, 23 M. 42.

(1852). In executed contracts for land, where the vendee in addition to the title he was buying, took a deed with covenants from the vendor, he cannot protect himself in equity from the payment of the purchase money on account of a failure of title, but must rely upon his covenants for protection. —Gartman v. Jones, 24 M. 234.

(1852). Where a judgment has been rendered in favor of the original vendor, or his legal representatives, a court of equity would, such vendor being insolvent, grant relief to the extent of the incumbrance on the land, the remedy by covenants in the deed having, on account of the insolvency of the vendor, become entirely worthless.—Wailes v. Cooper, 24 M. 208.

(1852). Where a vendee at the time of his purchase knew of defects of title or the existence of incumbrances on the estate, and took a deed with covenants of warranty, he cannot at law evade a recovery even after eviction, but must rely upon the covenants. Nor will a court of chancery in such case, as a general rule, grant any relief, but will remit the party to his covenants, such being the remedy he provided for himself.—Wailes v. Cooper, 24 M. 208.

(1856). Whether a partial failure of consideration arising from a breach of warranty of title, can be set up against an action for the purchase money; *Quære?* The safer rule is to leave a party to his action on the covenants in the deed.—Phipps v. Tarpley, 31 M. 433.

(1866). The representation by a vendor, that he has a good title to the land conveyed, is no more than is stated in a more solemn form when he executes a deed with covenants of warranty; and such representation, when there is an outstanding title, will not enable a vendee, in possession under a deed with covenants of warranty, to avoid the payment of the notes given for the purchase price of the land.—Winstead v. Davis, 40 M. 785.

(1870). In a case free from fraud, and in which it is not shown the vendor is not insolvent, it is no defense on the action on a promissory note given for the purchase money for the conveyance of land with general covenants of warranty, that the vendor had no title, or a defective title, to the land. In such case the vendee's remedy is upon the covenants of warranty contained in the deed.—Guice v. Sellers, 43 M. 52.

(1871). If the vendee knew of the outstanding cloud or incumbrance on the title at the date of his purchase, he cannot set it up as a reason for not paying the purchase money, but must rely on the covenants in the deed.—Miller v. Lamar, 43 M. 383.

(1873). In equity, where the insolvency of the vendor is proven, an incumbrance should be treated as a failure of consideration, and the purchaser allowed a reduction therefor from the purchase money.—Wofford v. Ashcraft, 47 M. 641.

(1879). A note given in consideration of a quitclaim deed conveying to one in possession land for which suit had been brought against him, cannot be defeated on the ground that no title passed by the deed, and that if the suit had been contested it would have been defeated.—Billingsley v. Niblett, 56 M. 537.

§ 308a. —— Conditions precedent to raising defense.

(1841). Where there is an express warranty of title in the sale of personalty, and the vendee is put in possession, the vendee cannot resist payment of the purchase money, until he has been evicted. The rule is otherwise where there is only an implied warranty of title, which arises from the fact that the vendor is in possession when he sells. The implied warranty is that the vendor has title, and if he have none, the implied warranty, like the covenant of seizin, is broken as soon as made.—Brown v. Smith, 5 H. 387.

(1841). It seems to be the general rule that if there is no fraud and the purchaser is not evicted, the insufficiency of the title is no ground for relief against the payment of the purchase money, the injured purchaser being left to his remedies at law on the covenants of title.—Coleman v. Rowe, 5 H. 460, 37 Am. Dec. 164.

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When the vendee is in possession of land under a contract, the covenants of which are concurrent and dependent, or where the undertakings of the parties are independent, if the vendee shall tender the purchase money, or offer to perform his part of the contract, the defect of title in the vendor, or his incapacity to make a good and operative conveyance, will constitute a good defense in bar of the action for the recovery of the purchase money, although there has been neither sale under execution, nor eviction of possession.—(1846) Peques v. Mosby, 7 S. & M. 340; (1850) Wiggins v. McGimpsey, 13 S. & M. 532. *Contra*, (1826) Miller v. Owens, W. 244.

A vendee in possession under a deed with covenants of general warranty of title only, cannot, when sued at law for the purchase money, set up the defense of a failure of consideration, by showing the title to be bad, unless he has been actually evicted, or there was fraud in the sale.—(1847) Hoy v. Talliaferro, 8 S. & M. 727; (1847) Duncan v. Lane, 8 S. & M. 744; (1848) Heath v. Newman, 11 S. & M. 201; (1848) Dennis v. Heath, 11 S. & M. 206; (1849) Anderson v. Hill, 12 S. & M. 679; (1850) Johnson v. Jones, 13 S. & M. 580; (1850) Wiggins v. McGimpsey, 13 S. & M. 532; (1851) Glenn v. Thistle, 23 M. 42; (1852) Wailes v. Cooper, 24 M. 208; (1856) Burrus v. Wilkinson, 31 M. 537; (1866) Winstead v. Davis, 40 M. 785; (1870) Guice v. Sellers, 43 M. 52, 5 Am. Rep. 476; (1871) Miller v. Lamar, 43 M. 383.

(1848). It seems that where a vendee has been put into possession under a deed, with warranty, of real estate, and has afterwards voluntarily surrendered his possession, and yielded his right without an effort to maintain it, to one claiming under a purchase at sheriff's sale, under a judgment against the vendor older than the deed to the vendee, yet made during the possession of the vendee, such voluntary surrender and yielding of his right will not amount to an eviction of the vendee and will not constitute a defense to an action on the note for the purchase money by the vendor against the vendee.—Dennis v. Heath, 11 S. & M. 206, 49 Am. Dec. 51.

(1848). Where the vendee is let into possession of the premises and is sued for the purchase money, and no eviction has taken place, no disturbance, or outstanding title is alleged to exist, and there is no allegation of fraud, mistake, or want of notice, such purchaser cannot defend on the ground of defect in title, because he did not acquire the fee in the property purchased.—Natchez v. Minor, 9 S. & M. 544, 48 Am. Dec. 727.

(1850). Suit was brought for the last instalment of the purchase money of land sold by bond conditioned to make title upon payment of the purchase money, and vendee relied on the fact that vendor had no title, as a defense to the action. *Held*, if he had accepted a deed and gone into possession, he could not defend until there was an actual eviction; but where a bond is executed, the covenants are mutual and dependent, and the vendee cannot be forced to part with his money until the vendor is ready to make title.—Feemster v. May, 13 S. & M. 275, 53 Am. Dec. 83n.

(1850). A vendee who is in possession under covenants of warranty, cannot at law, set up a failure of consideration as a defense to a note given for the purchase money, unless he has been evicted, or unless he can establish fraud in the contract of sale.—Johnson v. Jones, 13 S. & M. 580.

(1850). A vendee who is in possession under covenants of warranty cannot, in equity, set up a failure of consideration as a defense of a note given for the purchase money, unless he has been evicted, can establish fraud in the contract of sale, or the vendor is insolvent.—Johnson v. Jones, 13 S. & M. 580.

(1850). Where a bond to make title to land is given, or a contract for its sale entered into, and the vendee is put in possession, whether the undertakings of the parties, as to the making of title and payment, be concurrent and dependent, or independent, if the vendor be unable to make a good and operative conveyance to the vendee, or if there be any defect in his title, it will be a good defense in bar of an action for the recovery of the purchase money, although there has been neither sale under execution nor eviction of possession.—Wiggins v. McGimpsey, 13 S. & M. 532.

(1852). A court of equity, if a title be defective or incumbered, and the vendor thereof be insolvent, will relieve from the payment of the purchase money without eviction, even if the purchaser has received a deed with covenants of general warranty and gone into possession of the land. The insolvency of the vendor, however, would not be sufficient to obtain relief for the vendee in a court of law, as against the purchase money.—Wailes v. Cooper, 24 M. 208.

(1852). Where a covenant for the sale of real estate has been executed, and the vendee has received a deed with covenants of warranty, and taken possession of the land, he cannot, in a case free from fraud or misrepresentation, avoid a judgment for the purchase money on account of a defect or failure of title, unless he has been evicted. *Aliter*, if there has been fraud or misrepresentation in relation to the validity of the title or incumbrances upon it.—Wailes v. Cooper, 24 M. 208.

(1870). Defect of title, without eviction, when the vendee is in possession, of itself is no ground to relieve against the purchase money.—Guice v. Sellers, 43 M. 52.

(1870). If a vendee purchase with knowledge of the vendor's title and of whatever imperfections and infirmities appertain to it, he must rely upon the covenants of the

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deed for his protection where there has been no suggestion of a threatened disturbance of his possession nor of insolvency on the part of the vendor.—Guice v. Sellers, 43 M. 52.

(1871). If a vendor be insolvent so that his covenants of warranty are worthless, equity will not wait for eviction, and until the purchaser shall be utterly without redress, but will interpose in his behalf. But the case must be as strong in its merits as an eviction, *e. g.*, the existence of an outstanding title, the assertion of which will evict the vendee.—Miller v. Lamar, 43 M. 383.

(1871). It is a general rule that where the conduct of a vendor and warrantor of title is free from misrepresentation or fraud, a mere defect or cloud upon the title conveyed, will not relieve the vendee against payment of the purchase money unless there has been an eviction by title paramount; the purchaser will be remitted to his action on the covenants of warranty in the deed.—Miller v. Lamar, 43 M. 383.

(1893). Where a contract for the sale of land has been executed and the vendee put in possession, although he has not been evicted, a court of equity will not compel him to pay the price, if the title be invalid and the vendor be insolvent. But the vendee must clearly show the defect of title, and that, if sued, he cannot maintain his possession.—Waddell v. Latham, 71 M. 351, 15 So. 32, 42 Am. St. 467.

(1904). One who purchases from another lands, the title to which is found to be in the United States, may sue at once, without waiting for eviction, upon the covenants in his deed.—Holloway v. Miller, 84 M. 776, 36 So. 531.

§ 309. —— Defect in quantity or quality of land.

(1822). The court in this case incline to the opinion, that where the quantity of acres warranted in a deed is not to be had, the failure of consideration arising therefrom, being only partial, cannot be set up as a defense at law, unless there were fraud in the transaction.—Kerr v. Calvit, W. 115, 12 Am. Dec. 537.

(1849). At a public sale of town lots in the town of Aberdeen, a particular lot was reserved from sale as the terminus or depot of a projected railroad, and the adjoining lots were sold at that sale, "as front lots;" the depot lot so reserved lying between them and the river; and in consequence of this they brought a much higher price than they otherwise would have brought. Afterwards the railroad was abandoned, and the intended depot lot was sold out by the trustees in small lots on which the purchasers erected cotton sheds, which cut off the said adjoining lots sold as aforesaid from direct communication with the river, and made them "back" instead of "front" lots, by which they were greatly depreciated in value. *Held*, that the purchase money could not be recovered for the purchase of these lots, thus made "back" lots.—Anderson v. Hill, 12 S. & M. 679, 51 Am. Dec. 130.

§ 310. —— Set-off and counterclaim.

(1872). In an action for the price of land the purchaser may show in defense, by way of recoupment, that the vendor defrauded him by false representations as to the quantity, quality, conditions or boundaries of the land, or other matters injuriously affecting the subject matter of the contract; and where he does not seek to recover the consideration paid, no offer to rescind the contract is necessary.—Myers v. Estell, 47 M. 4.

(1876). The vendee of land who has been induced to purchase through fraudulent misrepresentations on the part of the vendor, may abide by the contract and recoup damages against the purchase money. This right to recoup is not lost by delay, but may be exercised at any time the vendor sues for such purchase money.—Estell v. Myers, 54 M. 174.

(1876). Where a vendee, who has become such in consequence of fraudulent representations made to him by his vendor, recoups, he is entitled to all the damages which he might recover in an action for deceit, but he is not entitled to a decree against the vendor for any excess over the latter's demand.—Estell v. Myers, 54 M. 174.

(1876). The vendee may recoup the difference between the actual value of the land at the time of the purchase, and its value as represented. To determine this, one way is to estimate what it would cost to put the land in the condition for which the vendee bargained; another, and simpler, is, assuming that it was of value agreed and the character warranted, to estimate what reduction in the value on account of the falsity of the representations should be made from the price. This estimate would have regard to the frequency and extent and duration of overflows, and their effect upon crops.—Estell v. Myers, 54 M. 174.

(1876). The vendee, after discovering the falsity of the representations, cannot continue to plant crops and recover for their loss by overflow. But, if in reliance on the representations of the vendor, who knew the purpose for which the land was bought, he plants a crop, he may recoup the deficit or partial loss of the crop by the overflow next after the purchase, reference being had to the character of the season and other circumstances affecting the production, and also damages by the drowning of cattle by the first overflow, where he could not, by reasonable efforts, have saved them, and for the death of mules from disease traceable directly to the overflow of the place. And if not estimated as a part of the depreciation in the value of the plantation, he is also entitled to the expense of repairing

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fences washed away, removing driftwood and the like, so far as these injuries were caused by the overflow warranted against. —Estell v. Myers, 54 M. 174.

(1879). Where the purchaser of land is allowed to recoup the amount of damage sustained by him in consequence of misrepresentations of the vendor in the sale thereof, against a demand for the purchase money, such amount should be deducted from the purchase money as of the day of the purchase.—Estell v. Myers, 56 M. 800.

(1895). A grantor executed a bond for title, but after notice of a defect in the same failed to perfect it, and the grantee acquired the title to the property from persons who had purchased it from the state, such latter owning the land at the time the bond was given. Under such circumstances, the grantee defending an action for the price, is entitled to credit for the amount the outstanding title cost him, and not for what it cost the purchasers from the state.—Murphree v. Dogan, 17 So. 231, not officially reported.

(1905). In a suit by a grantor for the purchase money of land conveyed by general warranty, the grantee may recoup damages sustained by reason of expenses incurred by him in getting possession of the land, but is not entitled to credit for the costs or store fixtures purchased by him from the then occupant of the store, to induce the surrender of the premises.—Weatherbee Bros. v. Lillybeck, 86 M. 156, 38 So. 284.

§ 314. Pleading.

(1836). Fraud cannot be set up by way of inducement, but must be directly charged. —Gibson v. Newman, 1 H. 341.

A party who attempts to make void the performance of an obligation upon the ground of fraud, is required not only to prove the existence of the alleged fraud, but that he has sustained an injury arising therefrom.—(1841) Davidson v. Moss, 5 H. 673; (1843) Moss v. Davidson, 1 S. & M. 112; (1843) Hall v. Thompson, 1 S. & M. 443; (1852) Harris v. Ransom, 24 M. 504.

(1844). The plaintiffs who were trustees of a small village, advertised lots in the village for sale, and stated in the advertisement that they would build a male and female academy. They failed to do so, and in consequence thereof the lots became worthless. In a suit against the purchaser of one of the lots, it was held that these facts ought to go to the jury, both upon the question of whether the sale was procured by false representations, and also upon the question of failure of consideration.—Brewer v. Harris, 2 S. & M. 84, 41 Am. Dec. 587.

(1847). The question of the insolvency of the vendor cannot be brought fairly to bear until it has been clearly shown that no title can be had. Then, as the only remedy is on the covenants, the ability of the vendor to answer in damages might possibly be a subject of inquiry.—McDonald v. Green, 9 S. & M. 138.

(1849). It is no objection to the title of the vendor of land who seeks to enforce his lien for the purchase money, that there is an outstanding mortgage on the land, unless it appear that the mortgage was executed by some one having authority.—Glasscock v. Robinson, 13 S. & M. 85.

(1849). The vendee cannot resist the vendor's bill to enforce his lien on the ground of want of title in vendor, unless he show an eviction, or point out and specify the defects.—Glasscock v. Robinson, 13 S. & M. 85.

(1852). A vendee cannot successfully defend an action for the purchase money upon the ground that he had been induced to make the purchase by fraudulent or mistaken representations of his vendor unless he show that the statutory lien which was the subject of the fraudulent concealment was still existing, or in other words unless he prove that in consequence of the fraud practiced he had been induced to take a defective title.—Harris v. Ransom, 24 M. 504.

(1873). A covenant to pay one-half the consideration on a certain date, and the other at a subsequent time, at which the covenantor is to execute a deed, is, as respects the first payment, independent, but as to the other dependent, and in an action for recovery of the last installment a tender of the deed must be averred; and so in an action for the whole after both installments are due.—Powell v. Stowers, 47 M. 577.

(1873). In an action on a note given for land, where plaintiff has covenanted to execute a deed on payment of all the purchase money, a plea that such purchase money "is and has been due for some time past," and that plaintiff has not tendered a deed, is demurrable for not averring that it was due when suit was begun.—Powell v. Stowers, 47 M. 577.

(1893). Where the vendee in possession, being sued for the price, fails to establish the invalidity of the title of the grantor, at most showing only a title imperfect in written muniments, but supported by possession sufficient in time, and probably in character, to cure all defects, complainant is entitled to a decree.—Waddell v. Latham, 71 M. 351, 15 So. 32, 42 Am. St. 467.

(1899). Demurrer will lie to a bill to recover on a note given in payment of land, but not payable until title was perfected, which fails to aver that the title is perfect. —Heidelberg v. Taylor, 25 So. 166, not officially reported.

§ 315. Evidence.

(1877). Where a recorded deed recites the existence of notes for unpaid purchase money of land, there is no presumption in favor of a purchaser from the vendee that the notes were paid at maturity.—Allen v. Poole, 54 M. 323.

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(1893). Where a purchaser of land procures the owner to deliver him a deed, absolute in form and reciting payment, but in fact conditioned that he negotiate a loan thereon to pay the price, until which time the deed is not to be considered delivered, but, failing to procure the loan, he refuses to restore the *status quo*, puts the deed on record, and occupies the land, and, when sued for the price, answers under oath that the delivery of the deed was unconditional, he is estopped afterwards to assert that the sale was executory, so as to devolve on complainant the burden of showing a perfect title. By reason of such conduct, the vendor may treat the deed as delivered, and the burden is on the purchaser to show a failure of title.—Waddell v. Latham, 71 M. 351, 15 So. 32, 42 Am. St. 467.

§ 317. Trial.

(1892). Where a vendee is sued for the purchase price of certain land and fails to answer that a part of the sum demanded had been paid, the trial court will properly refuse to remand the cause for the purpose of enabling the defendant to prove that fact.—Lemon v. Rogge, 11 So. 470, not officially reported.

§ 319. Appeal and error.

(1848). If the vendee, under a deed with a general warranty of title, in an action for the purchase money, offer in evidence a deed made by a sheriff, who sold the land under an execution against the vendor, having a lien prior to the sale to him, and it be rejected for any alleged defect in form or substance, the exclusion will be no ground of reversal, unless the vendee also offered evidence to show that he had been actually evicted under said sale.—Heath v. Newman, 11 S. & M. 201.

(C) ACTIONS FOR DAMAGES.

§ 322. Right of action.

(1876). Where as a part of the consideration for the purchase of land, a vendee agrees to ship to the vendor, a factor, all the cotton he controls, the factor may sue for a breach of the contract, and recover damages.—Lengsfield v. Richardson, 52 M. 443.

§ 324. Defenses.

(1876). Where one employs an attorney to make a purchase of land, and, with full knowledge and without objection receives a deed with a warranty limited in extent, he cannot afterwards set up in defense to an action for damages for breach of contract, a failure to warrant generally, though he supposed he was to get a deed with general warranty.—Lengsfield v. Richardson, 52 M. 443.

VII. REMEDIES OF PURCHASER.

(A) RECOVERY OF PURCHASE MONEY PAID.

§ 334. Grounds for recovery of payments.

(1841). In the case of a purchase of land, where the title fails, a court of chancery will decree a return of the purchase money, even after the complete execution of the contract by payment of the money and delivery of the deed, if there has been a fraudulent misrepresentation as to the title. But it seems to be settled in England and by most of the courts in this country, that if there is no fraud, and the purchaser is not evicted, the insufficiency of the title, is no ground for claiming restitution of the purchase money. The party is remitted to his remedies at law on his covenants to insure the title.—Coleman v. Rowe, 5 H. 460, 37 Am. Dec. 164.

(1848). The vendor received a part of the purchase money, and covenanted to make title on payment of the balance. The person from whom he bought, filed a bill against him, to enforce the lien for the purchase money due to the complainant in that bill. The last vendor, for a consideration paid him by his vendor, made no defense, and allowed a decree to be entered, under which the land was sold, and the purchaser put in possession. *Held*, that the vendee could recover the money he had paid on the contract.—Sims v. Boaz, 11 S. & M. 318.

(1857). A *mala fide* purchaser of land from an administrator in chiew, is not entitled to have refunded the purchase money which he has paid, upon a nullification of the sale by the administrator *de bonis non*.—Forniquet v. Forstall, 34 M. 87.

§ 337. Lien for purchase money and value of improvements and enforcement thereof.

(1846). From the time of the sale of land, the vendee becomes the trustee of the title for the vendor, and the latter becomes a trustee of the purchase money for the latter. Each has a lien on the estate—the vendor for the unpaid purchase money, and the vendee for the money he has paid on the title. And this lien of the vendee is superior to the lien of a judgment against the vendor, rendered subsequent to the sale, and before the conveyance of the title.—Money v. Dorsey, 7 S. & M. 15.

(1873). Where land is sold on credit and the vendee takes possession, the vendor making a deed which is delivered to a third party as an escrow, to be held until payment of the purchase money, which is paid, but after this, and before final delivery to the vendee, judgment is obtained against the vendor, and enrolled, the rights of the vendee are superior to those of the judgment creditor.—Whitfield v. Harris, 48 M. 710.

§ 339. Conditions precedent.

A purchaser who has paid part of the purchase money, and is to receive title upon payment of the balance, cannot recover back what he has paid, unless he show that he has offered to pay the balance, and demanded title which was refused, (1844) Ayres v. Mitchell, 3 S. & M. 683; (1848) Sims v. Boaz, 11 S. & M. 318; (1856) Hill v. Samuel, 31 M. 307, unless the contract has been rescinded

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either by agreement, or the act of the vendor.—(1848) Sims v. Boaz, 11 S. & M. 318. And so if the vendor remove from the state before he has opportunity to do so, no demand is necessary.—(1844) Ayres v. Mitchell, 3 S. & M. 683.

(1877). One holding land under a deed with general warranty may yield to an outstanding paramount title without waiting to be sued; but he cannot, without assertion of such title, abandon possession and demand a return of the purchase money.—Green v. Irving, 54 M. 450, 28 Am. Rep. 360.

(B) ACTIONS FOR BREACH OF CONTRACT.

§ 342. Nature and form.

(1876). In case of fraudulent representations as to the character of the land, the vendee may elect to rescind, or he may abide by the contract and sue for the deceit, or recoup damages as against the purchase money.—Estell v. Myers, 54 M. 174.

(1909). A person giving an option on land which he does not own and failing to fulfil his contract, cannot be held for the loss of profits on a resale except in a common-law action for fraud and deceit.—Schreck v. Moyse, 94 M. 259, 48 So. 513.

§ 343. Right of action.

(1839–43). A purchaser in possession is not permitted, except under peculiar circumstances, to buy in an outstanding incumbrance or title and oppose it to the title of his vendor under whom he entered. A court of equity will reimburse a purchaser in money advanced in the extinguishment of incumbrances by way of perfecting his title, but will not permit him to array such incumbrance in hostility to the title of his vendor.—Harper v. Reno, Freem. Ch. 323.

(1845). Where a vendor by deed of general warranty conveys a tract of land, which was subject to judgments older than the conveyance, and took the notes of the vendee for the purchase money, and afterwards assigned them to different persons, the vendee will be entitled to relief in equity against the payment of the notes in the hands of the assignees, to the extent of the judgment liens, and the loss must fall ratably on the holders of the notes.—Kilpatrick v. Dye, 4 S. & M. 289.

(1870). If, in the view of the court, the defect in the property sold, or the variation from the description, be unessential, the contract may be performed, but with compensation to the vendee.—Davis v. Heard, 44 M. 50.

(1880). To entitle a vendee by parol (who fails to obtain from the vendor what his agreement induced him to expect), to recover for loss caused by the fraud of the vendor in refusing to consummate the sale, the case must be such as would sustain an action for deceit.—Cain v. Kelly, 57 M. 830.

§ 344. Conditions precedent.

(1841). The vendee of land paid part of the purchase money in advance and executed his notes in instalments to secure the payment of the remainder, and took a bond from the vendor to make title with covenants of warranty, when the last instalment was paid, such vendor representing that he could make a good title. The vendee went into possession, and without previous eviction exhibited his bill in chancery, setting up an outstanding title, and asked for an injunction of the collection of the notes given for the purchase money, which was refused on the ground that the covenants were independent, and that there had been no fraud proven, nor eviction by paramount title.—Coleman v. Rowe, 5 H. 460, 37 Am. Dec. 164.

(1850). It seems that where relief in equity is sought by the vendee of land against the payment of the purchase money, on the ground of failure of title, he need not wait until actually evicted before he can apply for relief; it is ordinarily sufficient if a judgment in ejectment has been recovered against him, although the same has not been executed.—Green v. McDonald, 13 S. & M. 445.

(1884). If the obligor in a contract for the sale of land repudiates it and denies the right of the obligee under it, the latter need not tender the purchase money before bringing suit to enforce it. It is sufficient to offer in his bill to pay what is due, and, especially so if such amount cannot be definitely known until disclosed by the defendant.—Wilbourn v. Bishop, 62 M. 341.

§ 345. Defenses.

(1889). A vendor of land, as an excuse for his refusal to perform, cannot avail of his neglect to do that which was in his power, and which if done would have enabled him to execute the contract.—Thurman v. Pointer, 67 M. 297, 7 So. 215.

§ 349. Pleading.

(1849). In an action on a bond, conditioned, in consideration of a sum paid in cash, to make title on a given day, it is sufficient for the plaintiff merely to allege a demand of the deed; he need not allege that he had prepared and presented it for execution.—Standifer v. Davis, 13 S. & M. 48.

§ 351. Damages.

(1839–43). No principle is better founded in equity than that of purchaser who buys up or discharges an incumbrance can only claim against the vendor the amount actually paid because that would be the measure of damages in an action upon the covenants in his deed.—Harper v. Reno, Freem. Ch. 323.

(1839–43). Where a contract is executed and an action is brought upon the covenant of the deed after eviction the measure of damages is the purchase money with interest.—Gridley v. Tucker, Freem. Ch. 209.

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(1839–43). The rule in relation to executory contracts for the conveyance of lands is that if the vendor fails to convey according to the terms of his contract the measure of damages is the value of the land at the time of the breach and not the price fixed in the contract.—Gridley v. Tucker, Freem. Ch. 209.

The measure of damages for a breach of the warranty of title to land, is the purchase money and interest; the vendor cannot recover for the loss of a good bargain.—(1856) Phipps v. Tarpley, 31 M. 433; (1857) Herndon v. Harrisson, 34 M. 486, 69 Am. Dec. 399.

(1856). The vendee in a parol contract for the sale of land, if the vendor refuse to consummate the bargain, may recover damages from the vendor for his trouble, expense, loss of time, &c., incurred on the faith of the agreement, but nothing for the loss of the bargain.—Welch v. Lawson, 32 M. 170, 66 Am. Dec. 606.

(1857). Where a vendee in a title bond, upon a tender of the purchase money, and a demand for a deed, which is refused, elects to cancel the contract, he can, as general rule, recover nothing from the vendor, if the latter offer to return the notes for the purchase money before suit is brought, and also bring them into court at the trial, and tender them in satisfaction of the plaintiff's demand.—Herndon v. Harrisson, 34 M. 486, 69 Am. Dec. 399.

(1879). Where there has been a false representation as to the quality of the land, the rule is to ascertain its actual value at the time of sale, then to ascertain what it would have been worth if as represented, and to deduct the former sum from the latter. The remainder constitutes the damage sustained by the purchaser, and this sum may be set off against the amount due, if the price remains unpaid, or it may be made the basis of an action for deceit. The contract price must always be taken as the value of the property, unless a different value be clearly established. Where the misrepresentation is in quantity or title, the price paid or contracted to be paid is the standard, and if as to quality, the measure of damages is the difference between the land as warranted, and its actual value.—Estell v. Myers, 56 M. 800.

(1880). The vendee of land under a parol agreement cannot recover for losses sustained by anything occurring between himself and the vendor after he hears of the latter's unwillingness to reduce the contract of sale to writing because of a doubt as to his right to sell the land.—Cain v. Kelly, 57 M. 830.

§ 352. Trial.

(1911). In an action for the breach of an option to convey, it was error to instruct that the $1 consideration recited therein was a sufficient consideration, where the real consideration was the listing and advertising the property for sale.—Smith v. Cauthen, — M. —, 54 So. 844.

(1911). An instruction in an action for the breach of an option contract to sell property was held misleading in the ambiguous use of the term "personal services" as part of the consideration.—Smith v. Cauthen, — M. —, 54 So. 844.

VENDOR AND VENDEE.

Persons entitled to reformation of instrument, see REFORMATION OF INSTRUMENTS, §§ 26, 27.

VENDOR'S LIEN.

See SALES, §§ 301–315; VENDOR AND PURCHASER, §§ 251–299.

VENIRE.

See JURY; GRAND JURY.

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VENUE.

This topic INCLUDES place in which actions should be brought and tried in general; distinctions in respect thereof between local and transitory actions; and grounds for change of venue or place of trail, proceedings therefor, and effect of such change.

It EXCLUDES venue of actions by or against corporations (see CORPORATIONS; and titles of particular classes of corporations); venue of particular forms or classes of actions (see specific heads); and place of bringing proceedings other than actions (see HABEAS CORPUS; and titles of other special proceedings).

See cross-references for complete list of exclusions.

Analysis.

I. Nature or Subject of Action.

§ 4. Local or transitory nature of action in general.
§ 12. Actions arising out of the jurisdiction.

II. Domicile or Residence of Parties.

§ 26. Actions by or against nonresidents.
§ 28. Domicile or residence for purpose of action.

III. Change of Venue or Place of Trial.

§ 36. Causes in which change may be granted.
§ 44. Stipulations and agreements.
§ 46. Action not brought in proper county or district.
§ 47. Alteration of county or district pending action.
§ 61. Time for application.
§ 75. Order granting or refusing change.
§ 77. Waiver of change.

Cross-References.

See JUSTICES OF THE PEACE, § 72.
Actions by or against administrator, see EXECUTORS AND ADMINISTRATORS, § 436.
Actions by or against foreign corporations, see CORPORATIONS, § 666.
Actions for injuries to animals, see RAILROADS, § 435.
Actions for obstruction of water courses, see WATERS AND WATER COURSES, § 59.
Actions on notes, see BILLS AND NOTES, § 454.
Bastardy proceedings, see BASTARDS, § 35.
Ejectment, see EJECTMENT, § 38.
Equitable relief against judgment, see JUDGMENT, § 455.
Jurisdiction as dependent on locality of offense, see CRIMINAL LAW, § 97.
Locality of offense as determining, see CRIMINAL LAW, § 108.
Local prejudice as ground for change, see CRIMINAL LAW, § 126.
Necessity of proof, see INDICTMENT, § 166.
Necessity that offense be proved to have been committed in county, see INDICTMENT, § 166.
Necessity that record show venue, see CRIMINAL LAW, § 1086.
Place of bringing attachment proceedings, see ATTACHMENT, § 74.
Quo warranto, see QUO WARRANTO, § 28.
Transitory actions by or against foreign corporation, see CORPORATIONS, § 666.
Weight and sufficiency of evidence of venue, see CRIMINAL LAW, § 564.

I. NATURE OR SUBJECT OF ACTION.

§ 4. Local or transitory nature of action in general.

(1889). Whether actions in this state are local or transitory is governed solely by statute. The only local actions in this state are ejectment and trespass to land, styled at common law *quare clausum fregit*.—Archibald v. Mississippi &c. R. Co., 66 M. 424, 6 So. 238.

Local actions must be commenced in the county where the land is situated. All other

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actions must be brought with reference to the person of the defendant. Code 1880, § 1498.—(1881) Oliver v. Loye, 59 M. 320; (1889) Archibald v. Mississippi &c. R. Co., 66 M. 424, 6 So. 238.

§ 12. Actions arising out of the jurisdiction.

(1894). As to railroad corporations operating a line in this state, and suable here for injuries occurring in another state, see Louisville &c. R. Co. v. Pool, 72 M. 487, 16 So. 753.

(1897). A right of action created by the statute of another state, if of a transitory nature, may be enforced in the courts of this state if not in conflict with our public policy. —Pullman Palace Car Co. v. Lawrence, 74 M. 782, 22 So. 53. See also (1888) Pate v. Taylor, 66 M. 97, 5 So. 515; (1872) Christian v. O'Neal, 46 M. 669.

II. DOMICILE OR RESIDENCE OF PARTIES.

§ 26. Actions by or against non-residents.

(1891). Where notes are held and claimed by one in another state, our courts cannot, on publication, decree ownership of the same to another, although they are secured by trust deed on land in this state and the maker resides here. Neither the person nor the *res* being in this state, its courts, without appearance of the defendant, cannot acquire jurisdiction in such case.—Cocke v. Brewer, 68 M. 775, 9 So. 823. See also (1880) Hamilton v. Catchings, 58 M. 92.

§ 28. Domicile or residence for purpose of action.

The circuit court has no jurisdiction to entertain a suit against a defendant (there being no resident co-defendant), who is not found in the county, nor resided in it at the commencement of the suit; and hence, if an original writ be issued to the county in which the court is held, and a duplicate is issued to another county, upon the return of "*non est inventus*," on the first, and "executed," on the second, the defendant will have the right to have the cause dismissed, by showing that he did not reside in the county where the court was held.—(1841) Bank of Vicksburg v. Jennings, 5 H. 425; (1846) Read v. Renaud, 6 S. & M. 79.

(1854). The act establishing the vice chancery courts, provided that suits therein should be brought in the district in which the defendants lived; but if a suit be brought in another district, that it should not be dismissed, but on application of the defendant should be transferred to the superior court of chancery. Hence, in such a case, a plea to the jurisdiction on that ground, should be overruled, and if there be no application to make the change, the vice chancery court should proceed to final hearing.—Trotter v. Erwin, 27 M. 772.

(1896). The venue of actions *in personam* is in the county "in which the defendants or any of them may be found."—Campbell v. Triplett, 74 M. 365, 20 So. 844.

(1896). The circuit court of one county lacks jurisdiction to render a judgment by default in an attachment suit against a defendant upon whom service is had in a county other than that in which he resides.—Campbell v. Triplett, 74 M. 365, 20 So. 844.

III. CHANGE OF VENUE OR PLACE OF TRIAL.

Change of venue from justices, see JUSTICES OF THE PEACE, § 73.
Change of venue in attachment proceedings, see ATTACHMENT, § 75.
Change of venue in garnishment proceedings, see GARNISHMENT, § 83.
Waiver of regularity of change by failure to object in lower court, see APPEAL AND ERROR, § 186.

§ 36. Causes in which change may be granted.

(1844). The statute authorizing a change of venue in the circuit court has no application to cases taken to that court by appeal; and if granted in such a case, though by consent of parties, the order will be void, and confer no jurisdiction on the court to which the venue is attempted to be changed.—Yalabusha County v. Carbry, 3 S. & M. 529.

§ 44. Stipulations and agreements.

(1831). Parties in a civil case may legally consent to a change of venue.—Choat v. Billingsly, W. 420.

(1873). The circuit court has no inherent power to change the venue. The right is conferred and regulated by Code 1871, § 722, which must be at least substantially pursued. Mere consent of the parties will not authorize a change of venue.—Wilson v. Rodewald, 49 M. 506.

(1897). An attachment suit may be transferred from the circuit court of one county to the circuit court of another by the consent of the parties.—Weissinger v. Mansur &c. Co., 75 M. 64, 21 So. 757.

(1900). Under Code 1892, § 650, an action of trespass *quare clausum fregit*, brought in a district where the lands lie, cannot be removed by consent to another district of the county in which the action is brought.—Wilkerson v. Jenkins, 77 M. 603, 27 So. 611; (Weissinger v. Mansur, 75 M. 64, explained).

§ 46. Action not brought in proper county or district.

(1879). A motion against a sheriff for failure to return an execution under Code 1871, § 227, is determinable in the court to which the process is returnable, and the defendant, though a resident in another county, is not entitled to a change of venue.—Cox v. Ross, 56 M. 481.

§ 47. Alteration of county or district pending action.

If the defendant is found in the county where he is sued, he is entitled to have the

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venue changed to the county of his residence and freehold.—(1824) Spain v. Winter, W. 152; (1869) McLeod v. Shelton, 42 M. 517.

§ 61. Time for application.

(1885). An application for a change of venue comes too late when made after the trial of the case has been commenced.—Smith v. State, 1 Miss. Dec. 19.

§ 75. Order granting or refusing change.

(1838). An order for a change of venue in a civil case, made in vacation, must be under the hand and seal of the judge, directed to the clerk of the court where the cause is pending, and commanding him to send the papers to the clerk of the court to which the venue is changed. If application be made in term time, an order of the court is necessary. The statement of the clerk that the venue was changed, is insufficient, and gives no jurisdiction.—Saunders v. Morse, 3 H. 101.

§ 77. Waiver of change.

(1840). A motion entered on the docket for a change of venue, will, after judgment on the merits, be considered as waived, if it do not appear that the attention of the court was called to it, and a decision on it asked. —Grant v. Planters' Bank, 4 H. 326. See also (1839) Prussel v. Knowles, 4 H. 90.

VERBAL MESSAGES.

Acceptance, see TELEGRAPHS AND TELEPHONES, § 35.

VERBAL MORTGAGE.

Of chattels, see CHATTEL MORTGAGES, § 6.

VERDICTS.

Amendments, see TRIAL, § 338.
Amount of recovery, see TRIAL, § 332.
As part of record on appeal, see APPEAL AND ERROR, § 527.
Assignment, see ASSIGNMENTS, § 28.
Calculation of damages in actions on bills or notes, see BILLS AND NOTES, § 539.
Claimant's issue and attachment, see ATTACHMENT, § 312.
Collection in equity, see ASSIGNMENTS, § 127.
Conclusiveness on appeal, see APPEAL AND ERROR, §§ 998–1006.
Conclusiveness of successive verdicts, see APPEAL AND ERROR, § 1006; CRIMINAL LAW, § 1159.
Conformity of verdict to judgment, see JUDGMENT, § 256.
Contest of will, see WILLS, § 333.
Contrary to evidence as ground for new trial, see CRIMINAL LAW, § 935.
Contrary to evidence as ground for new trial, see NEW TRIAL, §§ 65–81.
Defects in verdict as ground for new trial, see CRIMINAL LAW, § 971.
Designation of parties, see TRIAL, § 327.
Direction in ejectment, see EJECTMENT, § 109.
Exceptions to, see APPEAL AND ERROR, § 264.
Garnishment proceedings, see GARNISHMENT, § 173.
General verdict, see TRIAL, §§ 321–344.
Harmless error, see CRIMINAL LAW, § 1175.
Homicide, see HOMICIDE, §§ 312–315.
In attachment proceedings, see ATTACHMENT, § 216.
In condemnation proceedings, see EMINENT DOMAIN, § 223.
In criminal prosecutions, see CRIMINAL LAW, §§ 873–890.
In detinue, see DETINUE, § 20.
In replevin, see REPLEVIN, §§ 92–97.
In trover, see TROVER AND CONVERSION, § 68.
Judgment on verdict, see JUDGMENT, § 198.
Larceny prosecution, see LARCENY, §§ 81, 83.
Manner of arriving at verdict as ground for new trial, see NEW TRIAL, § 52.
Manner of juries in arriving at verdict, see TRIAL, § 315.
Necessity of exception to verdict in criminal trial, see CRIMINAL LAW, § 1123.
Necessity of objection, see CRIMINAL LAW, § 1040.
On claimant's issue, see EXECUTION, § 198.
On trial of issue in equity, see EQUITY, § 381.
Presumptions as to verdict in lower court, see APPEAL AND ERROR, § 930.
Responsiveness to issues, see TRIAL, § 329.
Right of accused to be present on reception, see CRIMINAL LAW, § 636.
Slander, see LIBEL AND SLANDER, § 125.
Sufficiency of evidence to support, see EVIDENCE, § 597.
Surplusage, see TRIAL, § 336.
Urging or coercing agreement of jury, see CRIMINAL LAW, § 865.

VERIFICATION.

Amendment, see PLEADING, § 303.
Bill for injunction, see INJUNCTION, § 122.
Claims against estates, see EXECUTORS AND ADMINISTRATORS, § 227.
Pleading, see PLEADING, §§ 289–304.
Pleading in actions on note, see BILLS AND NOTES, § 485.
Pleadings in equity, see EQUITY, § 312.
Proof of claims against state, see STATES, § 176.
Sufficiency, see PLEADING, § 300.
Sufficiency of verification of pleadings in equity, see EQUITY, § 319.

VERIFIED ACCOUNT.

See ACCOUNT, ACTION ON, § 9.

VESSELS.

See SHIPPING; MARITIME LIENS.
Partnership in recovery of sunken vessel, see PARTNERSHIP, § 15.
Registration of mortgages, see CHATTEL MORTGAGES, § 82.

VESTED ESTATES.

See WILLS, §§ 629, 630.

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VESTED RIGHTS.

Constitutional guaranties, see CONSTITUTIONAL LAW, §§ 92–106.
Husband in wife's separate property, see HUSBAND AND WIFE, § 134.
Transfer, see CONSTITUTIONAL LAW, § 92.

VETO.

See STATUTES, §§ 25–34.
Ordinances by mayor, see MUNICIPAL CORPORATIONS, § 107.
Portion of bill, see STATUTES, § 33.

VICE CHANCERY COURTS.

See EQUITY, § 2.

VICE PRINCIPALS.

Fellow-servant doctrine, see MASTER AND SERVANT, §§ 186, 190.

VIEW.

Right to in course of trial, see TRIAL, § 28.

VINDICTIVE DAMAGES.

See DAMAGES, §§ 87–94, 151, 215.

VILLAGES.

See MUNICIPAL CORPORATIONS.

VINOUS LIQUORS.

See INTOXICATING LIQUORS, § 102.

VIOLATION OF INJUNCTION.

See INJUNCTION, §§ 216–230.

VISITORIAL POWERS.

For foreign corporations, see CORPORATIONS, §636.

VOID JUDGMENTS.

As prior adjudication, see JUDGMENT, § 577.
Equitable relief against, see JUDGMENT, § 419.

VOLUNTARINESS.

Of confessions, see CRIMINAL LAW, §§ 519–538.

VOLUNTARY APPEARANCE.

See APPEARANCE.

VOLUNTARY ASSIGNMENTS.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.

VOLUNTARY ASSOCIATIONS.

See ASSOCIATIONS.
Liability of members, see ASSOCIATIONS, § 16.

VOLUNTARY CONFESSIONS.

See CRIMINAL LAW, §§ 516–534.

VOLUNTARY DISMISSAL AND NON-SUIT.

See DISMISSAL AND NON-SUIT, §§ 4–43.
In equity, see EQUITY, § 359.

VOLUNTARY PAYMENTS.

Recovery, see PAYMENT, § 82.

VOLUNTARY SERVICES.

Right to compensation, see WORK AND LABOR, § 4.

VOLUNTEERS.

As *bona fide* purchasers, see VENDOR AND PURCHASER, § 220.
As parties to fraudulent conveyances, see FRAUDULENT CONVEYANCES, § 1.
Liability of master for injuries to, see MASTER AND SERVANT, §§ 88, 89.
Payment by volunteers, see PAYMENT, § 82.
Subrogation on payment by volunteers, see SUBROGATION, § 26.

VOIR DIRE.

Examination of jurors, see JURY, § 131.

VOTERS.

See ELECTIONS.
Necessity that juror be voter, see JURY, § 52.
Right of stockholders to vote in stockholders' meetings, see CORPORATIONS, § 197.

WAGERING CONTRACT.

Assignment of policy to person without insurable interest, see INSURANCE, § 122.

WAGER OF LAW.

Abolition, see ACTIONS, § 29.

WAGERS.

See GAMING.

WAGES.

See MASTER AND SERVANT, §§ 73–82.
Actions for, see MASTER AND SERVANT, § 80.
Exemption from legal process, see EXEMPTIONS, §§ 16, 48.
Notice of assignment, see ASSIGNMENTS, § 57.

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WAGONERS.

As carriers, see CARRIERS, § 4.

WAIVER.

See ESTOPPEL.
Abatement of action, see ABATEMENT AND REVIVAL, § 88.
Acts or omissions constituting waiver of exemptions, see EXEMPTIONS, § 93.
Agricultural lien, see AGRICULTURE, § 14.
Allowance to surviving wife, husband or children from estate of decedent, see EXECUTORS AND ADMINISTRATORS, §§ 183–186.
Answer in equity under oath, see EQUITY, § 312.
Answer under oath, see EQUITY, §§ 330, 343.
Application of doctrine to insurance policy, see INSURANCE, § 371.
Arraignment, see CRIMINAL LAW, § 262.
As to notice and proofs of loss, see INSURANCE, §§ 554–561.
Attachment lien, see ATTACHMENT, § 184.
Bar of statute of frauds, see FRAUDS, STATUTE OF, § 144.
Breach of condition in deed, see DEEDS, § 166.
Breach of contract, see CONTRACTS, § 316.
Breach of warranty in sale, see SALES, § 283.
Challenge to jurors, see JURY, § 110.
Change of venue, see VENUE, § 77.
Conditions in policy by acceptance of premiums, see INSURANCE, § 392.
Conditions in policy by delivery of policy without objection, see INSURANCE, § 389.
Conditions in policy by participation in adjustment of loss, see INSURANCE, § 397.
Conditions in policy subject to waiver, see INSURANCE, § 372.
Conditions of sale or contract, see SALES, § 477.
Condition requiring filing of loss claim, see CARRIERS, § 218.
Contract of sale by seller, see SALES, § 101.
Cure of defects in pleading, see PLEADING, § 400.
Default or delay in delivering goods sold, see SALES, § 176.
Default or delay in payment of price of land sold, see VENDOR AND PURCHASER, § 187.
Defects in indictment, see INDICTMENT, §§ 195–197.
Defects in performance of contract, see CONTRACTS, § 305.
Defects in process, see PROCESS, § 166.
Defects in service of garnishment, see GARNISHMENT, § 104.
Defects in title of vendor, see VENDOR AND PURCHASER, § 143.
Defects or objections to contract of sale, see VENDOR AND PURCHASER, § 42.
Defenses against assignee of notes, see BILLS AND NOTES, § 314.
Demurrer, see PLEADING, § 212.
Discharge of surety, see PRINCIPAL AND SURETY, § 129.
Erroneous taxation of costs, see COSTS, § 220.
Error by failure to appeal, see APPEAL AND ERROR, § 181.
Exceptions, see APPEAL AND ERROR, § 280.
Exemption from legal process, see HOMESTEAD, § 145.
Exemption of wages from garnishment, see GARNISHMENT, § 20.
Exemptions, see EXEMPTIONS, § 92.
Failure to revive action, see ABATEMENT AND REVIVAL, § 88.
Forfeiture of insurance policy, see INSURANCE, §§ 372–397.
Form and requisites of express waiver of conditions in policies, see INSURANCE, §§ 381–385.
Ground for discharge of servant, see MASTER AND SERVANT, § 30.
Homestead right, see HOMESTEAD, §§ 145–154, 177.
Implied waiver of conditions in policy, see INSURANCE, § 388.
Irregularities and errors at trial, see TRIAL, § 410.
Irregularities and errors in trial in equity, see EQUITY, § 381.
Irregularity in levy by giving bond, see REPLEVIN, § 47.
Irregularities in preliminary proceedings, see CRIMINAL LAW, § 887.
Instructions, see CRIMINAL LAW, § 840.
Jurisdiction in equity, see EQUITY, § 42.
Jurisdiction of courts generally, see COURTS, § 37.
Jurisdiction by failure to object in lower court, see APPEAL AND ERROR, § 185.
Jurisdiction of criminal prosecutions, see CRIMINAL LAW, § 105.
Jury trial, see JURY, § 27.
Lien, see LIENS, § 16; LANDLORD AND TENANT, § 254.
Lien for price of goods sold, see SALES, § 813.
Lien for price of land sold, see VENDOR AND PURCHASER, § 266.
Lien for taxes on land of another erroneously paid, see TAXATION, § 827.
Lien of carrier for freight charges, see CARRIERS, § 197.
Lien of mortgage, see CHATTEL MORTGAGES, § 136; MORTGAGES, § 148.
Matters of prejudice to infants, see INFANTS, § 97.
Motion to quash attachment, see ATTACHMENT, § 239.
New trial, see NEW TRIAL, § 10.
Notice and proof of loss under insurance policy, see INSURANCE, §§ 554–561, 789.
Notice of call on subscribers for corporate stock, see CORPORATIONS, § 89.
Notice of claim against carrier for loss or injury to goods, see CARRIERS, § 159.
Notice of claim against carrier for loss or injury to live stock, see CARRIERS, § 218.
Notice of non-payment of protest of bill or note, see BILLS AND NOTES, § 422.
Objections, see APPEARANCE, § 22.
Objections to depositions, see DEPOSITIONS, § 111.
Objections to grand jurors, see GRAND JURY, § 19.
Objections to instructions, see CRIMINAL LAW, § 840; TRIAL, § 421.
Objections to jurisdiction, see COURTS, § 37.
Objections to jurisdiction of justice, see JUSTICES OF THE PEACE, § 60.
Objections to jurisdiction of justices of the peace in criminal prosecutions, see CRIMINAL LAW, § 105.

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Objections to pleadings in equity, see EQUITY, § 330.
Objections to public improvements, see MUNICIPAL CORPORATIONS, § 318.
Objections to modification of instruction, see CRIMINAL LAW, § 838.
Objections to right of appeal, see APPEAL AND ERROR, § 168.
Objections to rulings on demurrer, see PLEADING, § 415.
Performance of contract, see CONTRACTS, § 305.
Plea in abatement in criminal prosecution, see CRIMINAL LAW, § 279.
Pleadings, see PLEADING, §§ 400–436.
Pleadings in equity, see EQUITY, § 330.
Power of executor to waive defense, see EXECUTORS AND ADMINISTRATORS, § 114.
Power of insurance officers or agents to waive condition in policy, see INSURANCE, §§ 374, 376.
Preliminary affidavit in criminal prosecution, see CRIMINAL LAW, § 213.
Presentation of claims against estate, see EXECUTORS AND ADMINISTRATORS, § 230.
Presentment of bill or note for payment, see BILLS AND NOTES, § 422.
Privilege of witness to refuse to answer, see WITNESSES, § 305.
Process or notice, see APPEARANCE, § 20.
Protest of bill or note, see BILLS AND NOTES, § 422.
Recovery of goods delivered or proceeds thereof, see SALES, § 318.
Redemption from mortgage sale, see MORTGAGES, § 597.
Relief from judgment, see JUDGMENT, § 147.
Requirement as to time to sue on insurance policy, see INSURANCE, § 623.
Requirement of notice of loss of goods in transportation, see CARRIERS, § 159.
Rescission of sale by buyer, see SALES, § 121.
Right to appeal by compliance with judgment or order, see APPEAL AND ERROR, § 156.
Right to appeal by recognition or acquiescence in decision, see APPEAL AND ERROR, § 154.
Right to assign error by withdrawal of plea, see APPEAL AND ERROR, § 153.
Right to attachment, see ATTACHMENT, § 48.
Right to foreclose mortgage, see MORTGAGES, § 408.
Right to have claim dismissed for improper filing, see ATTACHMENT, § 280.
Right to lien, see MECHANICS' LIENS, §§ 209–213.
Right to lien by taking collateral security, see MECHANICS' LIENS, § 212.
Right to new trial, see NEW TRIAL, § 10.
Right to object or challenge juror, see JURY, § 110.
Right to raise constitutional questions, see CONSTITUTIONAL LAW, § 43.
Right to reclaim goods, see SALES, § 318.
Right to relief from default judgment, see JUDGMENT, § 147.
Right to rescind by purchaser of realty, see VENDOR AND PURCHASER, § 114.
Right to rescission of vendor's contract, see VENDOR AND PURCHASER, § 95.
Right to specific performance, see SPECIFIC PERFORMANCE, § 7.
Rulings as to admissibility of evidence, see TRIAL, §§ 410, 414.
Stipulations in contract for sale of realty, see VENDOR AND PURCHASER, § 77.
Stipulation in policies as to time of bringing suit, see INSURANCE, § 623.
Tender of deed by vendor, see VENDOR AND PURCHASER, § 148.
Tender of purchase price of land, see VENDOR AND PURCHASER, § 170.
Tort, see ACTIONS, § 28.
Tort in action on contract, see ACTION, § 28.
Transfer of causes as between different courts, see COURTS, § 488.
Trespass and suit for money had and received, see TRESPASS, § 17.
Under deed of assignment, see ASSIGNMENT FOR BENEFIT OF CREDITORS, § 339.
Want of jurisdiction as to subject matter, see APPEAL AND ERROR, § 840.

WALLS.

See PARTY WALLS.

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WAR.

This topic INCLUDES armed contests between nations or states, and such contests within a nation or state which prevent the regular administration of the laws by the civil authorities; power to make war and peace, and commencement and termination of hostilities; effect of existence of war and of martial law on civil rights, liabilities, and remedies; rights of belligerents and of neutrals in general; measures for prosecution of war and exercise of war powers in general; embargo and non-intercourse acts, blockades, contraband goods, illegal trading, captures and prizes, confiscation and sequestration of enemies' property, and occupation and conquest of enemies' territory; and martial law and administration thereof by courts-martial, military commissions, and other tribunals.

See cross-references for complete list of exclusions.

Analysis.

§ 9. Prosecution of war, and liabilities for exercise of war powers in general.
§ 10. Effect of war on pre-existing rights, liabilities, and remedies.
§ 15. Commercial intercourse with enemy, or with territory under military control.
§ 31. Military government and martial law.

Cross-References.

As excuse for failure to make demand for payment of note, see BILLS AND NOTES, § 397.
Effect of war on running of statute of limitations, see LIMITATION OF ACTIONS, § 113.
Judicial notice of existence, see EVIDENCE, § 11.
Support of paupers during war, see PAUPERS, § 39.
Taxes imposed during war, see TAXATION, § 3.
Taxes in support, see COUNTIES, § 165.
Title of purchaser of public lands after secession, see PUBLIC LANDS, § 142.
Validity of contracts entered into in territory occupied by federal forces, see CONTRACTS, § 133.
Validity of notes given to hire substitute, see BILLS AND NOTES, § 106.

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§ 9. Prosecution of war, and liabilities for exercise of war powers in general.

(1871). The confederate government had the rights of a belligerent power; and it was a lawful belligerent act during the civil war, in certain circumstances under authority of the government, to destroy cotton to prevent its seizure and use by the enemy.—Ford v. Surget, 46 M. 130.

(1871). Where, in accordance with legislation of the confederate states, by direction of a provost marshal acting under orders of the confederate general commanding the department, one, though not in the military service, destroyed cotton, he is not amenable in damages to the owner.—Ford v. Surget, 46 M. 130.

(1874). A military order does not justify the destruction of private property either in war or time of peace, if done without the warrant of law applicable to the one state or the other. In 1865, after active hostilities east of the Mississippi river had ceased, and martial law did not prevail, a confederate officer commanding a military district, including the city of Jackson, had no authority to order the destruction of spirituous liquors therein, owned by private citizens. An officer executing such an order is liable in damages for the property destroyed, although it was claimed that the order was necessary for the protection of the city as against drunken paroled soldiers who had threatened to burn the city, and the officer acted in good faith. But punitive damages are not recoverable.—McLaughlin v. Green, 50 M. 453.

§ 10. Effect of war on pre-existing rights, liabilities, and remedies.

See CONTRACTS, § 133.

(1866). The rule of the law of war, which allows the ancient laws to remain in force among a conquered people until the same are changed by the conqueror, would uphold a contract when made after conquest, and before any change in the laws was made, and especially would this be so, when the military authorities of the conqueror, expressly permitted their operation so far as they relate to any particular contract.—Murrell v. Jones, 40 M. 565.

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(1866). The facts that an agent resided in New Orleans, and the principal in Mississippi, in 1862, and that New Orleans had fallen into the federal power for three days, does not *per se* revoke an agency to sell bills and notes for confederate money. The enemy relation had not, in that short time, been established between the principal and agent. The fall of New Orleans might be a good ground for revoking the agency to sell for confederate money, but did not itself work that effect.—Murrell v. Jones, 40 M. 565.

(1867). The Act of 22d of January, 1861, which provided that it shall not be lawful to commence or prosecute any suit or action for debt against any southern soldier, called into active service by the authorities of this state, whilst he is or may be engaged in the military service of any of the southern states, is constitutional.—State v. McGinty, 41 M. 435, 93 Am. Dec. 264.

(1871). Under Code 1857, § 11, p. 303, foreign insurance companies dealing with our citizens must be held to have agreed to accept performance from the assured in this state and also to pay losses here. The civil war did not *per se* revoke the agency of an agent in this state of a New York insurance company, who was authorized to receive payment of premiums, and a tender to him of premiums maturing during the war kept alive the policy.—Statham v. New York Life Ins. Co., 45 M. 581, 7 Am. Rep. 737.

(1871). Where at the opening of the late civil war, a New York life insurance company had an agent in this state, the war did not, *per se*, revoke the agency, nor make it unlawful for the agent to receive premiums which were tendered subsequently to the commencement of hostilities, and a tender to him of an annual premium due December 8, 1861, saved the assured from being in default as to the payment of premiums.—Statham v. New York Life Ins. Co., 45 M. 581, 7 Am. Rep. 737.

(1871). The late civil war, as between the belligerents, brought the consequences and disabilities incident under international law to foreign war; among these being a suspension as between the inhabitants of the belligerent countries, of the right of suit on contracts made before the war, and a prohibition of all intercourse, dealing and trading, except under license granted under competent authority.—Statham v. New York Life Ins. Co., 45 M. 581, 7 Am. Rep. 737.

(1871). Ante-bellum contracts between citizens of belligerent states, which have been performed in part by either party, were not dissolved by the war unless their performance was inconsistent with the duties and allegiance which the parties owed to their respective countries and involved some violation or infringement of these. If the contract may be preserved or performed without the transmission of money or property from one enemy to the other, or without their intercourse or correspondence, a state of war would not demand an abrogation of the contract.—Statham v. New York Life Ins. Co., 45 M. 581, 7 Am. Rep. 737.

(1873). Contracts of individuals and judgments of the courts and acts of the legislature during the existence of the southern confederacy, in all matters of a business or domestic character, not involving hostility to the union or the national constitution, are valid and binding without subsequent constitutional or legislative approval.—Lawson v. Jeuries, 47 M. 686, 12 Am. Rep. 342.

(1875). Where the owner of land in this state removed to another southern state during the late war, and there is no evidence to show that he was "voluntarily absent and engaged in arms or otherwise aiding and encouraging the rebellion," but that he left an agent and slaves to cultivate his land, his agent cannot treat it as abandoned, under the act of congress, July 2, 1864, and, by getting permission of a special agent of the federal government to cultivate it, terminate the agency and claim the crops as against such owner.—Shelby v. Offut, 51 M. 128.

§ 15. Commercial intercourse with enemy, or with territory under military control.

(1871). A loan of money, which the lender knew was wanted for the equipment of a cavalry company to serve the confederate states, without any stipulation in the contract to that effect, the borrowers being left free by the contract to use the money as they saw fit, is valid, and the money loaned may be recovered, although it was actually expended for such purpose.—Walker v. Jeffries, 45 M. 160.

(1875). The late civil war was territorial and *ipso facto* impressed a hostile character upon the people within the seceding states. The same disabilities followed as are superinduced by foreign war. Intercourse, commerce and business between the belligerent states became at once illegal.—Shacklett v. Polk, 51 M. 378.

(1875). Where parties within the lines of the territory occupied by the federal forces during the civil war contracted to come into this state to gather a crop of cotton and transport it into the loyal states, the contract will not be held void, it stipulating that necessary clearances and permits from the federal government were to be obtained, it being thus evidenced that the parties did not intend to violate the law.—Shacklett v. Polk, 51 M. 378.

§ 31. Military government and martial law.

(1871). The military government in this state established by proclamation of the president and afterwards continued in force by congress, and the provisional state government as an adjunct to it, expired February 23, 1870, the date of the act of congress admitting the senators and representatives of this state to seats in congress.—Leachman v. Musgrove, 45 M. 511.

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(1873). While in political matters for the preservation of public order, large discretion was by the reconstruction acts of congress given to the military commanders in the late insurrectionary states after the civil war, they could not vacate judgments of the civil courts. Therefore a military order issued by the commanding general in the state of Mississippi, February 24, 1869, attempting to annul an award of arbitrators voluntarily chosen in a civil case in the circuit court and directing a new trial, is void.—Welborn v. Mayrant, 48 M. 652.

(1874). Martial law is limited to the theater of active military operations, where no civil authority obtains, and there is a necessity of furnishing a substitute to preserve the safety of the army and society, and such rule can only prevail until the civil authority can have free course.—McLaughlin v. Green, 50 M. 453.

WARDS.

See GUARDIAN AND WARD.

WAREHOUSEMEN.

This topic INCLUDES regulation and conduct of the business of storage and safekeeping, for compensation, of goods of any kind, whether ordinary goods in storehouses or at wharves, &c., or valuables in safes or vaults of safe-deposit companies, grain in elevators, cattle in stockyards, &c.; and the mutual rights, duties, and liabilities of persons engaged in such business and those dealing with them.

It EXCLUDES special deposits of money in banks or trust companies (see BANKS AND BANKING); liabilities of carriers as warehousemen (see CARRIERS).

See cross-references for complete list of exclusions.

Analysis.

§ 11. Warehouse receipts.
§ 14. —— Construction and operation.
§ 24. Loss of or injury to goods.
§ 24a. —— Loss by fire.
§ 25. Delivery by warehousemen.
§ 27. Charges and expenses.
§ 29. Lien.
§ 34. Actions by or against warehousemen.

Cross-References.

Carrier as warehouseman as to goods awaiting transportation, see CARRIERS, § 139.

Carrier of baggage as warehouseman, see CARRIERS, § 404.

§ 11. Warehouse receipts.

(1895). A bailor whose warehouse receipts for cotton in store are held in pledge by a third person, cannot, either in his own name or for the use of the pledgee, maintain replevin therefor, or trover for its conversion.—Selleck v. Macon Compress &c. Co., 72 M. 1019, 17 So. 603.

(1901). There is a valid transfer of a warehouse receipt by its transfer without indorsement, when made with an intention to pass title to the property.—Shingleur-Johnson Co. v. Canton Cotton-Warehouse Co., 78 M. 875, 29 So. 770, 84 Am. St. 655.

(1905). In a suit on a warehouse receipt, testimony intended to establish the delivery of property different from that specified in the receipt and to show that the holder had received the proceeds thereof was not admissible where this issue was not made by the pleadings.—Star Congress &c. Co. v. Meridian Cotton Co., 87 M. 228, 39 So. 417.

(1905). A bank or holder of a warehouse receipt, is not shown to be a *mala fide* holder by the testimony to the effect that one of its officers witnessed the execution of a paper by which a third person undertook to indemnify the warehouseman should it develop that another receipt then delivered to that person for certain merchandise was improperly issued.—Star Compress &c. Co. v. Meridian Cotton Co., 87 M. 228, 39 So. 417.

(1905). As against a subsequent *bona fide* holder, it may not be shown that a warehouse receipt was issued by mistake, where

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it acknowledges the delivery of merchandise and binds the warehousemen to return the same or pay the market price thereof and stipulates that it shall be negotiable by indorsement and that no debt, demand, or set-off can be claimed against the merchandise, since Laws 1904, ch. 89, p. 125, provides that all warehouse receipts shall be conclusive evidence in the hands of a *bona fide* holder for value that the property mentioned in the receipt had been received.—Star Compress &c. Co. v. Meridian Cotton Co., 87 M. 228, 39 So. 417.

§ 14. —— Construction and operation.

(1908). A clause in a warehouse receipt which merely exempts the warehouseman from liability for loss by fire and water does not cover losses due to exposure to the elements. Such a clause relates to damage resulting from some disaster produced by fire or flood in the nature of an overwhelming catastrophe.—Grenada Cotton Compress Co. v. Atkinson, 94 M. 93, 47 So. 644.

§ 24. Loss of or injury to goods.

A warehouseman is only bound to exercise ordinary and reasonable diligence in the keeping and preservation of goods committed to his keeping, such as men ordinarily and reasonably exercise in their own affairs.—(1853) Cowles v. Pointer, 26 M. 253; (1908) Yazoo &c. R. Co. v. Hughes, 94 M. 242, 47 So. 662.

(1853). A warehouseman is not bound to construct his warehouse, so as to make it secure against all possible contingencies; it is sufficient, if the house be reasonably safe against ordinary occurrences.—Cowles v. Pointer, 26 M. 253.

(1853). A warehouseman is not bound at once to commence to remove the goods from a building in which high water—by extraordinary rise, which had not occurred in fourteen years—might possibly enter, as soon as the water commenced to overflow the bank of the river (on which the building is located), that being a common occurrence, and the building being raised on pillars above ordinary overflows. But it will be due diligence on his part, if he commence to provide against the overflow as soon as it becomes probable that the water will reach the building, and he then use all the means in his power to preserve the goods from damage, although it may appear that if he had commenced sooner the property would have been saved.—Cowles v. Pointer, 26 M. 253.

(1853). A warehouse was built on the banks of the Yallabusha river, and was raised on pillars higher than the water had been for fourteen years; a freshet came, and the water in the river rose in the house, and injured cotton which had been stored there for shipment. The warehouseman did not commence to remove the cotton as soon as the water overflowed the banks of the river, for this was a common occurrence during the rainy season. But as soon as it seemed probable that the water would rise in the house, he commenced to remove the cotton by all the means in his power, but failed to get it all away. *Held*, he was not liable for the loss of the cotton which he failed to remove.—Cowles v. Pointer, 26 M. 253.

(1872). A wharfinger and forwarding merchant receiving cotton to be shipped when ordered, who, by mistake, forwards it on account of other parties, when it is sold, is liable for the injury sustained in placing the same beyond the power of the owner to hold for a higher price.—Thompson v. Gwyn, 46 M. 522.

(1872). In such case it is error to restrict plaintiff to proof of the value of the cotton at the time it is so shipped by mistake and sold. It is competent to show that he had instructed his merchants to hold his cotton for higher prices and that they had held other cotton for a year and sold it at a greatly increased price.—Thompson v. Gwyn, 46 M. 522.

(1873). Wharfingers and warehousemen, as bailees, must use that diligence and care which persons of ordinary prudence bestow upon their own like business. They are not held to that high degree of responsibility which makes them insurers against loss or damage.—Archer v. Sinclair, 49 M. 343.

(1884). If property stored in a warehouse be seized under legal process against any other than the bailor, the warehouseman makes himself liable to the bailor for any losses which may result therefrom, unless he gives notice of the seizure and all material facts known to him or which he might by reasonable care and inquiry have known. Or if the warehouseman had no notice of any transfer of the property or claim by another, then he must give the notice to the person to whom the receipt was issued.—Mortimore v. Ragsdale, 62 M. 86.

(1887). The fact that the shipper of cotton assents to a delay by a warehouseman in delivering it to a carrier for shipment, will not preclude the shipper from recovering for its loss by fire while thus delayed, unless he knows of the danger of fire to which it is being exposed.—Merchants' Wharfboat Association v. Heidingsfelder, 64 M. 678, 2 So. 242.

(1887). But if such shipper, with knowledge of the peculiar danger to which the cotton is subjected, fails to object to the delay, he cannot avoid the effect of his acquiescence by showing that it was due to the fact that on previous occasions he had dissented without avail, it not being shown that on such former occasions the detention of the cotton subjected it to the same danger from fire.—Merchants' Wharfboat Assn. v. Heidingsfelder, 64 M. 678, 2 So. 242.

§ 24a. —— Loss by fire.

(1887). Where a railroad company, a warehouseman and a steamboat company have a general contract by which the rail-

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road receives cotton from shippers and delivers the same to the warehouseman, who holds it until the arrival of the steamboat and then delivers it to the boat, to be carried to its destination, the railroad company receiving the cotton on a through bill of lading is not such an agent of the shipper as that it can make a contract with the warehouseman in reference to the cotton, relieving the latter from the consequences of his own negligence or bind the shipper by the effect of any contributory negligence on the part of the railroad company.—Merchants' Wharfboat Association v. Wood, 64 M. 661, 2 So. 76, 60 Am. Rep. 76.

(1887). While, in such case, the warehouseman would ordinarily have the right to hold the cotton to await the departure of the boat with which he has the general contract above alluded to, yet if he, as a man of ordinary prudence, is admonished by the surrounding circumstances, of danger from fire to which the cotton is exposed, he should ship the same at the first opportunity, and it is negligence if he fails to do so and the cotton, in consequence thereof, is burned at his warehouse.—Merchants' Wharfboat Assn. v. Wood, 64 M. 661, 2 So. 76, 60 Am. Rep. 76.

(1887). But if, in such case, the cotton is burned in the warehouse, not from any of the causes which would reasonably indicate danger, but from another source, which neither of itself nor in connection with the other surroundings could be considered a cause of reasonable apprehension of danger, the warehouseman is not liable for the loss. In such case his negligence is not the proximate cause of the loss.—Merchants' Wharfboat Association v. Wood, 64 M. 661, 2 So. 76, 60 Am. Rep. 76.

(1887). Where cotton in a warehouse was destroyed by fire which originated in a nearby oil-mill, and an action was brought to recover damages for the loss of the merchandise, instruction of the jury, on a trial of the case, to the effect "that the defendant is not liable for the loss of the cotton in controversy unless they believe, from the evidence, that a reasonably prudent man, having cotton similarly situated, would not have permitted his cotton to have remained in such situation, because of apprehension that the oil-mill would catch fire in the ordinary course of events, either from itself or surroundings, and that such fire, so proceeding from it, would probably cause his cotton to be destroyed," was proper under the circumstances of the case and should have been given. (See Merchants' Wharfboat Assn. v. Wood, 64 M. 661.)—Merchants' Wharfboat Assn. v. Smith, 3 So. 249, not officially reported.

(1887). On the trial of an action for damages for cotton destroyed by fire while in a certain warehouse, the fire having originated in an adjacent oil-mill, an instruction to the effect that if a man of reasonable and ordinary prudence, with a knowledge of the situation of the oil-mill and its contents, ought to have apprehended danger of fire to the cotton by reason of fire being communicated from the oil-mill to the cotton, either by means of intervening buildings, or by means of a wind or breeze happening to blow at the time of such fire,—that if such a reasonably prudent man would have taken his cotton away, if placed in the same condition, in order to avoid the danger of accidental fire from such causes, the defendant is liable, was error, since fire, or apprehension of fire, originating in or proceeding from the oil-mill, was the only cause which could be made the basis of liability against the defendant. (See Merchants' Wharfboat Assn. v. Wood, 64 M. 661.)—Merchants' Wharfboat Assn. v. Livingston, 3 So. 251, not officially reported.

(1887). In an action for damages for cotton destroyed by fire while in a certain warehouse, the fire having originated in a nearby oil-mill, an instruction on the trial of the cause in behalf of the defendant to the effect that, in order to render such defendant liable it was necessary that danger should have been apprehended from fire originating in or proceeding from the oil-mill in the ordinary course of events, was proper and should have been given. (See Merchants' Wharfboat Assn. v. Wood, 64 M. 661.)—Merchants' Wharfboat Assn. v. Livingston, 3 So. 251, not officially reported.

(1887). On the trial of an action for damages for cotton destroyed by fire while in a warehouse, the fire having originated in an oil-mill close by, an instruction declaring "that, in considering whether a reasonably prudent man would have kept his cotton in the yard at that time, the jury cannot take into consideration any source of danger to the cotton, unless such as could reasonably have been apprehended as likely, in the ordinary course of events, to first directly or indirectly cause the oil-mill to burn, and then that the fire would proceed from the oil-mill and destroy the cotton. The danger to be apprehended must have been from a fire originating or proceeding from the oil-mill, and not from any other source," was proper under the circumstances of the case and should have been given. (See Merchants' Wharfboat Assn. v. Wood, 64 M. 661.)—Merchants' Wharfboat Assn. v. Smith, 3 So. 249, not officially reported.

(1887). On the trial of an action for damages for the loss of cotton by fire while in the defendant's warehouse, evidence offered tending to show the character of other persons, for prudence, who stored cotton in the cotton yard at or about the time of the fire, was incompetent and was properly excluded. (See Merchants' Wharfboat Assn. v. Wood, 64 M. 661.)—Merchants' &c. Assn. v. Smith, 3 So. 249, not officially reported.

(1887). On the trial of an action for damages for cotton in a warehouse, destroyed, together with its contents, by fire originating in a neighboring oil-mill, an instruction "that the danger" to the cotton "mentioned in defendant's instructions, and

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which is to be considered by the jury, is not such danger as merely might occur, but such danger as in the ordinary course of events probably would occur," was proper under the circumstances of the case and should have been given. (See Merchants' Wharfboat Assn. v. Wood, 64 M. 661.)—Merchants' &c. Assn. v. Smith, 3 So. 249, not officially reported.

§ 25. Delivery by warehousemen.

(1884). Although the warehouse receipt stipulates for delivery only upon the return of the receipt properly indorsed, yet if the bailor sells the property unconditionally to a third person, the warehouseman may make delivery to such person, although he is without the receipt and it has not been indorsed by the bailor. But in an action by the bailor for the property, or its value, the warehouseman must show the right of such third person to receive the property.—Mortimore v. Ragsdale, 62 M. 86.

(1884). After the warehouseman has received notice of the ownership of such third person, though the warehouse receipt has not been indorsed and transferred, he will not be justified in delivering the property to any other person.—Mortimore v. Ragsdale, 62 M. 86.

§ 27. Charges and expenses.

(1904). Where the complainant offered cotton for sale at a certain price and the defendant refused to take it and the complainant did not insist on the terms of a contract by which the defendant was bound to take it at that price, but left the cotton in storage with the defendant, treating it as his own, the defendant was entitled to charge the complainant, storage insurance and interest on money advanced on the cotton left with him.—American Cotton Co. v. Herring, 84 M. 693, 37 So. 117.

§ 29. Lien.

(1856). A warehouseman cannot retain the goods of the principal for a debt of the agent, and if he do so, and the amount of his charges which are a proper lien, be offered, and he refuse to accept them, unless the other is paid, the offer will be a sufficient tender, without an actual production of the money.—Wesling v. Noonan, 31 M. 599.

(1901). The warehouseman's lien law gives the warehouseman no right to retain goods in the warehouse for charges on goods received under another bailment. The lien is lost when all the articles of each several bailment are delivered to the bailor or his assignee.—Shingleur-Johnson Co. v. Canton Cotton-Warehouse Co., 78 M. 875, 29 So. 770, 84 Am. St. 655.

(1901). Code 1892, § 2682, creating a lien in favor of those who assist in the preparation of a crop does not create a lien in favor of a warehouseman who receives and stores cotton for the purpose of sale or shipment and the charges claimed are incident to the handling of a crop on the market.—Shingleur-Johnson Co. v. Canton Cotton-Warehouse Co., 78 M. 875, 29 So. 770, 84 Am. St. 655.

(1906). A landlord does not acquire a warehouseman's lien for the renting of premises by notifying a mortgagee of property therein contained that the lessee and the owner of the equity in such property has abandoned the lease to the property and that the landlord will hold the mortgagee for rent until the removal of the property.—Brunswick &c. Co. v. Murphy, 89 M. 264, 42 So. 288.

§ 34. Actions by or against warehousemen.

(1858). If in a declaration against a warehouseman, to recover the value of goods stored with him and destroyed by fire, it be averred, that the defendant received the goods on storage "for a certain reasonable reward to be paid to him by the plaintiff," and the proof be, that the defendant was to receive a stipulated price, the variance will be fatal. And so if the declaration aver that the goods were to remain in the custody of the defendant, until they were ordered to be shipped by the plaintiff, and the proof show there was no agreement as to the time during which they were to remain in the defendant's custody, the variance is fatal.—Drake v. Surget, 36 M. 458.

(1884). In an action against a warehouseman for cotton, plaintiff, by producing in evidence the receipt given therefor, and proving demand upon defendant before suit, and a refusal to deliver the cotton, establishes *prima facie* a right to recovery, and it devolves upon defendant to rebut the case thus made. It is not necessary for plaintiff to identify the cotton in any other manner than by the receipt, nor to show which of the bales had been recovered by him from other parties, into whose possession it had gone from the warehouseman. On the other hand, it is for the defendant to show delivery to the proper person.—Mortimore v. Ragsdale, 62 M. 86.

(1894). On the trial of an action to recover storage charges, in the absence of a special contract, the fact that certain rates had been uniformly charged would be evidence of an agreement by the defendant to pay such charges.—Planters' Compress &c. Co. v. Ireys, 16 So. 386, not officially reported.

(1894). On the trial of an action to recover storage charges, the fact that certain rates have been charged is no evidence of a want of authority in the manager of the storage business to vary the rates, if his apparent authority is to conduct the business, and the special rate is fairly within the scope of his authority, and not so unreasonable as to suggest fraud against the corporation.—Planters' Compress &c. Co. v. Ireys, 16 So. 386, not officially reported.

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(1902). A cotton compress company is liable to the owner of cotton lost by it for the value of such cotton at the time of the loss and not its value at the time suit is commenced.—Hattiesburg Compress Co. v. Johnson, 81 M. 731, 33 So. 654.

(1908). A clause in a warehouse receipt that claims for damages must be adjudicated before the removal of the goods from the warehouse cannot be insisted on where the course of dealing between the parties negatives the idea that this clause can be set up as a defense.—Grenada Cotton Compress Co. v. Atkinson, 94 M. 93, 47 So. 644.

(1908). Where separate receipts are given for each bale of cotton stored and the evidence shows the damage to all the cotton, bale by bale, and identifies the damaged bales as the identical cotton delivered and that the damage resulted from the negligence of the warehousemen in handling it, this is sufficient and it is not required that the plaintiff should prove the particular damage to each particular bale for which he held a receipt.—Grenada Cotton Compress Co. v. Atkinson, 94 M. 93, 47 So. 644.

(1908). The burden is on the bailor in the absence of proof as to the circumstances of the fire which destroyed the bailment to show that such fire resulted from the bailee's negligence where the destruction of the property by the fire is consistent with ordinary care.—Yazoo &c. R. Co. v. Hughes, 94 M. 242, 47 So. 662.

WARNING.

Duty of master to warn servant of danger, see MASTER AND SERVANT, § 150.
Duty to warn accused before making statements in preliminary examination, see CRIMINAL LAW, § 539.

WARRANTS.

Actions on state warrants, see STATES, § 193.
Attachment, see ATTACHMENT, § 154.
Authority to arrest under warrant, see ARREST, § 65.
Authority to arrest without warrant, see ARREST, § 61.
Distress warrant, see LANDLORD AND TENANT, § 270.
Interest on state warrants, see STATES, § 142.
Issuance, payment and registration, see COUNTIES, §§ 163–170.
Levee warrants, see LEVEES, § 33.
Mandamus to compel issuance, see MANDAMUS, § 100.
Mandamus to compel issuance of refunding warrants, see PUBLIC LANDS, § 157.
Municipal warrants, see MUNICIPAL CORPORATIONS, § 895.
Necessity of county seal, see COUNTIES, § 204.
Payment of county warrants, see COUNTIES, § 207.
Power of supervisor to issue, see COUNTIES, § 47.
Preliminary warrant in criminal prosecution, see CRIMINAL LAW, § 215.
Replevin of county warrants, see REPLEVIN, § 3.
School district warrants, see SCHOOLS AND SCHOOL DISTRICTS, § 95.
Search warrant for intoxicants, see INTOXICATING LIQUORS, § 249.
State warrants, see STATES, § 135.

WARRANTY.

Actions for breach of warranty, see SALES, §§ 425–442.
Assignments, see ASSIGNMENTS, § 97.
Breach in contracts of sale, see SALES, § 281.
Burden of proof of breach in action on policy, see INSURANCE, § 646.
By administrator in sale of personalty of estate, see EXECUTORS AND ADMINISTRATORS, § 157.
By indorser of note, see BILLS AND NOTES, § 280.
By insured as to building, see INSURANCE, § 274.
By insured on obtaining policies, see INSURANCE, § 263.
Covenant, see COVENANTS, § 67.
Covenant of warranty running with land, see COVENANTS, §§ 53, 67.
Damages for breach of covenant of warranty, see COVENANTS, § 130.
Implied warranty, see COVENANTS, § 8.
On assignment of claim, see ASSIGNMENTS, § 97.
On indorsement of bill or note for transfer, see BILLS AND NOTES, § 296.
Performance of covenant of warranty, see COVENANTS, § 99.
Sale of goods, see SALES, §§ 252–288.
Slaves, see SLAVES, § 7.

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WASTE.

This topic INCLUDES acts done or permitted by tenants holding particular estates in real property, causing permanent or lasting injury to the inheritance or to rights of those entitled in reversion or remainder; nature and extent of liability for such injuries in general; and remedies therefor.

It EXCLUDES rights and powers of tenants for life (see LIFE ESTATES), of tenants for years or at will (see LANDLORD AND TENANT), and of tenants in common (see TENANCY IN COMMON); and waste by guardians (see GUARDIAN AND WARD), executors or administrators (see EXECUTORS AND ADMINISTRATORS), or trustees (see TRUSTS).

See cross-references for complete list of exclusions.

Analysis.

§ 2. Statutory provisions.
§ 3. Permissive waste.
§ 5. Persons who may commit waste.
§ 6. Particular acts or omissions constituting waste.
§ 9. —— Trees and timber.
§ 14. Actions for waste.
§ 17. —— Injunction.

Cross-References.

Assets of estate, see EXECUTOR AND ADMINISTRATORS, § 117.
By tenant by curtesy, see CURTESY, § 12.
Committed by life tenant, see REMAINDERS, § 13.
Injunction against waste by co-tenant, see TENANCY IN COMMON, § 38.
Irreparable injury as ground for injunction, see INJUNCTION, § 14.

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§ 2. Statutory provisions.

(1906). Though the English statutes of Marlbridge and Gloucester, making a tenant for years liable for waste, are without force as statutes in Mississippi, the principles announced by them is a part of the law of the state.—Moss Point Lumber Co. v. Harrison County, 89 M. 448, 42 So. 290, 873.

(1906). The Act of 1833, relating to the leasing of school lands, though omitting the provision relating to waste found in the earlier statutes on the subject, does not affect the liability of a tenant for waste, inasmuch as the earlier acts did not create a liability for waste, but merely declared the common-law rule.—Moss Point Lumber Co. v. Harrison County, 89 M. 448, 42 So. 290, 873.

§ 3. Permissive waste.

(1881). Equity will not interfere in respect to mere permissive waste, by a life tenant, such as allowing the residence to decay, failure to keep up the orchard, and the like.—Cannon v. Barry, 59 M. 289.

§ 5. Persons who may commit waste.

(1906). Independently of the English statutes of Marlbridge and Gloucester, and without regard to whether they form a part of the common law of Mississippi, a tenant for years without reference to how many years his tenancy may run, is liable for waste as an incident of his lease unless exempted by its terms.—Moss Point Lumber Co. v. Harrison County, 89 M. 448, 42 So. 290, 873.

§ 6. Particular acts or omissions constituting waste.

(1881). The use by the life tenant of a farm, most of which is swampy and heavily timbered, in rebuilding fences, clearing more of the land and removing tenants' cabins to better locations, so as to enhance the rental value and to render the place more productive, is not waste. In view of the condition of this country, the English rule on this subject is not applicable.—Cannon v. Barry, 59 M. 289.

(1881). It is voluntary waste for the purchaser of a life interest in a farm, though at the instance of the life tenant, to detach and sell the gin fixtures, or to permit the gin house to be partially dismantled, even without his knowledge; and, if he allows a body of woodland, though unproductive and not essential to the farm, to be sold for taxes, even though the valuation by the assessor and the county levy were excessive, he should be ordered to redeem, and on his failure to do so a receiver should be appointed.—Cannon v. Barry, 59 M. 289.

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(1906). What constitutes waste by a tenant for a term of years depends on whether the act injures the inheritance, and whether the act is waste, depends upon the conditions existing at the time of the commission of the act.—Moss Point Lumber Co. v. Harrison County, 89 M. 448, 42 So. 290, 873.

§ 9. —— Trees and timber.

(1902). The cutting down of trees by a life tenant for his mere profit, is considered waste.—Learned v. Ogden, 80 M. 769, 32 So. 278.

(1902). A tenant who cuts the timber in the process of clearing the land for immediate cultivation may appropriate it or its proceeds to his own benefit, but he cannot cut the timber for sale without making himself liable for waste.—Warren County v. Gans, 80 M. 76, 31 So. 539.

(1906). An assignee of a 99-year lease of school lands is liable for waste, where he cuts down and carries away timber thereon to manufacture it into lumber and not for the purpose of clearing the land for cultivation.—Moss Point Lumber Co. v. Harrison County, 89 M. 448, 42 So. 290, 873.

(1906). A tenant of school lands for 99 years, who undertakes, after the expiration of 40 years of his lease, to cut timber which, though valueless at the commencement of the lease, had become of value at this time, is guilty of waste.—Moss Point Lumber Co. v. Harrison County, 89 M. 448, 42 So. 290, 873.

§ 14. Actions for waste.

(1902). In a suit for waste in cutting timber, the saw-mill books of the defendant are not admissible in evidence.—Learned v. Ogden, 80 M. 769, 32 So. 278, 92 Am. St. 621.

(1902). It is incumbent on the plaintiff in an action for waste in cutting timber to establish with reasonable certainty what trees were severed from the soil by the defendant, or his servants, or what other injury was done by him or his servants to the land.—Learned v. Ogden, 80 M. 769, 32 So. 278, 92 Am. St. 621.

(1902). In an action for waste evidence of the number of stumps, counted by witnesses, does not tend to establish the number of trees cut by the defendant.—Learned v. Ogden, 80 M. 769, 32 So. 278, 91 Am. St. 621.

§ 17. —— Injunction.

(1824). An injunction to stay waste will not issue where the remedy at law is adequate.—Poindexter v. Henderson, W. 176, 12 Am. Dec. 550.

(1848). Equity will not stay waste in cases of doubtful title.—Skipwith v. Dodd, 24 M. 487.

(1875). Relief to restrain waste is usually granted at the suit of the remainderman or reversioner against the tenant injuring the freehold. It is essential to the remedy that the party who commits the waste be in the rightful possession. It will not lie where the defendant is in possession by an adverse title.—Eskridge v. Eskridge, 51 M. 522.

(1875). While equity will enjoin serious and injurious trespasses to the freehold, which are not mere ousters or temporary trespasses, but which are attended with permanent results, such as destroying houses, felling timber, &c., the title of complainant must be either admitted or established at law.—Eskridge v. Eskridge, 51 M. 522.

(1875). Where, on a bill to enjoin commission of waste the defendant (who claims adversely to complainant, his vendee) files a cross bill alleging that complainant's deed included by mistake the land in question, and asked that it be construed in the light of the evidence and canceled as a cloud, relief thereon cannot be granted. Such relief can only be had after the deed has been reformed.—Eskridge v. Eskridge, 51 M. 522.

(1881). A contingent, remainderman, whose estate is not vested, cannot maintain a bill against the life tenant in possession to recover damages for past waste. He may, however, enjoin acts of voluntary waste, detrimental to the inheritance.—Cannon v. Barry, 59 M. 289.

(1881). To a bill to enjoin waste, filed by a contingent remainderman, all other contingent remaindermen, as well as the trustee, are necessary parties.—Cannon v. Barry, 59 M. 289.

(1894). The injunction will not be dissolved upon the ground that it should have been applied for in the first suit, where it appears that the defendant had begun to cut the timber after the decree and appeal therein.—Woods v. Riley 72 M. 73, 18 So. 384.

WATER-CRAFT.

Attachment, see ATTACHMENT, § 2.

WATER COMPANIES.

See WATERS AND WATER COURSES.
Taxation, see TAXATION, § 159.

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WATERS AND WATER COURSES.

This topic INCLUDES bodies and streams of water not capable of ordinary navigation, and surface and subterranean waters; rights and liabilities of proprietors of lands in respect of such waters, their sources, beds, flow, and use, dams and other embankments and flowage of lands thereby, and ice formed on such waters; easements and other rights or property in such waters; construction and operation of works for supply, control, and use of water as a motive power, for irrigation, for domestic purposes, or other uses, whether under franchises granted therefor or directly by the government; organization, franchises, and powers of companies formed for such purposes; rights, duties, and liabilities of such companies or of municipalities in respect of the management and operation of their waterworks; and liabilities for obstruction, diversion, or pollution of water courses, and remedies therefor.

It EXCLUDES waters capable of navigation as public highways (see NAVIGABLE WATERS; FERRIES); floatage of logs (see LOGS AND LOGGING); bridges (see BRIDGES); works for protection or improvement of lands (see LEVEES; DRAINS); and bodies and streams of water as boundaries (see BOUNDARIES).

See cross-references for complete list of exclusions.

Analysis.

I. Appropriation of Rights in Public Lands.

[*No paragraphs or references in this Digest.*]

II. Natural Water Courses.

(A) RIPARIAN RIGHTS IN GENERAL.
§ 38. What constitutes a water course.

(B) OBSTRUCTION AND DETENTION.
§ 51. Rights to natural flow of stream.
§ 52. Nature and extent of obstruction or detention in general.
§ 53. Dams.
§ 54. Embankments.
§ 55. Bridges and culverts.
§ 58. Removal or abatement of obstructions and encroachments.
§ 59. Actions.
§ 61. —— Injunction.
§ 62. —— Damages.

(C) POLLUTION.
§ 64. Rights as to purity of water.
§ 68. Mills and factories.
§ 73. Actions.

(D) DIVERSION.
§ 83. Actions.

(E) BED AND BANKS OF STREAM.
§ 89. Rights to bed.
§ 90. Rights to land between high and low water mark.

III. Subterranean and Percolating Waters.

§ 99. What are subterranean and percolating waters.
§ 101. Rights to wells, springs, and percolating waters.
§ 104. Pollution.

IV. Natural Lakes and Ponds.

V. Surface Waters.

§ 117. Rights to surface water.
§ 118. Obstruction or repulsion of flow.

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VI. Appropriation and Prescription.

§ 141. Nature and extent of rights acquired.

VII. Conveyances and Contracts.

VIII. Artificial Ponds, Reservoirs, and Channels, Dams, and Flowage.

§ 159. Right to collect and detain water in general.
§ 171. Injuries by flowage.
§ 175. Actions for injuries.

IX. Public Water Supply.

(A) DOMESTIC AND MUNICIPAL PURPOSES.

§ 184. Water or waterworks companies.
§ 188. —— Franchises, privileges, and powers.
§ 196. Purity of water and protection thereof from pollution or diversion.
§ 201. Supply to private consumers.
§ 203. Water rents and other charges.
§ 204. Injuries incident to supply or use.
§ 212. Offenses incident to supply or use of water.

(B) IRRIGATION AND OTHER AGRICULTURAL PURPOSES.
[No paragraphs or references in this Digest.]

(C) MINING, MECHANICAL AND MANUFACTURING PURPOSES.
§ 277. Acquisition of water rights, and rights incident thereto.

Cross-References.

See DRAINS; NAVIGABLE WATERS.
Damages for construction of highway interfering with surface water, see EMINENT DOMAIN, § 98.
Power of county supervisor to declare dam a nuisance, see COUNTIES, § 47.
Protection against overflows, see LEVEES.
Railroads crossing streams, see RAILROADS, §§ 106, 107.
Release of damages caused by overflow, see RAILROADS, § 113.
Taxation of water companies see TAXATION, § 159.

I. APPROPRIATION OF RIGHTS IN PUBLIC LANDS.

[No paragraphs or references in this Digest.]

II. NATURAL WATER COURSES.

(A) RIPARIAN RIGHTS IN GENERAL.

§ 38. What constitutes a water course.

(1886). A creek with a channel half a mile long, with definite bed and banks, through which water is discharged into lowlands adjacent to a running stream, though it be dry most of the time, is a water course with the incidents thereto.—Ferris v. Wellborn, 64 M. 29, 8 So. 165.

(1910). There is a natural water course where there is a natural channel with defined beds and banks through which water is conveyed, though the water does not run through this course at all times.—Belzoni Drainage Commission v. Winn, 53 So. 778.

(B) OBSTRUCTION AND DETENTION.

§ 51. Rights to natural flow of stream.

(1875). The right of the owner of land to the continued flow of water in its natural channel can only be extinguished by operation of law, the act of God, or the act of himself. If the abandonment or extinguishment of his right is claimed, something must have been done by him absolutely destructive of the right or which is incompatible with its exercise.—Miss. Cent. R. Co. v. Mason, 51 M. 234.

(1886). An adjoining owner has the right to have a natural water course which drains his land adjacent thereto remain as nature made it in its continued flow through the lands of another, and he may obtain relief in equity against its obstruction.—Ferris v. Wellborn, 64 M. 29, 8 So. 165.

(1895). The whole of the valley of an overflowing stream is not necessarily land within a water course. In the case of a

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creek with a channel about twenty feet deep and one hundred and twenty-five feet wide, the flood waters of which, flowing with the stream, periodically overflow its valley from two to three miles wide, the whole valley cannot be considered a running stream; and where a railroad, properly constructed, is built about three-fourths of a mile from, and parallel with, the channel, leaving a valley for the flow of the water a mile to a mile and a half wide, this fully meets the requirements of the law as to leaving unobstructed a running stream or water course, and the company is not liable to one owning land on the other side of the channel, on which the overflow water is made deeper and the current more swift by reason of the railroad embankment.—Kansas City &c. R. Co. v. Smith, 72 M. 677, 17 So. 78, 48 Am. St. 579, 27 L. R. A. 762.

§ 52. Nature and extent of obstruction or detention in general.

(1895). Where it appears that the overflow causing the injury was an extraordinary one, from which the injury would have resulted, even if the railroad had not been built, a recovery will be denied, (1) because no failure of duty on the part of the defendant in the construction of the roadway was established; (2) for want of causal connection between the act of defendant and the injury resulting from the flood.—Kansas City &c. R. Co. v. Smith, 72 M. 677, 17 So. 78, 48 Am. St. 579, 27 L. R. A. 762.

§ 53. Dams.

(1889). A railroad company, which has negligently suffered a dam built by it across a natural water course to remain in a condition to overflow the lands above it, is liable to the owner for injury to said land resulting from an overflow, although such owner purchased the land after the erection of the dam and with knowledge of its effects, and although no positive acts of the company have intervened since the purchase. The wrong is a continuing one.—Mississippi &c. R. Co. v. Archibald, 67 M. 38, 7 So. 212.

(1889). Where a railroad company, having constructed a trestle and dam across a natural water course, suffers them to remain in such a condition that the water is backed up and overflows plaintiff's land, causing damage, it cannot be relieved of liability by proof that since the original construction of the trestle and dam the channel of the stream had become gradually filled up, as a result of the opening to cultivation of lands contiguous to the stream and the consequent drainage into the stream above the dam of soil and other surface material. The company, in maintaining the dam and trestle, must have regard to such changed conditions and the operation of ordinary natural agencies.—Mississippi &c. R. Co. v. Archibald, 67 M. 38, 7 So. 212.

(1902). A county has no right to obstruct a stream by the construction of a dam across it, except in the exercise of eminent domain and where it fails to do so the work may be enjoined.—Leflore County v. Cannon, 81 M. 334, 33 So. 81.

§ 54. Embankments.

(1896). A railroad company is not under duty to so construct its roadbed as to provide against excessive and unusual floods, or to preserve adjacent lands from overflows which they were subject to in their natural state.—Yazoo &c. R. Co. v. Davis, 73 M. 678, 19 So. 487, 55 Am. St. 562, 32 L. R. A. 262.

(1896). Where a railroad runs through lands subject to overflow, the company has the right to build its roadbed above the reach of periodical floods, and cannot be held liable for filling in a trestle, which results in obstructing the drainage of the flood and surface waters, if large and numerous trestles still remain to afford such drainage, where no streams are obstructed, and there is no proof either that the road is improperly constructed or that a trestle, at the place in question, would be as safe and economical as the embankment. (Sinai v. Railroad Co., 71 M. 547, distinguished.)—Yazoo &c. R. Co. v. Davis, 73 M. 678, 19 So. 487, 55 Am. St. 562, 32 L. R. A. 262.

§ 55. Bridges and culverts.

(1875). A railroad company which, by filling a trestle under its road, and by making ditches, cattle guards and culverts too small to carry off the water, causes adjacent lands to be overflowed, is liable to the owner for damages sustained thereby.—Miss. Cent. R. Co. v. Caruth, 51 M. 77.

(1891). A railroad company opening a narrow trestle, through which water, accumulated for a great distance along one side of its track, pours upon adjoining land, causing water thereon in times of overflow to be deeper and the current much more swift than it otherwise would be is not relieved from liability for damages caused thereby because of having made compensation to the landowner under condemnation proceedings when its road was built. Such compensation only embraces damages arising from the proper construction of the road.—Illinois Cent. R. Co. v. Miller, 68 M. 760, 10 So. 61.

A railroad company opening a narrow trestle, through which water, accumulated for a great distance along one side of its track, pours upon adjoining land, causing the water thereon in times of overflow to be deeper and the current much more swift than it otherwise would be, is liable for the damages occasioned thereby. Whether this is called overflow or surface water is immaterial, for one cannot thus accumulate and injuriously discharge even surface water on the land of another.—(1891) Illinois Cent. R. Co. v. Miller, 68 M. 760, 10 So. 61; (1895) Kansas City &c. R. Co. v. Lackey, 72 M. 881, 16 So. 909.

§ 58. Removal or abatement of obstructions and encroachments.

(1880). Code 1871, ch. 34, providing a summary remedy for removing obstructions

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refers to obstructions to water courses erected by the owners of mills, gins and other machinery. The remedy authorized by § 1935 in said chapter will not be extended to doubtful cases. Hence, it is not applicable to levees and ditches on farms and residence lands.—Trice v. Lagrone, 57 M. 839.

(1900). A dam, which throws the water back on an upper owner, is a nuisance, which may be abated by one injured thereby, to the extent of his injury, where it can be done without a breach of the peace.—Liles v. Cawthorn, 78 M. 559, 29 So. 834.

§ 59. Actions.

(1880). As the statute giving a summary remedy for the removal of obstructions, does not provide for taxation of costs, if the justice erroneously renders a judgment for costs, an appeal lies under Code 1871, § 1332, and the fact that appellant seeks to try anew the merits, does not deprive him of the right to have the judgment for costs vacated.—Trice v. Lagrone, 57 M. 839.

(1880). No appeal from a justice of the peace proceeding under the statute to remove obstructions to a water course, which causes overflow and injury, is given and none lies.—Trice v. Lagrone, 57 M. 839.

(1880). Where a judgment of the special tribunal provided for in the statute providing a summary remedy for the removal of obstructions is obtained directing the cutting of an embankment on farm lands, the remedy not being applicable in such case, execution thereon will be enjoined.—Trice v. Lagrone, 57 M. 839.

(1885). A defendant who has been enjoined from closing or interfering with a bayou or natural drain which flows through complainant's land "in any way that will cause injury to complainants, especially as set forth in the bill," cannot complain of uncertainty in the decree, since it does not absolutely prohibit him to use the stream in question, and since it is to his advantage to use it so long as he does not injure complainants.—Learned v. Hunt, 63 M. 373.

(1887). In an action against a navigation company for damages for damming up a shallow stream and thus causing the overflow of the land of a riparian owner, and also by deepening the water destroyed a ford of such riparian owner, evidence that defendant refused to take freight for her on its boats, and discriminated against her in freight rates, is inadmissible.—Silver Creek Nav. &c. Co. v. Mangum, 64 M. 682, 2 So. 11.

(1889). An action to recover from a railroad company damages which accrued to plaintiff's land from the manner in which the company constructed its roadbed along the line of said lands, is not a local action, and may be brought in any county where any part of such railroad may be.—Archibald v. Mississippi &c. R. Co., 66 M. 424, 6 So. 238.

(1896). It is the province of the jury to determine whether or not the injurious effects of the manner in which the natural flow of water has been obstructed by a railway company would have resulted, had the company constructed its road with a due regard for the rights of adjacent proprietors. —Illinois Cent. R. Co. v. Wilbourn, 74 284, 21 So. 1.

(1896.) In an action for damages to plaintiff's land resulting from an overflow, caused by defendant's railroad embankments and an insufficient culvert over a stream, it is error to instruct the jury that the "plaintiff had the right to have the waters, whether rain water or spring water, flow as they naturally would have flowed without any obstruction by the railroad," for an interference with the natural flow of water incident to a proper construction and use of its roadbed, imposed no liability upon the defendant.—Illinois Cent. R. Co. v. Wilbourn, 74 M. 284, 21 So. 1.

(1900). The unauthorized proceedings of a board of supervisors in which they declare a dam to be a nuisance, are not admissible in an action by a lower riparian owner, who maintained the dam, against an upper riparian owner, who abated such dam. —Liles v. Cawthorn, 78 M. 559, 29 So. 834.

§ 61. —— Injunction.

(1886). As to the power to decree an injunction and damages in case of the obstruction of a water course causing overflows, see Ferris v. Wellborn, 64 M. 29, 8 So. 165.

(1896). Where a natural water course is so obstructed by a dam erected on a non-resident's land, as to do injury to a resident owner of the adjoining land, a court of equity has jurisdiction of a bill to redress the wrong.—Gordon v. Warfield, 74 M. 553, 21 So. 151.

§ 62. —— Damages.

(1887). Where under a legislative act, a navigation company dammed up a shallow stream to make it navigable, and thus caused the overflow of the land of a riparian owner, and also by deepening the water destroyed a ford by which she alone could reach the highway by which she was accustomed to go to and from the county seat and market town, she is entitled to recover of the company damages, but this right must be limited to compensation for the overflowing of her land; and if she be entitled to damages because of the deepening of the stream, which is not decided, the damages to this must be limited to the cost of providing a convenient means of crossing.—Silver Creek Nav. &c. Co. v. Mangum, 64 M. 682, 2 So. 11.

(1891). In an action for overflowing plaintiff's land, where the evidence shows damage, not to crops directly, but that the land is rendered incapable of producing full crops, plaintiff cannot recover the value of the land, and, in addition, damages on ac-

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count of the failure to make such crops.—Illinois Cent. R. Co. v. Miller, 68 M. 760, 10 So. 61.

(1896). The amount paid to a landowner by way of compensation, whether by contract or in condemnation proceedings, will be held to include all such damages from overflow as may be incidental to the proper construction and maintenance of the road.—Yazoo &c. R. Co. v. Davis, 73 M. 678, 19 So. 487, 55 Am. St. 562, 32 L. R. A. 262.

(1908). In an action for damages to land from overflow caused by the improper construction of a railroad roadbed there can be no recovery for damages to land not included in the declaration.—Mississippi Cent. R. Co. v. Magee, 93 M. 201, 46 So. 716.

(1908). In an action for overflowing land, due to the improper construction of a railroad roadbed, the plaintiff can recover only the damages occurring up to the bringing of the suit for the injury is a continuing one.—Mississippi Cent. R. Co. v. Magee, 93 M. 201, 46 So. 716.

(1908). There can be no recovery for damages to land occurring before the plaintiff acquired title to the premises.—Mississippi Cent. R. Co. v. Magee, 93 M. 201, 46 So. 716.

(C) POLLUTION.

§ 64. Rights as to purity of water.

(1891). The right secured by prescription to pollute the waters of a stream, must be limited by the character and extent of the right exercised during the prescriptive period. For any increase causing material injury to riparian owners, damages may be recovered.—Mississippi Mills Co. v. Smith, 69 M. 299, 11 So. 26, 30 Am. St. 546n.

§ 68. Mills and factories.

(1891). The public policy of encouraging manufactories does not go to the extent of exempting a manufacturing company from liability where, by artificial means, it changes the natural character of the water of a stream, and causes it to flow in a polluted condition upon or through the lands of persons, to their injury.—Mississippi Mills Co. v. Smith. 69 M. 299, 11 So. 26, 30 Am. St. 546n.

§ 73. Actions.

(1891). In an action for damages to plaintiff's farm, caused by the pollution by the defendant of the water of a stream traversing it, the injury not being necessarily permanent, it is error to allow evidence of the difference between the value of the farm with the stream clear, and its value with the stream polluted.—Mississippi Mills Co. v. Smith, 69 M. 299, 11 So. 26, 30 Am. St. 546n.

(D) DIVERSION.

§ 83. Actions.

(1877). Where defendant diverts his water course to the damage of another's land, one, who within a year purchases the land and after two years' possession sues defendant for damages, may recover whatever damage he has sustained, although nothing was done with reference to the water course after his purchase.—Chapman v. Copeland, 55 M. 476.

(E) BED AND BANKS OF STREAM.

§ 89. Rights to bed.

(1860). The rules of the common law which secured the property of the shores of the sea and of navigable rivers to the king, for the benefit of the public, were never applied to fresh water streams, though capable of navigation. The soil under these streams belongs to the riparian proprietors, and not to the crown; this right, however, is subject to an easement in the public, to navigate such streams as were in fact navigable.—Steamer Magnolia v. Marshall, 39 M. 109.

§ 90. Rights to land between high and low water mark.

(1860). A grant of land bounded "by" or "on" a fresh water stream, whether in fact capable of navigation or not, conveys the soil, *usque ad medium filum aquæ*, and of course conveys the shore between high and low water mark.—Steamer Magnolia v. Marshall, 39 M. 109.

III. SUBTERRANEAN AND PERCOLATING WATERS.

§ 99. What are subterranean and percolating waters.

(1902). There is a marked distinction in the rights of land owners in the use of surface and underground waters. The waters below are presumed to be wandering, percolating waters until a defined, continuous channel is shown; and even then, in order to apply to them the rule settled in reference to surface streams, it must be further shown, not only that the stream has a distinct, defined, underground channel, but this must be known or notorious.—Clarke County v. Mississippi Lumber Co., 80 M. 535, 31 So. 905.

(1902). In order to prevent the classification of underground streams with percolating waters, they must be known or easily ascertainable and discoverable from the surface of the ground without subsurface explorations. The important fact is that of knowledge had, or "easily acquirable, of their existence, location, and course." Underground streams with well defined channels will be treated as percolating waters if their existence and location are unknown and not reasonably ascertainable.—Clarke County v. Mississippi Lumber Co., 80 M. 535, 31 So. 905.

§ 101. Rights to wells, springs, and percolating waters.

(1902). One who acting in good faith, sinks a well on his own land and by the use of powerful agencies forces large quantities

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of percolating water therefrom for legitimate purposes, is not subject to injunction nor liable for damages to his neighbor in whose well the water is thereby diminished.—Clarke County v. Mississippi Lumber Co., 80 M. 535, 31 So. 905.

§ 104. Polluton.

(1884). The owner of a well injured by the roots from a tree on the lot of another may recover damages therefor if the owner of the tree, after notice of the injury, refuses to abate the nuisance.—Buckingham v. Elliott, 62 M. 296, 52 Am. Rep. 188.

IV. NATURAL LAKES AND PONDS.

Artificial lakes, reservoirs, etc., see *post*, §§ 159–165.

V. SURFACE WATERS.

§ 117. Rights to surface water.

(1888). The owner may arrest or prevent the flow of surface water diffused over his land, the result of rain, snow and the like, before it gets to rest; but after it loses its casual and vagrant character on reaching a natural basin or depression, thus becoming a lake or permanent body of water, on land owned chiefly by another, he cannot drain it, to the injury of such other, in order to reclaim that part of his own land covered by the water. It matters not that the water comes from the surface of adjacent lands owned by the person seeking to reclaim.—Alcorn v. Sadler, 66 M. 221, 5 So. 694.

§ 118. Obstruction or repulsion of flow.

(1891). One is liable in damages who collects in artificial channels surface water, falling upon his own land or that of others, and discharges it in undue and unnatural quantities upon the land of another.—Illinois Cent. R. Co. v. Miller, 68 M. 760, 10 So. 61.

(1891). Where the road bed of a railroad diverts water, either in streams having channels and banks or mere surface water, and causes it in undue quantities to overflow the land of another, the company is liable in damages therefor.—Illinois Cent. R. Co. v. Miller, 68 M. 760, 10 So. 61.

(1893). The ancient common law rule that surface water was a common enemy, to be fought against according to one's necessities, when applied to the conditions now existing, under which the right is everywhere granted to corporations to condemn land, must be qualified by the maxim that one must so use his own as not to do unnecessary injury to others. Hence, a corporation building a railroad in a manner which will naturally result in injury to another by obstructing the flow of surface and overflow water, when another method, equally safe, convenient, inexpensive, and not injurious, is rejected, is liable for the consequent injury.—Sinai v. Louisville &c. R. Co., 71 M. 547, 14 So. 87.

(1893). In determining whether a railway company is liable for damage to an adjacent land owner, caused by its contruction of an embankment for its track instead of a trestle, whereby the flow of surface and overflow water is obstructed, consideration should be had of the cost of the embankment, the probable obstruction of the flow of water resulting from the contour of the land, the extent of the probable injury to such landowner compared with the cost of the embankment, and whether another method, equally safe, useful and inexpensive might have been adopted.—Sinai v. Louisville &c. Co., 71 M. 547, 14 So. 87.

(1896). When the surface of land is such that a railroad embankment must dam the natural outlet of the surface water from farm lands, and a short trestle, no higher nor costlier than the embankment would dispose of the difficulty, the company erecting such embankment with knowledge of the facts, must respond in damages for injury resulting from the interference with the natural flow of the surface water from the farm land. (Sinai v. Louisville &c. R. Co., 71 M. 547, controlling.)—Canton &c. R. Co. v. Paine, 19 So. 199, not officially reported.

VI. APPROPRIATION AND PRESCRIPTION.

§ 141. Nature and extent of rights acquired.

(1891). The right secured by prescription to pollute the waters of a stream, must be limited by the character and extent of the right exercised during the prescriptive period. For any increase causing material injury to riparian owners, damages may be recovered.—Mississippi Mills Co. v. Smith, 69 M. 299, 11 So. 26, 30 Am. St. 546n.

VII. CONVEYANCES AND CONTRACTS.

Contracts relating to municipal water supply, see *post*, §§ 184–216.

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

§ 159. Right to collect and detain water in general.

(1893). Where the water in a lake or natural body of water on lands of adjoining owners, has been by means of a dam used by one of them in floating logs, made to cover more land of both owners than it would naturally do, the open, adverse and continuous user for ten years in maintaining a certain height of water, gives the owner of the dam an easement in the flooded land of the other owner, who cannot drain off the water so as to interfere with the right thus acquired.—Alcorn v. Sadler, 71 M. 634, 14 So. 444, 42 Am. St. 484.

(1893). Where water in a lake or natural body of water on lands of adjoining owners has been by means of a dam made to cover more of the land of both than it would naturally cover, the open, adverse and continuous user for ten years in maintaining a certain height of water gives the owner of the dam an easement in the flooded land of the heightening, the dam from time to time other owner and strengthening, or even

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would not affect the right to maintain the stage of water produced long enough ago to acquire an easement by lapse of time; nor does occasionally letting off the water through the outlet constitute such interruption of the enjoyment of the right to flood the land as would break its continuity.—Alcorn v. Sadler, 71 M. 634, 14 So. 444, 42 Am. St. 484.

§ 171. Injuries by flowage.

(1908). A railroad company is not liable for the obstruction of natural drainage unless it could prevent the injury without substantial inconvenience, expense and danger.—Alabama &c. R. Co. v. Beard, 93 M. 294, 48 So. 405.

(1911). A railroad company may erect barriers to turn a stream back into its old channel, where it has left its former channel by reason of high water and the construction of the roadbed and the stream in the new channel endangers the roadbed, and this although the diverted water injures the land of an adjacent landowner.—Yazoo &c. R. Co. v. Brown. — M. —, 54 So. 804.

§ 175. Actions for injuries.

(1908). In an action against a railroad for constructing an embankment obstructing water, instructions are erroneous which authorize a verdict for the plaintiff on a finding that the construction of the embankment caused the injury but which ignore a contention that it only interfered with surface drainage, for a railroad company is not liable in all cases where a necessary track embankment interfered with natural drainage, but only where it can prevent the injury without substantial additional inconvenience, expense and danger.—Alabama &c. R. Co. v. Beard, 93 M. 294, 48 So. 405.

(1908). Where, in an action against a railroad company for the construction of an embankment obstructing water, the issue was whether the damages resulted from the obstruction of a water course or from interference with surface water and the plaintiff's evidence went to show that a natural water course with fairly well defined channels was obstructed and the defendant's evidence showed the contrary, the plaintiff could not recover on the theory that the embankment obstructed surface water.—Alabama &c. R. Co. v. Beard, 93 M. 294, 48 So. 405.

IX. PUBLIC WATER SUPPLY.

(A) DOMESTIC AND MUNICIPAL PURPOSES.

Grant of exclusive water franchises, see MUNICIPAL CORPORATIONS, § 686.
Grant of right to use streets for mains, see MUNICIPAL CORPORATIONS, § 679.
Injunction to restrain cutting off water connections, see INJUNCTION, § 205.
Municipal contracts, see MUNICIPAL CORPORATIONS, § 227.
Ordinances governing municipal waterworks, see MUNICIPAL CORPORATIONS, § 594.

§ 184. Water or waterworks companies.

(1904). Where a contract to supply a city with water requires the party contracted with to furnish first-class fire protection, the fact that the different sizes of pipe that might be used in constructing the plant were mentioned in the contract does not limit the obligation of the party contracted with to furnish first-class fire protection nor does it preclude the city from complaining that the pipes actually laid in pursuance of the contract did not afford first-class protection.—Meridian Waterworks Co. v. Meridian, 85 M. 515, 37 So. 927.

§ 188. —— Franchises, privileges and powers.

(1908). The grant of an exclusive privilege to construct a waterworks plant in a city and use the streets for that purpose amounts to the grant of a franchise.—Adams v. Bullock, 94 M. 27, 47 So. 527.

§ 196. Purity of water and protection thereof from pollution or diversion.

(1904). Where a city entered into a contract for water supply under Laws 1886, ch. 325, p. 589, authorizing it to contract alone for pure and wholesome water, it is not estopped by its contract to complain that the water company used a reservoir from which impure and unwholesome water was delivered although the contract contemplated that the water should be furnished from such a reservoir.—Meridian Waterworks Co. v. Meridian, 85 M. 515, 37 So. 927.

(1904). Under a contract with a city requiring a party to furnish "pure and wholesome water," the water to be furnished must be reasonably pure and wholesome; perfect purity cannot be exacted.—Meridian Waterworks Co. v. Meridian, 85 M. 515, 37 So. 927.

§ 201. Supply to private consumers.

(1910). Evidence examined and held that the conduct of a railroad company in failing to reject a proposition made to it by the manager of a city waterworks company to furnish water, did not amount to an acceptance of the proposition so as to form a contract for such water for five years.—Vicksburg Waterworks Co. v. Yazoo &c. R. Co., 96 M. 807, 51 So. 915.

§ 203. Water rents and other charges.

(1905). A rule of a city owning its own waterworks, that if water charges are not paid the water shall be turned off and not connected again till the delinquent charge is paid, is unreasonable and void.—Burke v. Water Valley, 87 M. 732, 40 So. 820, 112 Am. St. 468.

(1906). Where a water company accepts an ordinance by which a maximum rate for water is fixed, the rates fixed by the company within this maximum rate are binding upon the consumer.—Griffith v. Vicksburg Waterworks Co., 88 M. 371, 40 So. 1011.

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§ 204. Injuries incident to supply or use.

(1900). A water company which contracted with the municipal authorities to supply hydrants at a designated pressure for its fire department is not liable to a citizen for loss by fire by reason of want of such pressure of water. There is no privity between the parties.—Wilkinson v. Light &c. Co., 78 M. 389, 28 So. 877.

(1909). The failure of a water company to notify a patron of the cutting off of the water supply, to make necessary repairs, was not actionable negligence, where the company had no knowledge of the danger to a housekeeper from cutting off the supply from a newly installed gas heater.—Brame v. Light &c. Co., 95 M. 26, 48 So. 728, 21 L. R. A. (N. S.), 468n.

(1910). A city is liable to a customer of its waterworks plant, who is deprived of the use of the water by the neglect of the city, to remove obstructions interfering with the delivery of the water to the customer.—Jackson v. Anderson, — M. —, 51 So. 896.

(1910). One deprived of the use of water by the failure of a city to remove an obstruction in its system of waterworks, is not limited in his recovery to the actual money loss sustained by him by reason of the city's neglect. He is entitled in addition thereto, to compensation for the trouble, annoyance and inconvenience suffered on account of being deprived of the water. —Jackson v. Anderson, — M. —, 51 So. 896.

§ 212. Offenses incident to supply or use of water.

(1907). In a prosecution against the manager of a waterworks company for permitting mains to become out of repair, in the violation of an ordinance making it unlawful for mains to remain out of repair for more than two days in succession, it is no defense that the leaky condition of the pipes resulted from vibrations caused by locomotives passing over the street under which the pipes were laid.—Crumpler v. Vicksburg, 89 M. 214, 42 So. 673, 11 L. R. A. (N. S.) 476.

(1907). In a prosecution for permitting a water pipe in a street to remain in a leaky condition for more than two days, in violation of an ordinance, evidence as to the condition of the street in which the leaky pipe in question was alleged to have been located prior to the date the prosecution was commenced, was admissible.—Crumpler v. Vicksburg, 89 M. 214, 42 So. 673, 11 L. R. A. (N. S.) 476.

(B) IRRIGATION AND OTHER AGRICULTURAL PURPOSES.

See LEVEES.

(C) MINING, MECHANICAL AND MANUFACTURING PURPOSES.

§ 277. Acquisition of water rights, and rights incident thereto.

(1911). The code chapter on municipalities gives cities no power to supply persons living outside the municipality with water from the waterworks owned by the city.—Steitenroth v. Jackson, — M. —, 54 So. 955.

WAYS.

Creation of easement by implication, see EASEMENTS, § 17.
Private crossing over railroad, see RAILROADS, § 102.
Private rights of way, see EASEMENTS.
Private roads, see PRIVATE ROADS.
Public ways, see HIGHWAYS.
Streets, see MUNICIPAL CORPORATIONS, §§ 649–696, 755–822.

WAYS OF NECESSITY.

Creation by implication, see EASEMENTS, § 18.

WEAKNESS OF MIND.

As ground for avoidance of contract, see CONTRACTS, § 11.
Validity of contract assented to by person of weak mind, see CONTRACTS, § 92.

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WEAPONS.

This topic INCLUDES right to bear arms in self-defense or in defense of the state; regulation of manufacture, dealing in, and use of weapons; liabilities for injuries therefrom caused by negligence; and offenses of having or carrying weapons concealed or in any other manner prohibited, pointing or shooting firearms, &c., not constituting any other distinct offense.

It EXCLUDES matters relating to specific injuries or crimes committed by use of weapons (see ASSAULT AND BATTERY; HOMICIDE).

See cross-references for complete list of exclusions.

Analysis.

§ 3. Constitutional and statutory provisions.
§ 5. Carrying weapons.
§ 7. —— Intent or purpose.
§ 8. —— Weapons prohibited.
§ 11. —— Persons and occasions exempted or privileged.
§ 13. —— Justification or excuse.
§ 14. Pointing or exhibiting weapon.
§ 17. Criminal prosecutions.
§ 17a. —— Indictment.
§ 17b. —— Evidence.

Cross-References.

Assault with dangerous or deadly weapon, see ASSAULT AND BATTERY, § 56.
Averment as to weapon used in commission of homicide, see HOMICIDE, § 135.
Evidence of possession and use of weapon by person killed or assaulted, see HOMICIDE, § 193.
Harmless error in instructions, see CRIMINAL LAW, § 1172.
Instructions on presumption from use of deadly weapon, see CRIMINAL LAW, § 778.
Presumption of intent from use of deadly weapon, see HOMICIDE, § 145.
Presumption of malice from use of weapon in commission of homicide, see HOMICIDE, § 146.
Sale of pistols by pawn brokers, see PAWNBROKERS, § 4.
Used in committing murder, see HOMICIDE.
Useless clubbing by officers as assault, see ASSAULT AND BATTERY, § 47.

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§ 3. Constitutional and statutory provisions.

The Act of 1888 (Laws, p. 89), amending Code 1880, § 2985, by striking out the words "having good and sufficient reason to apprehend an attack," and providing, without any saving as to past offenses, that the punishment for carrying concealed weapons shall be a fine not exceeding one hundred dollars, "nor less than twenty-five dollars," and in the event the fine and costs be not paid, then by "hard labor not exceeding two months, nor less than one month," abrogated the right of defense growing out of the fear of an attack, and otherwise changed the law, without mitigating its penalty, and is, as to offenses previously committed, *ex post facto*. One indicted under the code section, cannot be punished thereunder because the penalty is repealed; nor can he be indicted and punished under the amendatory act, because as to him it is *ex post facto*. (Clarke v. State, 23 M., explained.)—(1888) Lindzey v. State, 65 M. 542, 5 So. 99, 7 Am. St. 674; (1888) Hodnett v. State, 66 M. 26, 5 So. 518.

(1889). In striking out of Code 1880, § 2958, the clause, "or having good and sufficient reason to apprehend an attack" (Acts 1888, p. 89), it is manifest that the legislature made a clerical mistake as to the words "an attack," and did not intend to embrace them in the Act, as otherwise the section is left without any meaning. Therefore said section as amended is to be read without excluding these words.—Earhart v. State, 67 M. 325, 7 So. 347.

(1895). Act of congress of July 29, 1861, Rev. Stat. U. S., § 788, in providing that "marshals and their deputies shall have, in each state, the same powers in executing the

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laws of the United States as the sheriffs and their deputies in such state may have by law in executing the laws thereof," did not confer merely such power as was then by law possessed by sheriffs, but such as the respective states might from time to time confer. Hence, a deputy marshal, while executing criminal process in this state, and in this district, may lawfully carry a concealed weapon, this being permitted to the state's peace officers and their deputies by Code 1892, § 1027.—State v. Williams, 72 M. 992, 18 So. 486.

§ 5. Carrying weapons.

(1895). A pistol, though unloaded, is within the prohibition of Code 1892, § 1026, making it a misdemeanor to carry concealed, in whole or in part, any pistol or other deadly weapon of like kind or description.—State v. Bollis, 73 M. 57, 19 So. 99.

§ 7. —— Intent or purpose.

(1890). Code 1880, § 2985, makes the fact of carrying a concealed weapon criminal, regardless of the intent with which it is carried.—Strahan v. State, 68 M. 347, 8 So. 844.

§ 8. —— Weapons prohibited.

(1911). In a prosecution for carrying a concealed weapon, there was no error in refusing a charge requested by the defendant that if the pistol alleged to have been carried by the defendant had no hammer or main spring, then the same was not a pistol. —Mitchell v. State, — M. —, 55 So. 354.

(1911). An object once a pistol does not cease to be one by becoming temporarily inefficient.—Mitchell v. State, — M. —, 55 So. 354.

§ 11. —— Persons and occasions exempted or privileged.

(1880). Under Act of 1878 (Laws, p. 175), prohibiting the carrying of concealed weapons, the exception in favor of one "threatened with an attack" does not mean a mere denunciation of evil, but menace such as gives reason to cause just apprehension of an attack against which he may defend with the kind of weapon carried.—Tipler v. State, 57 M. 685.

(1886). Traveling or setting out on a journey, which, under Code 1880, § 2985, is an excuse for carrying concealed weapons, means traveling such distance as to take one beyond the reach of his friends and acquaintances.—McGuirk v. State, 64 M. 209, 1 So. 103.

(1886). On trial for carrying concealed weapons, proof that accused left his pistol ten miles from his home at the house of a friend and some time afterwards went to his market town, twenty miles away, and returned by way of his friend's house to get the pistol, and carried it concealed to his home, does not show such "traveling" as justifies carrying the concealed weapon, under Code 1880, § 2985.—McGuirk v. State, 64 M. 209, 1 So. 103.

(1889). The pursuit of a fugitive daughter, begun without knowing where it will lead, is "traveling on a journey," within the meaning of the statute (Code 1880, § 2985,) against carrying concealed weapons.—Haywood v. State, 66 M. 402, 6 So. 237.

(1904). A person is no longer a traveler within the meaning of the law making it a misdemeanor to carry a deadly weapon concealed and excepting travelers therefrom, when he reaches his destination and engages a room at a boarding house or hotel, intending to stay an indefinite time and not to return until the business for which he made the journey is completed.—Rosaman v. Okolona, 85 M. 583, 37 So. 641, 107 Am. St. 303.

§ 13. —— Justification or excuse.

(1886). Proof that accused heard that a person who lived in the neighborhood of his friend's house, had threatened his life, and that accused had knowledge of such threat, is not a justification of accused as "being threatened with, or having good and sufficient reason to apprehend, an attack," since he was carrying the weapon, not as a precaution against an attack, but to get it home.—McGuirk v. State, 64 M. 209, 1 So. 103.

(1892). One threatened with an attack, may, under Code 1880, § 2985, lawfully carry a concealed weapon, although the attack be not threatened to be made at a particular time or on a particular occasion.—Sudduth v. State, 70 M. 250, 11 So. 680.

(1896). Apprehension of bodily harm will not entitle a person to carry concealed deadly weapons. It is serious bodily harm, great bodily harm, that the threatened person may guard himself against by carrying concealed such a weapon.—Strother v. State, 74 M. 447, 21 So. 147.

(1896). The statute (Code 1892, § 1027) by its very terms, compels the threatened man not only to have good and sufficient reason to apprehend a serious attack from his enemy, but also requires him to actually apprehend such attack.—Strother v. State, 74 M. 447, 21 So. 147.

(1896). The apprehension of a "serious attack from an enemy" and the apprehension of "great bodily harm," are synonymous phrases.—Strother v. State, 74 M. 447, 21 So. 147.

(1911). On a prosecution for carrying concealed weapons, it is a defense that the defendant carried such weapons on a reasonable belief in threats of violence which had been communicated to him.—Page v. State, — M. —, 54 So. 725.

§ 14. Pointing or exhibiting weapon.

(1897). The provocation which will justify the exhibition of a deadly weapon in violation of the statutes which permits such exhibition only in self-defense, must arise at the time of the exhibition.—Hughs v. State, 22 So. 827, not officially reported.

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(1898). Code 1892, § 969, authorizing conviction for accidentally discharging pointed weapon causing death under an indictment for homicide is constitutional.—Washington v. State, 76 M. 270, 24 So. 309.

(1909). The words "point" and "aim" are synonymous as used in Code 1906, § 1045, making it an offense to point or aim a gun, &c., and only one offense is charged in an indictment against an accused which sets out that he did "point and aim" a pistol at and toward the prosecutor.—Coleman v. State, 94 M. 860, 48 So. 181.

§ 17. Criminal prosecutions.

(1880). There being some evidence of threats of personal injury to accused, it is for the jury to determine whether the accused carried the weapon because of apprehension justly and honestly entertained of danger of an attack, or whether the apprehension claimed as a justification, is made a pretext for a violation of the law.—Tipler v. State, 57 M. 685.

(1903). In a prosecution for carrying concealed weapons the jury should be instructed that the defendant should be held not guilty if the weapon was carried because of communicated threats.—Murdin v. State, 82 M. 507, 33 So. 944.

(1903). A verdict in a prosecution under Code 1892, § 969, which prohibits, under penalty, the pointing and discharge of a fire arm, at another, except under certain circumstances, to the effect that, "We find the defendant not guilty of murder, but we find him guilty of intentionally pointing a gun," is in proper form, and operates as a conviction under the first clause of the code section above mentioned.—Goolsby v. State, 35 So. 212, not officially reported.

§ 17a. —— Indictment.

(1871). The omission of the word "manner" after the words "rude, angry and threatening," in an indictment under Code 1857, art. 56, p. 582, for exhibiting a deadly weapon, is a formal defect amendable under the statute. Where, under said statute, the indictment avers that the defendant exhibited he weapon in a rude, angry and threatening manner, this is sufficient, without averring that he was also carrying it, and where the weapon exhibited is a pistol, it is not necessary to aver it was loaded.—Gamblin v. State, 45 M. 658.

(1888). An indictment for carrying a concealed weapon which fixes the date of the offense prior to the passage of the Act of March 9, 1888, is not aided or relieved by virtue of Code 1880, § 3013, which provides that, "no indictment for any offense shall be held insufficient for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened." Such statute cannot create an offense where none otherwise exists.—Hodnett v. State, 66 M. 26, 5 So. 518.

(1888). An indictment which charges that the carrying of concealed weapon was at a time when there was no law making it punishable, is fatally defective. An indictment in May, 1888, which alleges carrying a concealed weapon in January, 1888, charges no offense, under an act passed in March, 1888, and should be quashed.—Hodnett v. State, 66 M. 26, 5 So. 518.

(1889). An indictment fixing the date of the offense at a time prior to the passage of the Act of March 9, 1888, charges no offense and is not relieved by Code, § 3013.—Hodnett v. State, 66 M. 26, 5 So. 518.

(1890). Under Code 1880, § 2941 (Code 1892, § 1148), which makes it an offense to "shoot in any highway," an indictment is good which charges the defendant with shooting "on the public highway."—Woods v. State, 67 M. 575, 7 So. 495.

(1901). An indictment under Code 1892, § 969, making it an offense to point or aim a firearm at another intentionally or to discharge the same except in self-defense or in the lawful discharge of official duty, need not use the word "necessary" before the word "self-defense" in negativing the exception of self-defense.—Richardson v. State, 79 M. 289, 30 So. 650.

(1901). An indictment under a statute which punishes the wanton discharge of firearms was sufficient to charge the injury caused by the discharge where it set out that the defendant pointed the pistol at a named person and "did then and there, while so intentionally pointing said pistol, wilfully and feloniously discharge the same and injured" such person.—Richardson v. State, 79 M. 289, 30 So. 650.

(1905)). An indictment or affidavit for carrying a concealed weapon in violation of Code 1892, §§ 1026, 1027, is fatally defective if it does not charge that the weapon was "unlawfully" carried.—(Followed in Whittaker v. State, 45 So. 145, not officially reported.) Jordan v. State, 87 M. 170, 39 So. 895.

(1908). Under Code 1906, § 1103, making it a misdemeanor to carry concealed weapons, there is no material variance between an indictment charging the carrying of such a weapon concealed and proof which shows a partial concealment.—Martin v. State, 93 M. 764, 47 So. 426.

§ 17b. —— Evidence.

(1879). On an indictment for assault with a pistol, there can be no conviction of an assault with another weapon, but assaults with other weapons immediately preceding that charged, may be considered to show the animus of the accused.—Lanier v. State, 57 M. 102.

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(1886). Proof that accused had heard that another person had threatened his life will not warrant the carrying of a pistol concealed, if such threat was made a year previous, and if accused was informed, soon after the threats were made, that such person had left the country, and accused had not since heard of him.—McGuirk v. State, 64 M. 209, 1 So. 103.

(1888). Where an indictment for carrying concealed weapons has been found since the date of the said Act March 9, 1888, time is of the essence of the offense, because it depends upon the time when the act was committed whether it was a punishable offense or not.—Hodnett v. State, 66 M. 26, 5 So. 518.

(1896). While the burden of proving the defense of apprehended great bodily harm in a prosecution for carrying concealed weapons, is devolved by law upon the defendant, yet so long as there is a reasonable doubt of the defendant's guilt or a probability of his innocence, the state has not satisfactorily made out its case.—Strother v. State, 74 M. 447, 21 So. 147.

(1898). The evidence of the state on a prosecution for carrying a concealed pistol was that the accused held the weapon in his hand, and was pointing it, but there was no testimony to establish concealment. The evidence of the accused's companion showed that if the defendant had a pistol, as claimed by the state, he must have had it concealed on his person before and after the act of pointing it. *Held*, that a verdict of guilty must be sustained.—Smith v. State, 24 So. 316, not officially reported.

(1899). Appellant was indicted for and found guilty by a jury of carrying concealed weapons. In the absence of evidence to prove appellant's guilt, he could not be convicted of the offense charged.—White v. State, 25 So. 1039, not officially reported.

(1902). Evidence that a weapon was carried to protect the chicken house of the sister of accused examined in a prosecution for carrying concealed weapons and held too indefinite to constitute a defense to the charge.—Wilson v. State, 81 M. 404, 33 So. 171.

WEIGHTS AND MEASURES.

This topic INCLUDES standards of quantity established by public authority; and enforcement of application of such standards to sales and other transactions in general.

Analysis.

§ 2. Constitutional and statutory provisions.
§ 8. Public weighers, measurers, or surveyors.

§ 2. Constitutional and statutory provisions.

(1875). Statutes requiring articles to be inspected or weighed and measured before being sold in the markets, are in the nature of police regulations, and in the absence of constitutional limitations, are valid if reasonable and not in restriction of trade.—Gaines v. Coates, 51 M. 335.

§ 8. Public weighers, measurers, or surveyors.

(1876). Complainant was elected cotton weigher of Vicksburg, under an ordinance making it unlawful for any one but the city weigher to act. After his election, the legislature abolished the office and provided for the county to elect a weigher, and he was elected by the county. Defendant began weighing cotton, when complainant filed a bill to enjoin it from so doing, and for an account of profits. *Held*, that while complainant had the exclusive right to weigh, he is not entitled to an injunction, because at the date of filing the bill his right had expired by a repeal of the act; and he is not entitled to an account, because his claim does not arise *ex contractu*, but is in damages, and the remedy is at law.—Planters' Compress Assn. v. Hanes, 52 M. 469.

(1908). Laws 1908, p. 269, ch. 227, § 3, creating the office of cotton weigher and giving persons the right to withhold their cotton from the weigher gives such weigher no right to restrain a warehouse company from employing a private weigher, as that is a matter between the company and its customers. It is no additional ground for such injunction that the warehouse company urges others to withhold their patronage from the weigher.—Miller v. Winston County Union Warehouse Co., 94 M. 348, 47 So. 501. See also (1876) Planters' Compress Association v. Hanes, 52 M. 469.

WELLS.

Pollution, see WATERS AND WATER COURSES, § 104.
Rights to, see WATERS AND WATER COURSES, § 101.

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WHARVES.

This topic INCLUDES the construction, maintenance, regulation, and use of wharves, piers, and docks for the landing of vessels, whether constructed under franchises granted therefor or directly by the government, and whether the use be subject to payment of wharfage or other fees or free; organization, franchises, and powers of wharf or dock companies; and rights, duties, and liabilities of such companies or of municipalities in respect of the management and use of their wharves, piers, or docks.

It EXCLUDES matters applicable to corporations in general (see CORPORATIONS); powers of municipalities to grant and regulate wharf franchises (see MUNICIPAL CORPORATIONS); exercise of the power of eminent domain (see EMINENT DOMAIN); rights and liabilities of riparian or littoral proprietors (see NAVIGABLE WATERS); dry docks and dockage of vessels therein (see SHIPPING); and liabilities of wharfingers as warehousemen (see WAREHOUSEMEN).

See cross-references for complete list of exclusions.

Analysis.

§ 3. Statutory regulations.
§ 7. Grants, franchises, and privileges.
§ 15. Wharfage.
§ 22. Injuries to wharves.

Cross-References.

Licenses on wharf boats, see LICENSES, § 11.
Municipal, see MUNICIPAL CORPORATIONS, § 274.
Public wharves, see NAVIGABLE WATERS, § 43.
Tonnage duties, see MUNICIPAL CORPORATIONS, § 719.
Wharfingers distinguished from warehousemen, see WAREHOUSEMEN, § 24.

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§ 3. Statutory regulations.

(1857). The 14th section of the Act of 1854, incorporating the town of Shieldsborough, confers the power on the corporate authorities of the town to grant to the owner of a licensed public wharf the exclusive right to erect and keep such a wharf within the limits of the corporation; and if such exclusive right be granted in consideration of twenty-five dollars paid by the grantee to the corporation, the privilege is irrevocable.—Martin v. O'Brien, 34 M. 21.

§ 7. Grants, franchises, and privileges.

(1857). When an exclusive right to keep a wharf within certain limits, on the sea shore, is once granted by the legislature it is irrevocable.—Martin v. O'Brien, 34 M. 21.

(1857). The right of the owner of the land bounded by the sea extends only to high-water mark; the shore below high-water mark belongs to the state, as trustee for the public; and the state may, without the consent of the adjacent owner, grant this much of the sea shore for the purposes of a wharf.—Martin v. O'Brien, 34 M. 21.

(1887). The question of liability of wharfinger for goods destroyed, see Merchants' Wharf Boat Assn. v. Heidingfelder, 64 M. 678, 2 So. 242.

§ 15. Wharfage.

(1858). A contract by a wharfinger that he would not charge storage or wharfage for "any goods left on his boat for any citizen of the place," embraces goods consigned to citizens on storage for others.—Butler v. Smith, 35 M. 457.

§ 22. Injuries to wharves.

(1852). The owner of a steamboat, landing at a wharf boat kept for the landing of steamboats, is not liable for an injury done to the wharf boat in the landing of the steamer, if he exercise due and proper care, prudence and skill in making the landing.—Thomasson v. Agnew, 24 M. 93.

WHAT LAW GOVERNS.

See CONFLICT OF LAWS.

WHISKY.

See INTOXICATING LIQUORS.
Judicial notice of intoxicating quality, see CRIMINAL LAW, § 304.

WIDOW.

As party to partition, see PARTITION, § 45.
Dower, see DOWER.

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Right of inheritance, see DESCENT AND DISTRIBUTION, §§ 52–65.
Right to appointment as administrator, see EXECUTORS AND ADMINISTRATORS, § 17.
Rights as to homestead, see HOMESTEAD, §§ 136–153.

WIDOW'S ALLOWANCE.

See EXECUTORS AND ADMINISTRATORS, §§ 173–200.

WIFE.

See HUSBAND AND WIFE.

WILFUL ACTS.

See NEGLIGENCE, § 11.

Liability of master for wilful acts of servant, see MASTER AND SERVANT, § 306.

WILFUL INJURIES.

See CARRIERS, § 283; NEGLIGENCE, § 11.
In cases of contributory negligence, see CARRIERS, § 341.
Street railway accidents, see STREET RAILROADS, § 104.

WILFULNESS.

As ground for exemplary damages, see DAMAGES, § 91.
Of agents of carriers as warranting exemplary damages for breach of contract, see CARRIERS, § 277.
Use of term in indictment, see INDICTMENT, § 91.

WILLS.

This topic INCLUDES instruments in writing making dispositions of property to take effect at death; nature, requisites, validity, incidents, construction, operation, and effect of such instruments; evidence relating thereto; probate, establishment, and contest thereof; estates or interests created, and conditions or restrictions imposed thereon; and rights and liabilities of devisees and legatees.

It EXCLUDES gifts in expectation of death (see GIFTS); restrictions on creation of perpetuities or trusts for accumulations (see PERPETUITIES); appointment, rights, powers, duties, and liabilities of executors and of administrators with will annexed, &c. (see EXECUTORS AND ADMINISTRATORS); effect of intestacy (see DESCENT AND DISTRIBUTION); and legacy and succession taxes (see TAXATION).

See cross-references for complete list of exclusions.

Analysis.

I. Nature and Extent of Testamentary Power.

§ 1. Nature of power.
§ 2. What law governs.
§ 4. Property and rights subject to testamentary disposition.
§ 12. Restrictions on devises and bequests for charitable or religious purposes.

II. Testamentary Capacity.

§ 21. Nature and measure in general.
§ 27. Married women.
§ 31. Degree of mental capacity.
§ 33. Insane persons.
§ 40. Peculiar belief or opinion.
§ 41. Eccentricity.
§ 51. Evidence.
§ 53. —— Admissibility in general.
§ 54. —— Conduct and declarations of testator.
§ 55. —— Weight and sufficiency.

III. Contracts to Devise or Bequeath.

§ 66. Performance or breach.

IV. Requisites and Validity.

(A) NATURE AND ESSENTIALS OF TESTAMENTARY DISPOSITIONS.

§ 70. What law governs.

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§ 72. Testamentary intent.
§ 73. Disposition of property in general.
§ 80. Conditional or contingent will.
§ 82. Unjust or unnatural disposition.
§ 86. Will distinguished from other dispositions of property.
§ 88. —— Deed or other conveyance or contract.
§ 93. Evidence as to character of transaction or instrument.

(B) Form and Contents of Instruments.
§ 94. Necessity and sufficiency of writing in general.
§ 96. Form of instrument in general.

(C) Execution.
§ 111. Signature or subscription by or for testator.
§ 113. Attestation and subscription by witnesses.
§ 115. —— Number of witnesses.
§ 116. —— Competency of witnesses.
§ 117. —— Presence of testator and witnesses.
§ 118. —— Subscription or acknowledgment of testator in presence of witnesses.
§ 125. Codicils.

(D) Holographic Wills.
§ 130. Nature and requisites in general.
§ 132. Handwriting of testator.

(E) Nuncupative Wills.
§ 136. Nature and requisites in general.
§ 138. Property which may be disposed of.
§ 140. Circumstances and occasion of making.
§ 141. Making, validity, and sufficiency of disposition.
§ 142. Attestation.

(F) Mistake, Undue Influence, and Fraud.
§ 154. Undue influence.
§ 162. Evidence.
§ 163. —— Presumptions and burden of proof.
§ 166. —— Weight and sufficiency.

(G) Revocation and Revival.
§ 167. Revocation by act of testator in general.
§ 171. Destruction or mutilation.
§ 172. Cancellation, obliteration, or alteration.
§ 178. Subsequent will.
§ 184. Codicil.
§ 188. Revocation of joint or mutual will.
§ 190. Revocation by operation of law in general.
§ 191. Marriage and birth of issue.
§ 194. Disposition of property or other alteration of estate.
§ 197. Republication of will in general.

V. Probate, Establishment, and Annulment.

(A) Probate and Revocation in General.
§ 204. Statutory provisions.
§ 205. Necessity for probate.
§ 209. Nuncupative wills.
§ 213. Probate in common form.
§ 215. Determination in probate proceedings as to validity or construction of provisions of will.
§ 217. Successive applications for probate.
§ 221. Revocation of probate.

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(B) Actions to Establish or Determine Validity in General.
§ 222. Nature and form of remedies in general.

(C) Probate or Establishment of Lost or Destroyed Wills.
§ 231. Nature and form of remedies in general.
§ 234. Loss, suppression, or destruction of instrument.

(D) Probate or Record of Foreign Wills.
§ 240. Instruments which may be admitted to probate or record.
§ 241. Necessity of original probate in state of testator's domicile.
§ 242. Nature and situs of property.
§ 243. Right to probate.
§ 245. Admission to record of will probated in other jurisdiction.

(E) Jurisdiction, Limitation, and Laches.
§ 247. Jurisdiction of probate and proceedings relating thereto.
§ 249. —— Domicile of testator.
§ 252. —— Foreign wills.
§ 260. Limitations.

(F) Parties and Process or Notice.
§ 262. Parties to proceedings in probate court.
§ 265. Parties to actions.

(G) Petitions, Objections, and Pleadings.
§ 277. Objections to probate, answers to petitions therefor and caveats.
§ 280. Pleading in actions to contest or set aside will or probate.
§ 283. —— Plea or answer.
§ 286. —— Issues, proof, and variance.

(H) Evidence.
§ 287. Presumptions and burden of proof.
§ 291. Admissibility.
§ 294. —— Attesting witnesses.
§ 297. —— Declarations of testator as to execution or revocation.
§ 299. Weight and sufficiency.
§ 302. —— Execution, existence, and genuineness.
§ 303. —— Testimony of attesting witnesses.

(I) Hearing or Trial.
§ 308. Scope of inquiry and powers of court.
§ 312. Mode of hearing or trial in general.
§ 315. Submission of issues to jury.
§ 322. Reception of evidence.
§ 325. Demurrer to evidence.
§ 328. Instructions.
§ 332. —— Undue influence and fraud.
§ 333. Verdict and findings by jury.

(J) Judgment or Decree.
[*No paragraphs or references in this Digest.*]

(K) Review.
§ 356. Nature and form of remedy.
§ 371½. Dismissal, withdrawal, or abandonment.
§ 387. Determination and disposition of cause on appeal from probate court.
§ 390. —— Affirmance, modification, or reversal of judgment or decree of probate court.
§ 393. Review of decisions in actions relating to wills or probate.
§ 400. —— Scope and mode of review.

(L) Fees and Costs.
§ 402. Power to award costs in general.

(M) Operation and Effect.
§ 417. Effect of probate on will in general.

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§ 418. Presumptions as to probate.
§ 421. Collateral attack on probate or judgment.
§ 422. Conclusiveness of probate or record.
§ 424. —— Probate in common form.
§ 431. Conclusiveness of refusal or revocation of probate.
§ 433. Admissibility, as evidence, of will or proofs, or of record or exemplified copy thereof.
§ 434. Foreign probate or judgment.

VI. Construction.

(A) General Rules.
§ 435. Application to wills in general.
§ 436. What law governs.
§ 438. Intention of testator.
§ 440. —— Ascertainment from words of will.
§ 441. —— Situation of testator and circumstances of making of will.
§ 442. —— Contravention of law.
§ 445. Construction in favor of instrument.
§ 449. —— Disposition of entire estate, or partial intestacy.
§ 452. Construction in favor of heirs, next of kin, or surviving wife or husband.
§ 454. Language of instrument.
§ 456. —— Ordinary or arbitrary or peculiar meaning.
§ 459. —— Molding or change of language in general.
§ 461. —— Substitution of words.
§ 463. —— Rejection of superfluous or repugnant words.
§ 464. —— Mistakes in writing, grammar, or spelling.
§ 468. Separate clauses or parts.
§ 470. —— Construction as a whole.
§ 471. —— Repugnant and conflicting provisions.
§ 473. —— Partial invalidity.
§ 474. Construing instruments together.
§ 478. Implied dispositions in general.
§ 481. Time from which will speaks.
§ 482. Operation as to after-acquired property.
§ 483. Effect of change in condition or circumstances occurring subsequently to the will.
§ 485. Evidence to aid construction.

(B) Designation of Devisees and Legatees and Their Respective Shares.
§ 497. Children and grandchildren.
§ 498. Issue, descendants, or offspring.
§ 499. Collaterals.
§ 505. Heirs.
§ 521. Classes.
§ 524. —— Time of ascertainment of class.
§ 529. Shares and division among members of class.
§ 530. Taking per stirpes or per capita.

(C) Survivorship, Representation, and Substitution.
§ 536. Succession on death of devisee or legatee before gift takes effect in general.
§ 537. Death of devisee or legatee as contingency.
§ 546. Survivorship.
§ 548. —— Persons included and shares as survivors.

(D) Description of Propety.
§ 561. Particular description of specific real property.
§ 564. Rents, profits, income, or use and occupation of real property.
§ 565. Personal property in general.

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§ 575. Words of description of both real and personal property.
§ 578. After-acquired property.
§ 586. Residuary clause.

(E) Nature of Estates and Interests Created.
§ 590. Creation by will in general.
§ 591. Technical words of limitation in general.
§ 592. Limitation over on death of devisee or legatee.
§ 595. Estates by implication in general.
§ 596. Fee simple.
§ 599. —— Implication in general.
§ 602. Qualified or defeasible fees.
§ 604. Estates tail.
§ 613. Life estates.
§ 614. —— Words necessary or sufficient in general.
§ 616. —— Devise or bequest for life with power of control or disposition.
§ 618. Income.
§ 619. Annuities.
§ 620. Maintenance.
§ 622. Remainders.
§ 623. Cross-remainders.
§ 625. Executory devises or bequests, and shifting, springing, or other future uses, or estates in the nature thereof.

(F) Vested or Contingent Estates and Interests.
§ 629. Construction in favor of vesting.
§ 630. Contingency on which estate or interest depends in general.
§ 634. Remainders.
§ 635. Opening of vested estates or interests to let in after-born children.

(G) Conditions and Restrictions.
§ 640. Validity of conditions.
§ 654. —— Effect of invalidity.
§ 655. Construction and operation of conditions.
§ 657. —— Conditions precedent.
§ 658. —— Conditions subsequent.

(H) Estates in Trusts and Powers.
§ 669. Creation of testamentary trusts in general
§ 670. Words necessary or sufficient to create trust.
§ 672. —— Grants of authority or directions importing trust.
§ 673. —— Provisions for maintenance.
§ 675. —— Precatory words.
§ 676. Implication of trusts.
§ 679. Construction of testamentary trusts.
§ 684. —— Capital and income.
§ 685. —— Purposes of trust.
§ 688. Effect of failure of trust.
§ 690. Construction of testamentary powers.

(I) Actions to Construe Wills.
§ 699. Time to sue, limitations, and laches.

VII. Rights and Liabilities of Devisees and Legatees.

(A) Nature of Title and Rights in General.
§ 712. Devise or bequest to attesting witness.
§ 714. Devise or bequest to creditor.
§ 720. Title of devisees and legatees.
§ 728. Rents and profits, income, and accumulations.
§ 729. Annuities.
§ 730. Maintenance from estate.
§ 732. Property or fund out of which legacies are to be paid.

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§ 733. Time of accrual of right to devise or legacy.
§ 734. Interest on legacies.
§ 735. Apportionment of income or annual or other stated payments.
§ 742. Conveyance of property by devisees or legatees.
§ 745. Actions by devisees or legatees.

(B) Specific, Demonstrative, and General Devises and Bequests.
§ 750. Construction of devises and bequests in general.
§ 752. Specific bequests.
§ 754. —— Stocks, bonds, and other securities.
§ 756. General bequests.

(C) Advancements, Ademption, Satisfaction, and Lapse.
§ 757. Advancements.
§ 763. Ademption.
§ 772. Satisfaction.

(D) Election.
§ 778. Nature and grounds in general.
§ 780. Testamentary provisions.
§ 782. —— Provisions for surviving wife.
§ 784. Estates and interests to which election is applicable.
§ 785. Persons entitled to elect.
§ 786. Capacity to elect.
§ 788. Mode of election and proceedings therefor in general.
§ 790. Time for making election.
§ 798. Operation and effect.

(E) Abatement.
§ 804. Nature and grounds in general.
§ 805. Insufficiency of estate in general.
§ 812. Specific devises or bequests.

(F) Legacies Charged on Property, Estate or Interest.
§ 819. Testamentary charges in general.
§ 820. Charge on property of estate in general.
§ 821. Charge on property or interest devised or bequeathed.
§ 823. Personal liability of devisee or legatee of property charged.
§ 825. Release, waiver, or other extinguishment of charge.
§ 826. Enforcement of charge.

(G) Debts of Testator and Incumbrances on Property.
§ 848. Contribution.

(H) Void, Lapsed, and Forfeited Devises, and Bequests, and Property and Interests Undisposed Of.
§ 849. Disposition or devolution in general.
§ 851. Effect of failure of devise or bequest on limitation over or other disposition.
§ 855. Effect of failure of limitation over or other disposition on precedent estate.
§ 857. Effect of residuary provisions.

(I) Rights and Remedies of Creditors of Devisees and Legatees.
§ 867. Right to subject interests under will in general.

Cross-References.

Competency of witnesses as to construction, see Witnesses, § 135.
Concealment of will as creating one an executor *de son tort*, see Executors and Administrators, § 538.
Creation of future estates, see Perpetuities, § 4.
Devise of homestead, see Homestead, § 136.
Devise of park property to city, see Municipal Corporations, § 221.
Devise or bequest to use of another, see Trusts, § 36.
Direction in will for conversion of property, see Conversion, § 14.

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Effect of testamentary provisions on right to sell property under order of court for payment of debts, see EXECUTORS AND ADMINISTRATORS, § 327.
Execution of provisions by executor, see EXECUTORS AND ADMINISTRATORS, § 81.
Garnishment of devise, see GARNISHMENT, § 36.
Jurisdiction of equity to compel transfer of devise, see EQUITY, § 22.
Parol evidence to explain words in will, see EVIDENCE, § 449.
Parol evidence to show intent of testator, see EVIDENCE, § 461.
Powers of executor pending contest, see EXECUTORS AND ADMINISTRATORS, § 78.
Power of executor to sell under terms of will, see EXECUTORS AND ADMINISTRATORS, § 138.
Property devised as part of wife's separate estate, see HUSBAND AND WIFE, § 117.

I. NATURE AND EXTENT OF TESTAMENTARY POWER.

§ 1. Nature of power.

(1839–43). The right to dispose of property by will is as broad and comprehensive as the right or disposition by one still living.—Ross v. Duncan, Freem. Ch. 587.

§ 2. What law governs.

See *post*, § 70.

(1843). Where, by the law of Louisiana, it is provided that if disposal of property by will exceed the quantum of which a person may legally dispose, the bequest shall not be void, but shall be reduced to the amount which he may rightfully dispose, and the same law also provides that a husband of a second wife, who had children by a former, could only bequeath to his second wife by will the extent of the usufruct of one-fifth of his estate, the bequest by the husband of a second wife who was domiciled in Louisiana of an absolute sum of money to her was void and could not be reduced under the provisions of the law.—Montgomery v. Milliken, Sm. & M. Ch. 495.

(1852). So much of a will as makes any disposition of realty situated in a jurisdiction foreign to the testator's domicile, is to be governed by the *lex rei sitæ*. Hence, if, by the law of the domicile, a will is inoperative as to after acquired lands, this incapacity will not extend to a devise of such land situated in a state where that rule does not exist; but if good by the *lex rei sitæ*, the devise will be carried into effect. For the reason why, by the common law, such devise was not good, was not on account of a want of intention of the testator to make it, but from an incapacity to make it, and it is therefore no objection to the will having that operation, if so intended, as to land situated in a place, by the law of which, no such restriction is placed on the capacity of the testator.—Doe v. Wynne, 23 M. 251, 57 Am. Dec. 139.

(1855). All property situated in the domicile of the testator is controlled by that law and this includes personalty and promissory notes as well as realty.—Owen v. Moody, 29 M. 79.

(1858). Every state has the right to regulate and control all property, real and personal, within its limits, and to fix the rules for its transfer both *inter vivos* and by testament and each state may, as to property (real or personal) within its limits, adopt or reject, in its discretion, the law of the domicile of the testator in case of a foreign will; and whether it adopt or reject the *lex domiciliі*, dispositions of property in its own limits, made as it directs, are valid and binding everywhere.—Wells v. Wells, 35 M. 638.

(1858). As a qualification of the force of the *lex domiciliі*, it must be observed that it has no force outside of the state, and that other states may adopt or reject it, as to property within their limits, according to their discretion.—Wells v. Wells, 35 M. 638.

§ 4. Property and rights subject to testamentary disposition.

One may, by will, dispose of his homestead. Under Code 1871, § 1956 (Code 1880, § 1277), it descends only in case of intestacy. —(1881) Norris v. Callahan, 59 M. 140; (1884) Osburn v. Sims, 62 M. 429.

§ 12. Restrictions on devises and bequests for charitable or religious purposes.

(1866). By common law, in a will of personalty, a general residuary bequest carries not only everything not disposed of, but everything ill-disposed of, or that by lapse, or any other casualty may fall in the residuum, and this rule as to personalty bequeathed to religious purposes, is not changed by the statute (arts. 55 and 56, p. 303, of the Rev. Code of 1857), which makes such bequests void, and declares that the heirs-at-law or distributees of the estate shall take such bequests as though no testamentary disposition had been made. These articles were not intended to interfere with the power of testamentary dispositions, further than to make the bequests specified void.—Barton v. King, 41 M. 288.

(1874). Under Code 1857, arts. 55 and 56, p. 302, a devise for a religious or charitable purpose is void, and the heirs of the testator take in lieu of the devisee.—Tatum v. McLellan, 50 M. 1.

(1895). Under Const. 1890, § 269, making void devises of lands, or money from the sale thereof, in favor of religious or ecclesiastical corporations, or any person or body politic, in trust for charitable uses, and, under § 270, making void bequests of money or personal property in favor of such cor-

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porations, but omitting prohibition of bequests to them in trust for charitable uses, a will giving lands and personal property to an educational association in trust for erecting and maintaining a college, is void as to the realty, but valid as to the personalty.—Blackburn v. Tucker, 72 M. 735, 17 So. 737.

(1895). The prohibition of charitable devises and bequests contained in Const. 1890, §§ 269, 270, apply to wills made before the constitution was adopted, where the testator did not die until afterwards.—Blackburn v. Tucker, 72 M. 735, 17 So. 737.

II. TESTAMENTARY CAPACITY.

§ 21. Nature and measure in general.

(1896). It is not only necessary that the testator shall have testamentary capacity but that that capacity shall be exercised freely and voluntarily.—Sheehan v. Kearney, 82 M. 688, 21 So. 41, 35 L. R. A. 102.

§ 27. Married women.

(1854). The rules allowing the wife to dispose of her property by will do not apply, where the estate bequeathed by the will is secured to her as her separate property, for in England, the wife was regarded, as to her separate estate, as a *feme sole*, and capable of disposing of it in any manner not prohibited by the settlement. The wife has not however, as to her separate estate, held under the Act of 1839, such a power of disposition. The husband has a vested interest in her property, which she could not alienate without his consent; and hence, the same rule would apply as to wills made by her before marriage, as it existed at common law when she had no separate estate. Nor is the rule changed by the Act of 1821 (H. C. 649), which declares that "no devise made according to the statute, nor any clause thereof, shall be revocable, but by cancellation, or another will or codicil." This statute also existed in England, and was uniformly held to apply to express acts of revocation, and not to revocations by inference of law, or by implication from various circumstances, among which is a subsequent marriage of a testatrix.—Garrett v. Dabney, 27 M. 335.

(1854). Whether a married woman has, under any circumstances, the power of disposing, by will, of her separate property, held under the Acts of 1839 and 1846. *Quære?*—Garrett v. Dabney, 27 M. 335.

(1856). The Acts of 1839 and 1846, are enabling statutes, and must receive such construction as to enlarge and not abridge the rights of married women, in reference to their separate estates; and, moreover, the modes prescribed for the disposition of their separate estates by *femes covert*, refer to conveyances made by them *inter vivos*, and they do not affect their right to make wills, as it existed before their enactment; and this right is, to make a will of their personal chattels by the assent of their husbands.—Lee v. Bennett, 31 M. 119.

(1858). The wife cannot make a will without the consent of her husband, nor does the abandonment of the wife by the husband, invest her with such power.—Cain v. Bunkley, 35 M. 119.

(1873). Where property is conveyed to a trustee for the use of a married woman for life, with remainder to her issue should she die before her husband, and a subsequent clause confers upon her the power to dispose of the property by will, in case of death before her husband, the deed reciting that she has relinquished dower and otherwise aided the grantor, in view of the whole instrument, she may devise the property, and her devisee will hold the property absolutely.—Goosey v. Goosey, 48 M. 210.

(1888). Under Code 1880, § 1169, which provides that a married woman may dispose of her estate by will as if she was not married, a wife may devise her homestead, though occupied by her with her husband. Section 1260, imposing restrictions on the husband and wife as to the alienation and incumbrance of the homestead, do not affect the right of disposition by will.—Kelly v. Alred, 65 M. 495, 4 So. 551.

§ 31. Degree of mental capacity.

(1840). A party whose mind has been somewhat impaired by age and disease, may, nevertheless, make a will, if he were able to make a disposition of his estate with understanding and reason.—Brock v. Luckett, 4 H. 459.

(1840). The will is good if made when the testator had sufficient capacity to make it, though he may have been, both before and after that, incapable of making a will.—Brock v. Luckett, 4 H. 459.

§ 33. Insane persons.

(1866). Wherever a party once conceives something extravagant to exist, which, however, has no existence but in his own heated imagination, and his conception of its existence is incapable of being permanently reasoned out of him, this is delusion, and he is insane. But however great the extravagances of an alleged lunatic, and however like to a madman he may speak or act on some or all subjects, yet in the absence of anything like delusion, as above explained, he is not insane.—Mullins v. Cottrell, 41 M. 291.

(1866). The delusion may consist either in a wild and insane belief of the existence of some palpable fact, manifest to the senses, not to exist, as that a particular individual is another person, or is a horse, or a wild beast, or the like; or it may consist in the belief that a state of moral facts exists, when it is clear to a sound mind that it exists only in the morbid imagination of the person believing in its existence, as the belief that a person's best friend is his deadly enemy, and is always seeking to destroy him.—Mullins v. Cottrell, 41 M. 291.

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(1866). From the very nature of such delusions, they must exert a controlling power over the mind and actions of the person entertaining them; and wherever the subject of them is presented to the mind of the insane person, their effect must be manifest and decided. One of these results is excitement or emotion, either of fear, anger, or some other such manifestation, as the nature of the delusion would likely produce. —Mullins v. Cottrell, 41 M. 291.

(1866). In cases of monomania, all the mental faculties are affected more or less; but the affection is more strikingly manifested in some than in others. If the delusion be not so great as to affect seriously the intellectual powers, or to dethrone the reason as to the particular act, in reference to which the question of sanity arises, it cannot be said to amount to insanity. The intellectual disturbance may be sometimes difficult of detection; but in every case of true insanity, it is more or less present. However perverted the affections may be, there is no insanity unless there be intellectual disturbance, or disturbed reason. Hence, no eccentricity or peculiarity of character, no degree of moral depravity, or of unnatural feeling, not amounting to destitution of reason, nor mental incompetency to do the particular act, is to be considered as insanity.—Mullins v. Cottrell, 41 M. 291.

§ 40. Peculiar belief or opinion.

(1866). A merely erroneous religious creed, or an aversion to any particular sect, is not evidence of insanity; yet as the conversation of a man who is alleged to be insane, upon any subject tending to show the state of his mind, is competent to be given in evidence, so may his conversations developing his religious opinions.—Mullins v. Cottrell, 41 M. 291.

§ 41. Eccentricity.

(1860). In this case many witnesses testified to great eccentricity on part of the testator, and to his belief in witchcraft, and gave it as their opinion that he was not competent to make a will; many others testified that he understood the value of property, and had capacity to make a will. The verdict was in favor of sanity, and this court refused to set it aside because the evidence being conflicting, the verdict would not be disturbed unless it was clearly wrong.—Kelly v. Miller, 39 M. 17.

§ 51. Evidence.

Evidence on probate of will, see *post*, §§ 287–303.

(1856). On the trial of an issue *devisavit vel non*, the presumption of law is in favor of the sanity of the testator, and that the will was fairly made, and not procured by fraud; and it is the duty of the party who alleges the contrary, to prove it.—Payne v. Banks, 32 M. 292.

(1878). Some direct proof that the testator was of sound and disposing mind must be given in the probate of a will, even in common form.—Martin v. Perkins, 56 M. 204.

(1896). The burden of proof on the trial of an issue *devisavit vel non* is, both as to testamentary capacity and undue influence,—or that the testator was a free agent, —is on the proponents throughout, there being no shifting of the burden.—Sheehan v. Kearney, 82 M. 688, 21 So. 41, 35 L. R. A. 102.

(1896). When the proponent of a will offers the will and the record of its probate, a presumption is thereby raised that the alleged testator had testamentary capacity and this presumption satisfies the burden of proof in that respect; and the contestant must fail unless he overcomes this by proof on his part. But there is no shifting of the burden of proof properly understood.—Sheehan v. Kearney, 82 M. 688, 21 So. 41, 35 L. R. A. 102.

(1903). The burden of proof is on the proponents of a will on an issue *devisavit vel non* both as to the testamentary capacity and undue influence but they make out their case *prima facie* by showing the due probation of the will.—Sheehan v. Kearney, 82 M. 688, 21 So. 41, 35 L. R. A. 102.

§ 53. —— Admissibility in general.

(1866). In this case, it was held that the good conduct of the daughter after the disagreement, might be given in evidence, as it was proper to be considered in determining whether there was want of reasonable ground for his ill feeling at the time the will was made.—Mullins v. Cottrell, 41 M. 291.

(1908). Where it is established that a testator had capacity to make a will at the time he executed his will, then the want of testamentary capacity before and after the execution of the will is not material and should not be received. The question to be determined is capacity at the time of the execution of the will.—Lum v. Lasch, 93 M. 81, 46 So. 559.

§ 54. —— Conduct and declarations of testator.

(1866). Whether a will be conditional or not, depends on its terms. The declarations of the testator are inadmissible to explain or contradict it in this respect. Hence, where a soldier wrote to his wife, "In case I never get back to you, I want all I have to be yours," and he did get back sick, but soon afterwards died, it was held, that his declarations, made both before and after the date of the letter, to the effect that he wished his wife to have all he had, were inadmissible to explain whether the will was a conditional one or not. Such a will is conditional, and on the testator's return, it became of no effect.—Magee v. McNeil, 41 M. 17, 90 Am. Dec. 354.

(1866). Where in a case of alleged insanity, the conversations of the testator are introduced as evidence of the condition of his mind, if a witness detail a part of a con-

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versation between himself and the testator, it will be proper for the witness to state the whole, including opinions expressed by the witness to the testator, so that the answers of the testator may be understood. If any opinions thus expressed by the witness, should be incompetent, they can be excluded, or the jury directed to disregard them.—Mullins v. Cottrell, 41 M. 291.

(1896). Declarations by a testator as to the disposition he intends to make of his property, before the making of the will, and his declarations after he has made the will, of what he had intended to do or has done, in the disposition by will of his property, are admissible, on the issue of testamentary capacity to show the state of his mind whether sound or unsound.—Sheehan v. Kearney, 82 M. 688, 21 So. 41, 35 L. R. A. 102.

(1896). The declarations of an alleged testator, whether made before, after, or at the time of making the alleged will, as to his testamentary intentions are,—both on the issue of testamentary capacity and of undue influence,—competent evidence.—Sheehan v. Kearney, 82 M. 688, 21 So. 41, 35 L. R. A. 102.

(1896). In cases of insanity or undue influence the subsequent as well as the prior declarations of the testator are admissible. The principal fact to be established is the mental condition of the testator at the time of making his will, and for this purpose evidence of his declarations previously and subsequently is relevant and competent.—Sheehan v. Kearney, 82 M. 688, 21 So. 41, 35 L. R. A. 102.

§ 55. —— Weight and sufficiency.

(1840). When an issue on the sanity of a testator is tried before a judge, if he be entirely satisfied, from the evidence already given, of the sanity of the testator when the will was made, he may refuse to hear testimony as to his insanity after that time, but such evidence is competent, and it would be error to exclude it from the jury, if the issue were tried by one.—Brock v. Luckett, 4 H. 459.

(1840). Twelve witnesses, many of whom had been acquainted with the testator from March, when he was afflicted with an attack of paralysis, up to the day previous to the execution of the will in the succeeding December, testified to his insanity, and stated the health and condition of the testator on which their belief was founded, viz.: palsy in the right side, leg and face; a fondness for relating old anecdotes and scenes; forgetfulness of recent events; miscalling the names of men and things; disconnection of ideas in conversation, and frequent transitions from one subject to another; the giving of contradictory orders and shortly denying having given them; impediment in speech, and irritability in temper and incompetency to attend to business. Four of these witnesses were physicians, three of whom had attended the testator from time to time, and they expressed the opinion that the testator could not have had a lucid interval.

Five witnesses, the draftsman of the will and the subscribing witnesses to it, declared their opinion to be, that the testator was of sound and disposing mind when the will was executed; and it was proved that he had walked a mile on the morning of the execution of the will. Some of these witnesses, who had seen the testator some weeks previously, testified to an improvement in his health and mind. It was also proved that he conversed rationally and sensibly for four hours on the day of the execution of the will, without making an irrational remark; that he gave directions about his business, dictated the will, that he caused it to be read to him, and some portions of it, twice; that he conversed of early scenes, and did not miscall names, nor talk incoherently, and that he conversed intelligently and rationally about his own business, the monetary system of the country, and other subjects. He also spoke of an improvement in his health, and of its having been thought that he was insane, and he expressed gratification at seeing so many of his old friends on that occasion, and he wished them to converse with him and see if he were of sound mind, and competent to transact business. These witnesses all thought that he was entirely competent on that day, to transact any of his own business. *Held*, that he was of sound and disposing mind.—Brock v. Luckett, 4 H. 459.

(1866). He who seeks to avoid a will on the ground of insanity or delusion must establish the incapacity of the testator by the clearest and most satisfactory proofs. And this rule is more stringent and the proof more difficult when the will is impeached on the ground of partial insanity of the testator, his general soundness of mind being conceded. The rule also increases its stringency where, in addition to the proof of general insanity, the subscribing witnesses testify to the testator's sanity and capacity to make a will at the time of its execution, and where the dispositions of the instrument are reasonable on their face, and the will is in the handwriting of the testator. In such a case, the proof of insanity at the time of executing the will, ought to be clear beyond all doubt, in order to affect it.—Mullins v. Cottrell, 41 M. 291.

(1866). In this case the testator was a man above the average intellectual level—was about sixty years of age—a successful planter and merchant—but of strong passions and determined will. He was a widower and had two daughters, to whom, at one time, he seemed greatly attached, and he took considerable pains to have them educated. When they were nearly grown, he left them for a few months with a friend, whilst he was absent on a business trip. The daughters, whilst with this friend, attended night meetings at the Methodist church, to which he had an especial antipathy—being himself rather an infidel in his religious notions. He had told his daughters before that

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time, that he did not wish them to attend night meetings, unless he accompanied them, or furnished them an escort. On his return home he did not break with his daughters for attending the meetings in his absence, but again told them that he did not wish them to attend again unless he accompanied them, or furnished an escort. However, in a few weeks they attended the night meetings of that church, from a neighbor's house, and accompanied by his family, on two successive nights, and also joined the church. These meetings were orderly, and attended by the most respectable people. On hearing of the last attendance, he immediately wrote a letter to his daughters, refusing them his care and protection, on account of this act of disobedience. This was twenty-three years before his death. One of the daughters lived ten or twelve years afterwards, and the other survived him. The latter married a member of the Methodist church, to whom he was inimical; she had no children and seemed likely to have none. He gave as a reason for turning off his daughters, their disobedience as above stated, and that they had gone to his enemies for advice instead of coming to him. When he talked about his daughters, he was generally sad, but not excited; and, upon being questioned by several of his neighbors of great intelligence about the disagreement with his children, he stated, sadly but calmly, the cause, and convinced several that he was right.

He was also shown to be a great quiz; and it was proven that he stated to several persons, that he heard in Marshall county, in this state, the cannon fired at Fort Sumpter and Pensacola, in 1861.

He made a will, giving all his property to a niece and her children; it was wholly in his handwriting, and the subscribng witnesses thought he was sane, and he gave them as a reason for disinheriting his daughter, that she was married and well provided for, and had no children, and would not likely have any, and that he did not wish his property to go to her husband's family.

The jury found against the will, but on appeal, the verdict was set aside as unwarranted by the evidence.—Mullins v. Cottrell, 41 M. 291.

(1896). If either the existence of the testamentary capacity or the freedom of its exercise is wanting, the instrument is not the alleged testator's will. Both are essential parts of the proponent's case.—Sheehan v. Kearney, 82 M. 688, 21 So. 41, 35 L. R. A. 102.

(1908). An unsound mind incapable of making a valid will is not shown by proof on a contest that the testator who had no relatives save a child by his divorced wife, whose paternity he denied, devised his property to one who had been his faithful servant for more than thirty years.—Lum v. Lasch, 93 M. 81, 46 So. 559.

III. CONTRACTS TO DEVISE OR BEQUEATH.

§ 66. Performance or breach.

(1860). A party who receives a deed conveying to him property absolutely, may in consideration thereof, bind himself by parol to dispose of the property by will, to a designated beneficiary, and if he execute the will in pursuance of the contract, it will be irrevocable; and if he fail to execute it, it will be a fraudulent violation of his contract, against which equity will give relief to the beneficiary.—Anding v. Davis, 38 M. 574, 77 Am. Dec. 658.

IV. REQUISITES AND VALIDITY.

(A) NATURE AND ESSENTIALS OF TESTAMENTARY DISPOSITIONS.

§ 70. What law governs.

See *ante*, § 2.

(1854). A will of personalty must be made according to the law of the testator's domicile, and if invalid by that law, is invalid everywhere; and this rule is the same, though the testator be absent from home, and make a will in a foreign state, and dies there. And such will must be probated here originally; its probate in the state where he died is void.—Sturdivant v. Neill, 27 M. 157.

§ 72. Testamentary intent.

(1856). The formal publication of his will, by a testator, is unnecessary; a will may be good, if in all other respects regular, without any words of the testator declaratory of the nature of the instrument, or any formal recognition of, or allusion to it.—Watson v. Pipes, 32 M. 451.

§ 73. Disposition of property in general.

(1846). A will directed the transportation of such of testator's slaves as should elect to go to Liberia—there to be emancipated—and that his other estate should be sold, and the money applied, under the direction of the American Colonization Society, to the transportation of his slaves to Liberia and their support after their arrival there. The slaves elected to go, but the executor refused to carry out the trusts in the will. *Held*, that it was a trust of which a court of chancery would take cognizance, as the full measure of relief could not be granted in the probate court.—Wade v. Am. Col. Society, 7 S. & M. 663, 45 Am. Dec. 324.

(1892). A bequest of the interest or dividends of personal property, or of the rents or income of land, to be used for the support of the donee for life, free from liability for his debts, is valid. The enforcement of such a limitation does not violate any rule of public policy, or interfere with the rights of creditors of the donee.—Leigh v. Harrison, 69 M. 923, 11 So. 604, 18 L. R. A. 49.

§ 80. Conditional or contingent will.

(1866). A soldier in the late war between the states, wrote to his wife as fol-

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lows: "In case I never get back to you, I want all I have to be yours." He did get back, sick, and soon afterwards died. *Held*, that the condition on which the letter was to take effect as a will, had not happened; and, moreover, that his declarations made before and after his coming back, that he wanted his wife to have his property, were incompetent to make it a good will.—Magee v. McNeil, 41 M. 17, 90 Am. Dec. 354.

(1903). The fact that an instrument testamentary in character referred to a proposed trip and the dangers incident thereto as the occasion of its execution and that the maker's death while on the voyage was not made a condition upon which its validity depended does not prevent its operation as a will and it may be probated after the return of the testator and his subsequent death.—Redhead v. Redhead, 83 M. 141, 35 So. 761.

§ 82. Unjust or unnatural disposition.

(1866). In determining whether a will is valid, which is unnatural and unjust to a child of testator, being the result of estrangement between them, which estrangement is alleged to be the effect of an insane hatred and aversion to the child, the offspring of a wild and totally unfounded idea, that fills the testator's mind that she has been disobedient and undutiful, it will not be sufficient to overturn the will, to show that the testator's aversion to his heir was unnatural, and without sufficient grounds therefor; but it must also be shown that the idea of disobedience, which is the foundation of the aversion, was wholly without foundation, and a mere figment of a diseased brain. For if the idea were formed on apparent cause, and upon a view on the part of the testator of the conduct of the child, which he might consider erroneous and unjust, and even cruel and unnatural, it would show an error of judgment merely, and not an absolute want of intellect on that subject.—Mullins v. Cottrell, 41 M. 291.

§ 86. Will distinguished from other dispositions of property.

See DEEDS, § 4.

If an instrument be in form a deed, yet is to have no operation until after the maker's death, it will be a will.—(1838) Harrington v. Harrington, 2 H. 701; (1861) Sarter v. Sarter, 39 M. 760.

§ 88. —— Deed or other conveyance or contract.

See DEEDS, § 4.

(1838). An instrument in form of a deed, for a consideration of love and affection to the grantees, gave and granted to them certain slaves, and, also, to one of them, "all the land I now possess, or may possess at the time of my decease, together with all the household goods and chattels in my dwelling house. The above named property at my decease, and not before, an inventory signed with my own hand, and bearing even date, to have and to hold the aforesaid property, unto the above named 'grantees,' for their proper use, absolutely, without any manner of condition." *Held*, to be a will.—Harrington v. Harrington, 2 H. 701.

(1848). An irrevocable deed, by which personalty is conveyed to a trustee for the use of the grantee during life, and after his death to others, is a deed and not a will.—Cameron v. Cameron, 10 S. & M. 394, 48 Am. Dec. 759.

(1854). The judgment of a court, when it has jurisdiction over the subject matter and the person, however erroneous, is not void. Therefore the probate court, having full jurisdiction to determine whether a writing be a will or not, if it admit such writing to record and probate as a will, or as a part of the tetsator's will, its judgment is conclusive until reversed, and the executor cannot insist, in bar of the widow's petition for dower under such a probated paper, that it is not in fact a will but a deed.—Wall v. Wall, 28 M. 409.

(1855). In determining whether an instrument be a deed or a will, the main question is, did the maker intend to convey any estate or interest whatever, to vest before his death and upon the execution of the instrument? Or, on the other hand, did he intend that all the interest and estate should take effect only after his death? If the former, it is a deed; if the latter, a will; and it is immaterial whether he calls it a will or deed, the instrument will have operation according to its legal effect.—Wall v. Wall, 30 M. 91, 64 Am. Dec. 147.

(1857). An instrument which, in consideration of love and affection and of past services rendered, and of future support for life, to be given by the beneficiary to the maker, stipulates that the latter will stand seized of the real and personal property therein mentioned, for his own use during his life, and no longer, and that then a trustee shall convey to the use of the beneficiary, vests in him an interest *in presenti*, to be enjoyed *in futuro* after the death of the maker, and is a deed, not a will.—Exum v. Canty, 34 M. 533.

(1858). The following instrument was propounded for probate as a will:

"I, H, in view of the strong probabilities of my early death, and a desire to secure my friends in their just rights, do hereby convey all my estates, both real and personal, to L and E, in fee simple, to be held by them until my debts, on which they are sureties, are satisfied. I also request L to take charge of T's and give him as good an education as the country affords. Witness my hand and seal," &c. It was signed by the maker, but not sealed, and it was witnessed by four witnesses who proved its execution. The sureties, L and E, resisted its probate, claiming that it was a deed.

It was proved by one of the subscribing witnesses, that H, on the date of the instrument, and during his last illness, requested

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all persons to withdraw from the room, and then asked witness to prepare a paper for him, and send for a justice of the peace, and for H's sister, and also for the grantee, L. Witness drew up the paper according to his directions. Whilst witness was reading it over to H, the persons subscribing as witnesses came into the room, and H signed the paper, and requested them to subscribe as witnesses, which they did, in his presence, and in the presence of each other. The justice did not come; and when the subscribing witnesses came in the room, H said something about fearing that the justice would not come till he was not in a condition to execute it, and that he wished those gentlemen to sign as witnesses, and that it would all be fixed up when the justice came. It was also proven that the instrument lay on H's bed, after its execution, and was handed by one of the witnesses to C, the overseer of H's and that two nights afterwards H asked C where it was, and said, "hold on to it, and keep it; that L and E were his friends, and they would do to tie to, and that the instrument would protect them." The instrument was admitted to probate, and L and E appealed.

Per Curiam, "The question is whether the instrument admitted to probate, was designed by the deceased to operate as a will or a deed. We are of opinion that it was intended to operate as a deed, and whether it can so operate or not, it cannot be regarded as a will, for the reason that it was not designed as such. Decree reversed."—Edwards v. Smith, 35 M. 197.

(1860). A party who receives a deed conveying to him property absolutely, may, in consideration thereof, bind himself by parol to dispose of the property to a designated beneficiary by will; and if he executes a will in pursuance of the agreement, it will be irrevocable, and if he fail to execute it, it will be a fraudulent violation of his contract, against which equity will give relief to the beneficiary.—Anding v. Davis, 38 M. 574, 77 Am. Dec. 658.

(1861). An instrument which was in form a deed, contained the clause: "For the love and affection which I have for my wife, Harriet N. Sartor, I give unto her all my property, real and personal, during her widowhood; and if she marries, it is all to go back to my niece, Sally." There was nothing else in the instrument which showed unequivocally whether the maker intended it to take effect before or after his death. *Held*, that it was doubtful, from the expression, "I give, * * * during widowhood," whether the maker intended to give an interest *in presenti*, or only after his death; but that upon the consideration that he gave all his estate, it was highly improbable that he intended the gift to take effect before his death, and it was, therefore, held to be a will.—Sartor v. Sartor, 39 M. 760.

(1871). A will is an instrument by which one makes a disposition of property to take effect after his death. In its nature it is ambulatory and revocable during his life. An instrument which conveys to the grantee a present interest, though to be enjoyed in possession in the future, is a deed and not a will, and the interest of the grantee cannot, after its execution, be defeated by the grantor, and this, although it be voluntary.—McDaniel v. Johns, 45 M. 632.

(1884). An instrument, though in form a deed and styled and acknowledged as such, but which passes no present interest, and is to have no operation until the death of the maker, and directing that the person named as grantee is to have only the surplus after paying his debts, being testamentary in its character, is not a deed but a will, and to be valid must be attested and probated.—Cunningham v. Davis, 62 M. 366.

(1907). A writing not attested as a will but acknowledged as a deed conveying a life estate, followed by the words "I will," a second life estate to a daughter and providing that after the death of the daughter the property "goes to her children and their heirs and assigns forever," is not a will but a deed to the second life estate as well as to the first one.—Brinson v. Sandifer, 90 M. 41, 42 So. 89.

(1907). A conveyance, disposing of land, "in consideration of the sum of $1 and other valuable consideration, that J. T. Rogers will look after my welfare and business when so required to do * * * to take effect and be of force after my death," is not a will but a deed, conveying to the person named a remainder interest. The consideration it recites is described and contractual, and cannot be varied by parol.—Rogers v. Rogers, 43 So. 434, not officially reported.

§ 93. Evidence as to character of transaction or instrument.

(1832). Where it is doubtful on the face of the instrument whether it be a deed or will, parol evidence to show the facts attending its execution, and the declarations of the testator at the time of making it, are admissible.—Herrington v. Bradford, W. 520.

(1910). Whether a writing was intended as a will or not may be shown by parol testimony alone, or by such testimony together with the writing.—Prather v. Prather, — M. —, 52 So. 449.

(B) FORM AND CONTENTS OF INSTRUMENTS.

§ 94. Necessity and sufficiency of writing in general.

No particular form is required in the drawing up of a will; any paper is sufficient, if it show a testamentary intent. Hence, a letter, or letters, written wholly in the handwriting of a decedent, in which he expresses clearly an intent to make a disposition of his

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property after his death, are testamentary, and may be admitted to probate as the will of the writer.—(1848) Anderson v. Pryor, 10 S. & M. 620; (1866) Magee v. McNeil, 41 M. 17, 90 Am. Dec. 354.

(1899). An instrument which states "Want Sarah's relatives to have all property" written and signed by decedent, without date is not, in the absence of evidence that it was intended to be testamentary, a will.—Young v. Wark, 76 M. 329, 25 So. 660.

(1910). A parol agreement by two sisters that the survivor should have certain personal property, is not a testamentary disposition of the property. It amounts to no more than a futile effort to make a parol will.—Marshall v. Stratton, 96 M. 465, 51 So. 132.

§ 96. Form of instrument in general.

(1848). A soldier in the Mexican war of 1846, who was killed at Buena Vista, on 22d February, 1847, wrote a letter whilst in Mexico, dated June 4th, 1846, in which he said: "If I never come back, ma promised me my property should go to Martha Yarborough;" and on 19th July, he wrote another letter in which he said: "I wish you to inform Yarborough what I told you concerning my property, ma promised me it should go as I wished, to my niece Martha;" and he also on 27th October, wrote to "Martha," as follows: "Your grandma promised me to let you take Nan and Jake (his slaves), in case I never get back." *Held*, that these letters were testamentary, and constituted the writer's will; and that a letter dated 29th October, 1846, to one of his brothers in which he requested him "to tell John" (another brother, who was in difficulties about shooting at a negro), "not to be uneasy. Every cent I have in the world is at his disposal. I tried to get a discharge, so that I might come and be with him at his trial, but could not," was not testamentary.—Anderson v. Pryor, 10 S. & M. 620.

(1910). A letter written by a decedent to a brother, in which he states that if anything should happen to the decedent, he wanted certain of his brothers to have his property and to be sure and not let anyone beat them out of it in the days to come, was held a valid will where the writer did not intend to deliver to his brother during his own lifetime, but kept it, treating and intending it as his will.—Prather v. Prather, — M. —, 52 So. 449.

(C) EXECUTION.

§ 111. Signature or subscription by or for testator.

(1856). Where the testator, being capable in law of making a will, has full consciousness of the act to be performed, and intending to do it, consents to have his hand guided by another in writing his signature to the will, and it is accordingly so written, it is a sufficient signing within the statute, whether his inability to write his name results from a want of education or from physical debility; such a signing is equivalent to an actual signing by the testator, or at least to a signing by such third person, by the express direction of the testator.—Watson v. Pipes, 32 M. 451.

(1890). Under the requirement that a will shall be attested by two or more witnesses in the presence of the testator, where he has signed, and, having a mental consciousness of the act to be performed, but, because of the position he is in, does not actually see the witnesses subscribe their names, the attestation is good, provided he had the physical ability to change his position, and by so doing could have seen the signing.—Walker v. Walker, 67 M. 529, 7 So. 491.

(1890). A will was prepared at the testator's direction, and at his request three persons were called to witness its execution. He was quite sick and was lying in a "sort of stupor," but when spoken to would respond intelligently. The paper was handed to him, with the remark, "Here is your will," when he called for and adjusted his spectacles and either read or glanced over the instrument, and, knowing the contents, signed it in the presence of the witnesses, and asked if they would identify his signature. They answered yes, and thereupon took the paper and subscribed it as witnesses, at a table in the room, which was back of the testator, and where they were not actually seen by him, but where he could have seen them by turning his head on the pillow, which he was easily able to do. *Held*, a sufficient execution and attestation.—Walker v. Walker, 67 M. 529, 7 So. 491. See (1876) Temple v. Hammock, 52 M. 360.

(1896). Another may assist a testator to sign his will by steadying his hand, and a testator who cannot write may sign his will by his mark.—Sheehan v. Kearney, 82 M. 688, 21 So. 41, 35 L. R. A. 102.

(1896). Code 1892, § 1520, means nothing more by the phrase, "shall always be in the proper handwriting of such person," than that the "signature" shall be written, as contradistinguished from engraved, or lithographed, or printed, in case the party be able to write; and if he be not able to write it is meant that his "signature" in the cases provided by the statute, shall be made by "his proper mark," and not "printed, engraved, or lithographed." This statute does not require the signature to a will to be written out: a mark may still be adopted as a signature.—Sheehan v. Kearney, 82 M. 688, 21 So. 41, 35 L. R. A. 102.

(1896). Whatever the testator is shown to have intended as his signature will be held a valid signing of the will, no matter how imperfect, or unfinished, or fantastical, or illegible, or even false, the separate characters or symbols he used may be, when critically judged.—Sheehan v. Kearney, 82 M. 688, 21 So. 41, 35 L. R. A. 102.

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(1896). In signing a will, the testator must have testamentary capacity and the act of signing must be in the exercise of such capacity.—Sheehan v. Kearney, 82 M. 688, 21 So. 41, 35 L. R. A. 102.

(1896). Any signature or mark by the testator, or by another in his presence and at his express direction, to the will, as and for his completed signature, and acknowledged and adopted by him as such at the time is a sufficient signing of the instrument within the meaning of Code 1892, § 4488.—Sheehan v. Kearney, 82 M. 688, 21 So. 41, 35 L. R. A. 102.

§ 113. Attestation and subscription by witnesses.

(1860). The particular part of the will on which the attesting witnesses subscribe their names, is immaterial; it is sufficient if the attesting witnesses sign their names upon the paper, in presence of the testator, in testimony that it was signed and published by him as his will.—Murray v. Murphy, 39 M. 214.

(1860). If one of the subscribing witnesses to a will, being a justice of the peace, prefix to his signature a certificate of the acknowledgment of the will by the grantor, in the ordinary form of certificates of acknowledgment of deeds, &c., it will not vitiate his attestation. The certificate is superfluous and useless, and cannot have the effect to impair his signature, which was the essential act to be done.—Murray v. Murphy, 39 M. 214.

(1898). An amanuensis who has signed a testator's name, per his own, to such testator's will cannot be held to have affixed his signature as a witness to the testament.—Burton v. Brown, 25 So. 61, not officially reported.

(1908). It is a rule of substantive law and not a rule of evidence, that the written attestation of three competent witnesses to a will shall be essential to its validity; in other words the written attestation of three competent witnesses is, by the substantive law, made a solemn formality without the observance of which the will was prior to Code 1871, § 1101—an act in substance the same as that of St. 25, Geo. II, ch. 6—absolutely void, and is now void as to the subscribing witness.—Swanzy v. Kolb, 46 So. 549, not officially reported.

§ 115. —— Number of witnesses.

(1843). The Statute of Wills in Mississippi requires three witnesses to a will devising real estate. Where a will bequeathing both real and personal estate had but two witnesses it was held good as to the personal estate but void as to the real estate.—Nutt v. Nutt, Freem. Ch. 128.

§ 116. —— Competency of witnesses.

(1849). The husband is incompetent to attest a will which makes a devise or bequest to the wife to her sole and separate use.—Rucker v. Lambdin, 12 S. & M. 230.

(1849). The words "credible witness," in the statute of wills, means competent witness, and the witness must be competent at the time of attestation.—Rucker v. Lambdin, 12 S. & M. 230.

(1908). Under Code 1871, § 1101, not the whole will, but the devise or legacy to the interested subscribing witness is void. The annulment of such devise or legacy to the subscribing witness leaves him competent as to the remainder of the will.—Swanzy v. Kolb, 46 So. 549, not officially reported.

(1908). The word "credible" in Code 1871, § 2388, which provides that, "If not wholly written and subscribed by himself or herself, it (the will) shall be attested by three credible witnesses in case of the devise of real estate," is synonymous with "competent."—Swanzy v. Kolb, 46 So. 549, not officially reported.

(1908). That which in Code 1871, § 1101, providing, "If any person shall be a subscribing witness to a will wherein any devise or bequest is made to such subscribing witness and the will cannot otherwise be proved, such devise or bequest shall be void and the witness shall be competent as to the residue of the will as if no such devise or bequest had been made, and shall be compelled to testify," is to be thus "otherwise proved," is the execution of the will and not its contents.—Swanzy v. Kolb, 46 So. 549, not officially reported.

§ 117. —— Presence of testator and witnesses.

It is essential to the due attestation of a will, that the witness attest it in the presence of the testator.—(1849) Rucker v. Lambdin, 12 S. & M. 230; (1856) Watson v. Pipes, 32 M. 451.

(1856). And the presence contemplated by the statute is not simply the bodily presence of the testator, but it is also essential that he be mentally capable of recognizing and actually conscious of the act of attestation when performed. To be corporeally present, it is not indispensable that the testator, and the witnesses should be in the same room, or in the same house, or that he actually see them attest the will; it is sufficient if the attestation be within the scope of the testator's view, and where he can see the witnesses, if he desire to do so.—Watson v. Pipes, 32 M. 451.

(1857). The object of the statute in requiring a will to be attested by the subscribing witnesses, in the presence of the testator, so far as the form of attestation is concerned, is to identify the instrument as that signed and published by the testator, and to prevent fraud and imposition in establishing spurious wills, and at the same time to show the persons, by whom the facts necessary to establish the will can be proven, when the will shall be propounded for probate; and

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all that is necessary for this purpose is that the witnesses shall sign their names upon the paper, in presence of the testator; and hence, it is well settled that no particular form of words is necessary to constitute an attestation.—Fatheree v. Lawrence, 33 M. 585.

§ 118. —— Subscription or acknowledgment of testator in presence of witnesses.

(1910). An attestation of a signature to a will by parties who did not see the testators sign but signed at his request, and the testator afterwards exhibited the will to other persons stating to them that it was his will, and that the signature was his signature, is sufficient for it is not required by the Mississippi statute on the subject that the subscribing witnesses should see the testator sign.—Miller v. Miller, 96 M. 526, 51 So. 210.

§ 125. Codicils.

(1899). A codicil will pass real estate only where attested by three witnesses.—Johnson v. Delome Land &c. Co., 77 M. 15, 26 So. 360.

(D) HOLOGRAPHIC WILLS..

§ 130. Nature and requisites in general.

(1904). A holographic will in the form of a letter which recited that the testator was in bed, did not know that he would live till the next day and requesting an answer from the person to whom it was addressed, is valid and not dependent upon a contingency indicated by the request for an answer although it is never answered and the testator lived several months after writing it.—Buffington v. Thomas, 84 M. 157, 36 So. 1039, 105 Am. St. 423.

(1904). A will testamentary in its character wholly written, dated and signed by the testator is a valid holographic will, although it contains a request that the person to whom it is addressed shall keep its contents private.—Buffington v. Thomas, 84 M. 157, 36 So. 1039, 105 Am. St. 423.

§ 132. Handwriting of testator.

(1903). A testamentary instrument written in the handwriting of the testatrix except two words, "my will," as a caption thereto written by another is valid as a holographic will if complete and perfect in itself.—Baker v. Brown, 83 M. 793, 36 So. 539.

(E) NUNCUPATIVE WILLS.

See *post*, § 209.

§ 136. Nature and requisites in general.

Nuncupative wills have never been regarded with favor by the courts; greater strictness of proof in several particulars, is required in order to establish them, than in cases of written wills. If the proof fail to show a strict compliance with the statute in every particular, the alleged will cannot be established. The *rogatio testium*, which is in truth the test of the *animus testandi*, must be strictly proven.—(1854) Woods v. Ridley, 27 M. 119; (1857) Lucas v. Goff, 33 M. 629.

(1897). Verbal instructions for drawing up a written will cannot be admitted to probate as a nuncupative will.—Donald v. Unger, 75 M. 294, 22 So. 803.

(1897). An illness of two or three months during which the party had ample time and opportunity, after notice of the impossibility of recovery, to make a written will and after repeated efforts to do so is not a last sickness within the meaning of Code 1892, authorizing nuncupative wills in the last sickness of the deceased.—Donald v. Unger, 75 M. 294, 22 So. 803.

§ 138. Property which may be disposed of.

(1882). Under Code 1880, § 1266, and other statutes, as at common law, land cannot be devised by a nuncupative will.—Sadler v. Sadler, 60 M. 251.

§ 140. Circumstances and occasion of making.

(1830). It is essential to a nuncupative will, that the words should be spoken, *animo testandi*, and that the testator should believe he was making a will.—Gibson v. Gibson, W. 364.

(1873). Words of disposition, though in the last illness, do not constitute a nuncupative will unless it be proved that at the time the testator called on some person present to take notice, or bear testimony that such is his will, or words to that effect. Besides evidence of testamentary capacity, the statute requires the clearest proof, not only of the *animus testandi*, but of the *rogatio testium*.—Andrews v. Andrews, 48 M. 220.

(1873). Where one being informed by his attending physician that he is in danger of death, and being asked what disposition he wishes to make of his property, answers, stating the disposition, this does not constitute a nuncupative will. The statute is to be strictly construed with respect to the requirement that the testator shall call on some person present to take notice or bear testimony that such is his will, or words to that effect.—Andrews v. Andrews, 48 M. 220.

(1876). Where the testimony shows that a dying man called for pen, ink, and paper for the purpose of making a will, and they being brought, he was assured by the party who was writing at his dictation, that he could make a valid verbal will, and he replies "well," and continues to make disposition of his property, and there is testimony that he said, "You all take notice of what I say, or am about to say," and then proceeds with the disposition, the requirements of the law for making a nuncupative will are fully met.—George v. Greer, 53 M. 495.

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(1879). Proof that one, while very ill, a few hours before her death, stated that she wanted her husband to have her property, although in the presence of two witnesses, does not constitute a nuncupative will, if she neither mentions a will nor calls upon those present to take note of her language.—Broach v. Sing, 57 M. 115.

§ 141. Making, validity, and sufficiency of disposition.

(1849). If it be shown that the decedent called upon his physician to write his will, and was informed by the latter that there was not time to do so, but there were competent witnesses present (naming them to the testator), and that he could state his wishes to them; and thereupon the decedent proceeded to state his will; and after a few minutes, being informed by his physician that his will would not probably be valid unless he mentioned all of his brothers, and he thereupon stated to the same witnesses that he gave to each of his brothers $5.00; it was held, that the statute was complied with, and the will was valid. But if, in such case, the will be immediately written down by the witness, but not read over to testator, it will not be good as a written will.—Parkison v. Parkison, 12 S. & M. 672.

(1854). The alleged testator being near his death, upon the arrival of his brother M, said, "Oh, my brother, I wish I could have a few moments ease, that I could talk with you, I want you to promise to settle my business." He was then asked if it was a part or the whole of his business, and he replied, "The whole. I wish you to do the best you can for me; I wish James Morton to be made safe." M then asked him how he was to ascertain the situation of his business, and he replied, "You must hunt it out yourself; you can ask James Morton, he knows more about it than anybody else." Soon afterwards he exclaimed, "If I had time I would make a will." He was informed that he could make a verbal will by stating his wishes to those present, and he then remarked quickly, "I wish my wife to have this place," when he was stopped by a spasm and died soon afterwards, without saying more about his will. *Held*, that the evidence showed that he did not use any words in a testamentary sense, except the last words, making a devise to his wife.—Woods v. Ridley, 27 M. 119.

(1857). The deceased being informed of his precarious condition, by his attending physician, was asked if he had made any disposition of his property, to which he replied, that it was too late, and that he was unable to make a written will, but that he desired E H to have all his property, and that he wanted some good person to take charge of her, so that she might be benefited by it, but that he was afraid it would not be done, and that his property would fall into the hands of some person who would destroy it. *Held*, that these facts did not sufficiently establish the *animus testandi*, and there was no will.—Lucas v. Goff, 33 M. 629.

§ 142. Attestation.

(1830). There must be two witnesses to a nuncupative will.—Gibson v. Gibson, W. 364.

(1849). The statute requires that the *rogatio testium* shall be proved by two witnesses; but it does not require that two witnesses shall be called on by the testator to bear witness; the calling on one is sufficient, if the calling be proved by two.—Parkison v. Parkison, 12 S. & M. 672.

(F) MISTAKE, UNDUE INFLUENCE, AND FRAUD.

§ 154. Undue influence.

(1896). The testator's signature must be affixed in the absence of undue influence.—Sheehan v. Kearney, 82 M. 388, 21 So. 41, 35 L. R. A. 102.

(1908). On grounds of public policy a will is presumed void, where made by a patient in favor of his physician to the exclusion of relatives, and there is no evidence showing a reason for the exclusion.—Hitt v. Terry, 92 M. 671, 46 So. 829.

§ 162. Evidence.

(1908). On the question of undue influence in the execution of a will the jury in a will contest case have the right to take into consideration the unnaturalness of the will in its disposition of the property in connection with the evidence as to the relation of the parties, and the state of feeling between the testator and his relatives.—Hitt v. Terry, 92 M. 671, 46 So. 829.

§ 163. —— Presumptions and burden of proof.

(1910). The proponents of a will which unnaturally disturbs the property of the testator, have the burden of giving a reasonable explanation of the unnatural character of the will.—Jamison v. Jamison, 96 M. 288, 51 So. 130.

§ 166. —— Weight and sufficiency.

(1910). The law does not demand direct and positive evidence to show undue influence in making a will. The case may be made by convincing circumstantial evidence.—Jamison v. Jamison, 96 M. 288, 51 So. 130.

(G) REVOCATION AND REVIVAL.

§ 167. Revocation by act of testator in general.

(1866). A will is revoked by implication where, after its execution, there occurs a material change in the testator's circumstances, imposing such new obligations and duties, as to raise an inference that the testator would not adhere to a will made previous to their existence, and would consider it a moral duty to revoke it, such as a subsequent marriage, and birth of a child, &c. But this rule does not apply where there has been a mere change in the testator's feelings, as if before death he became

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reconciled to a child which he disinherited by his will.—Jones v. Mosley, 40 M. 261, 90 Am. Dec. 327.

(1866). A misapprehension on the part of the testator as to the legal capacity of a devisee to take, is a mistake of law and not of fact, and will not affect a clause of revocation contained in the will.—Vining v. Hall, 40 M. 83.

§ 171. Destruction or mutilation.

(1882). Where a will is mutilated by the testator, this is sufficient evidence of revocation. It is doubtful whether his declarations as to the will and its contents, and his testamentary intention, other than those which accompany the act of mutilation, are admissible in evidence, but if there be only a presumption that the mutilation was by the testator, such declarations, though not part of the *res gestæ*, are admissible, since otherwise the intent of the decedent may be defeated by accident or fraud.—Tucker v. Whitehead, 59 M. 594.

§ 172. Cancellation, obliteration, or alteration.

(1836). An alteration or erasure, however small, made with intent to revoke, is a good revocation. In this case, the testator made a will in 1831, and afterwards expressed an intention to make a new will, and he applied to B to write "a new will," presenting at the same time the will of 1831, in which were alterations and erasures, which he pointed out, and objected to other provisions in it. He stated to B that he had done away with that will, and that the interlineations and alterations were made by his directions; and B having made a memorandum of the additional alterations desired, received the will, interlined and erased as above described, as a guide to be used in drafting another. During his last illness he expressed a wish that if B should not write a new will, a will he had made in 1829 should go into effect. *Held*, that the will of 1831 was revoked, and that the will of 1829 was not revived.—Bohannon v. Walcot, 1 H. 336, 29 Am. Dec. 631.

(1855). An act of cancellation or obliteration is equivocal in itself, and not conclusive, but only *prima facie* evidence of an intention to revoke; and where such an act is associated with another, upon which it is dependent, and which fails of effect, the *prima facie* presumption of an intent to revoke is rebutted, and the obliteration or cancellation will not have that effect; but it is otherwise of a will duly executed, containing an express clause of revocation, but which fails to take effect as to a disposition of the estate therein attempted to be made.—Hairston v. Hairston, 30 M. 276.

§ 178. Subsequent will.

(1855). The doctrine of dependent relative revocations, in which the act of cancellation, obliteration, &c., being done with reference to what is intended to be an effectual disposition of the estate, will be a revocation or not, as the relative act is efficacious or not, has no application to a case in which the intent to revoke is contained in a will or writing duly executed. Hence, if a will containing a clause of revocation be wholly inoperative as to the disposition of the estate therein attempted to be made, because the devisee is incapable of taking, yet it will be good as a revocation of a former will.—Hairston v. Hairston, 30 M. 276.

(1866). Where the second will had been lost, and no satisfactory proof of its contents could be made, except as to the revoking clause, the failure of the lost will to take effect as a devise from inability to prove its contents would not prevent its revoking clause taking effect.—Vining v. Hall, 40 M. 83.

(1866). Where a will is only attested by two witnesses, a revoking clause therein will not revoke a former will, except so far as such former will relates to personalty—a will of realty under the statute (Rev. Code of 1857, p. 432, art. 34, 35), being incapable of revocation by another will, except the last, will be executed, so as to pass realty.—Vining v. Hall, 40 M. 83.

§ 184. Codicil.

(1855). A codicil duly and legally executed, which makes a disposition of the testator's property inconsistent with the disposition made in the will, is to the extent of such inconsistency, a revocation of the will without an express clause to that effect, and it will so operate, although the disposition attempted to be made by the codicil be void for illegality. Thus, when a testator by his will gave his slaves absolutely to his widow, but by a codicil thereto gave them to her "if she should marry and have issue, otherwise that they should be set free," the codicil, though void as to the attempted emancipation, revokes the bequest of them made in the will, and the widow can only claim such interest in the slaves as is vested in her by the terms of the codicil.—Read v. Manning, 30 M. 308.

(1896). Where the devise or bequests in a will are clear and free from doubt, the intention to revoke by a codicil must be equally clear and explicit in order to work the revocation.—McGehee v. McGehee, 74 M. 386, 21 So. 2.

(1896). A testatrix by a codicil, No. 3, devised and bequeathed "Hollywood house, household and kitchen furniture, with the section of land (32) on which it stands" to her sister. Codicil No. 4, limited this devise to a life estate, with remainder over to the sister's second son. Prior to her death, the testatrix felt obliged to provide for certain outstanding indebtedness and added another codicil revoking "all codicils and bequests save my dwelling house and furniture belonging to the same." *Held*, that no part of codicils 3 or 4 was revoked and that the remainderman took Hollywood house and section 32 on which it stood.—McGehee v McGehee, 74 M. 386, 31 So. 2.

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§ 188. Revocation of joint or mutual will.

(1908). Where a husband and wife agreed that their property was to be held jointly and on the death of either it should go to the other for life and after the death of the survivor then to be divided equally between their respective heirs and the contract was to operate as a conveyance and not as a will, the agreement was a covenant to stand seized and the wife could not after her husband's death sue to cancel the agreement as a cloud on title and have the property vested in her where no fraud or mistake was established.—Robertson v. Robertson, 94 M. 645, 47 So. 675.

§ 190. Revocation by operation of law in general.

(1900). A nuncupative will executed according to the laws of Louisiana will not be revoked by the removal and change of citizenship from Louisiana to this state.—Pratt v. Hargraves, 77 M. 892, 28 So. 722, 78 Am. St. 551.

§ 191. Marriage and birth of issue.

(1854). By the common law, the marriage of a *feme sole* was a revocation of a will made by her, for the reason that marriage destroys the ambulatory nature of the will, and left it no longer subject to her control, and, moreover, by the marriage, the wife's chattels vest in the husband, which puts an end to the will. And if she become a *feme sole* again by the dissolution of the marriage, the will is not revived without republication.—Garrett v. Dabney, 27 M. 335.

(1908). A will is not impliedly revoked by the subsequent marriage of the testator and this is the case, although the statute makes the widow an heir.—Hoy v. Hoy, 93 M. 732, 48 So. 903.

§ 194. Disposition of property or other alteration of estate.

(1858). A deed executed by a testator after the publication of his will, is not a revocation of the will, unless the whole estate devised be conveyed in the deed. If the deed conveys a part of the property devised, it will operate as a revocation *pro tanto*, and to the extent of the inconsistency between them.—Wells v. Wells, 35 M. 638.

§ 197. Republication of will in general.

(1836). Where a will is revoked, it has neither a potential nor actual existence, and it requires for its revivor some express and direct act of the testator equivalent to adopting it as his present will, and as a new testamentary act, and the expression of a wish that, in case a new proposed will should not be executed, that a former revoked will should take effect, is not sufficient to revive it.—Bohannon v. Walcot, 1 H. 336, 29 Am. Dec. 631.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(A) PROBATE AND REVOCATION IN GENERAL.

§ 204. Statutory provisions.

(1882). Code 1880, § 1969, making probate in common form *prima facie* evidence of validity, not intended to be retroactive, has no applicability to wills probated before its enactment.—Tucker v. Whitehead, 59 M. 594.

§ 205. Necessity for probate.

(1855). The probate of a will is a judicial power, confided by our laws to the probate judge, and, unless shown to have been exercised by him, no testamentary paper can have the effect of a will.—Fatheree v. Lawrence, 30 M. 416.

(1856). If the will dispose of the testator's property, as in case of intestacy, its probate is unnecessary, for the devisees and legatees may recover on their title as heirs and distributees.—Campbell v. Webster, 31 M. 345.

(1856). Whether a testamentary document, made by a *feme covert* with the assent of her husband, be regarded as a will, or as an instrument in the nature of a last will and testament, it is equally necessary that it be regularly admitted to probate.—Lee v. Bennett, 31 M. 119.

(1877). A will not probated, and not acted on as being a will, is not admissible as showing color of title.—Rothschild v. Hatch, 54 M. 554.

(1885). Before a will can be admitted in evidence in support of title to property, therein bequeathed or devised, it must appear to have been duly probated. A record of the will, on due proof of its execution, will not do.—Fatheree v. Lawrence, 30 M. 416.

(1899). Courts of equity will not recognize or act upon a will until it has been probated.—Pratt v. Hargreaves, 76 M. 955, 25 So. 658, 71 Am. St. 551.

(1907). Where a will reciting a valuable consideration directs a sum of money to be paid a designated person and charges it preferentially on the estate, an express trust is imposed on the executors to pay the amount and it is not necessary to have it probated.—O'Reilly v. McGuiggan, 91 M. 498, 44 So. 986.

§ 209. Nuncupative wills.

See *ante*, § 140.

(1849). A nuncupative will cannot be established without proof, in accordance with the statute, that the alleged testator

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called upon a person present, to take notice, that the disposition then made is his will.—Garner v. Lansford, 12 S. & M. 558.

(1854). The courts of this state will not pretend to set aside the probate of a nuncupative will made in a foreign state; yet they will, in the exercise of this power to construe the will, determine what part of the words spoken are of a testamentary character, and confine the operation of the will to such words.—Woods v. Ridley, 27 M. 119.

(1876). Under Code 1871, § 2394 (Code 1880, § 1268; Code 1892, § 4494), nuncupative wills cannot be primarily admitted to probate without citation previously served on all the heirs resident in the state. It is the probate which must take place within six months unless the words have been reduced to writing within six days of their utterance. And if, after the six months, but within two years allowed for contesting, the heirs appear and raise the issue *devisavit vel non*, testimony to establish the will cannot be excluded on said issue on the ground that six months had then elapsed since the speaking of the words claimed to be testamentary.—George v. Greer, 53 M. 495.

§ 213. Probate in common form.

The probate of a will in common form, is a mere incipient step necessary to its execution, and is not binding on the heirs or distributees, who may have it reopened, and the question of its validity tried.—(1843) Hamberlin v. Terry, 7 H. 143; (1845) Cowdens v.. Dobyns, 5 S. & M. 82; (1849) Garner v. Lansford, 12 S. & M. 558.

§ 215. Determination in probate proceedings as to validity or construction of provisions of will.

(1856). The probate court has no jurisdiction to entertain a petition by the heir to set aside the probate of a will, on the ground of the illegality of the bequests therein made, and to re-admit it to probate, so far as the bequests are legal; in a proceeding in relation to the probate of a will, the court has no power to construe its contents.—Lusk v. Lewis, 32 M. 297.

(1856). If a will be alleged to have illegal devises in it, still, if it be properly executed, it will be admitted to probate, and the order of the probate will be general, extending to the whole will. The court cannot restrict the probate to such parts as it may deem of legal validity. The validity of the devises may be contested afterwards. —Lusk v. Lewis, 32 M. 297.

§ 217. Successive applications for probate.

(1878). The refusal to probate a will in common form on an *ex parte* application, under Code 1871, § 1099, will not prevent a subsequent application by the legatee for a full and formal investigation on an issue of *devisavit vel non*.—Martin v. Perkins, 56 M. 204.

§ 221. Revocation of probate.

(1849). The revocation of the probate of a will by the probate court, without notice to any of the legatees, and without any issue being submitted to the jury, is invalid, and distribution made after such revocation, as in cases of intestacy, is no bar to the claim of a legatee for his legacy.—Quinn v. Moss, 12 S. & M. 365.

(1849). A petition was filed by the heirs to set aside the probate of a nuncupative will, and for distribution. The administrator, who had been appointed before probate of the will (there being no new appointment of an administrator *o. t. a.* after probate), and who had administered the estate to final settlement, was a defendant in his character as administrator, and also personally. The court set aside the probate and decreed distribution. *Held*, that no decree for distribution could be made, because there was no administrator *c. t. a.* before the court, and that the original (and sole) administrator should not have been joined as a party in his trustee capacity.—Garner v. Lansford, 12 S. & M. 558.

(1849). If a nuncupative will be admitted to probate without the requisite proof, the probate court may, at a subsequent time, upon petition of the heir, without a jury, set aside the probate; but the executor would then have a right to introduce other proof to sustain the will.—Garner v. Lansford, 12 S. & M. 558.

(B) ACTIONS TO ESTABLISH OR DETERMINE VALIDITY IN GENERAL.

§ 222. Nature and form of remedies in general.

(1839-43). Courts of equity have jurisdiction to correct mistakes and obvious omissions in a will, but they must be such as are demonstrable from the scope and structure of the will or as are readily pointed out by a plain construction of its terms.—Nutt v. Nutt, Freem. Ch. 128.

(1845). When a petition was filed attacking the probate of a will on the ground that it appeared on its face not to be a will, and an issue *devisavit vel non* was prayed for, this was held a proper remedy.—Cowden v. Dobyns, 5 S. & M. 82.

Generally in all cases where the competency of the testator, or the due execution of the will, according to the forms of law, is involved, an issue *devisavit vel non* is the proper remedy, and these are the only questions triable under that issue.—(1856) Lusk v. Lewis, 32 M. 297; (1866) Cameron v. Watson, 40 M. 191.

(1860). Where a will has been admitted to probate, in common form, as a will of realty, and it appear from the record that it was attested and proved by three witnesses, the proper mode in which to contest

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its attestation and probate as a will of realty, is to petition for an issue *devisavit vel non*.—Murray v. Murphy, 39 M. 214.

The probate court may set aside the probate of a deed which was allowed as a will, without an issue *devisavit vel non*.—(1855) Wall v. Wall, 30 M. 91, 64 Am. Dec. 147; (1861) Sartor v. Sartor, 39 M. 760.

(C) PROBATE OR ESTABLISHMENT OF LOST OR DESTROYED WILLS.

§ 231. Nature and form of remedies in general.

(1866). Where the contents of a will which has been improperly destroyed, are satisfactorily proven, they will be established as the will of the testator; but the policy of the law requires such contents to be established by the clearest, and most conclusive, and satisfactory proof.—Vining v. Hall, 40 M. 83.

(1866). Whether, if a part of the contents be clearly proven they can be established, or whether it is essential that the whole contents be established; *Quære?* But if there be no satisfactory proof of the contents so far as establish any part of the will, except a clause revoking all other wills, that clause will be established, and will have the effect to revoke former wills. The failure of the will from want of proof of its contents, or from any other matter *dehors* the will does not prevent the revoking clause from taking effect.—Vining v. Hall, 40 M. 83.

§ 234. Loss, suppression, or destruction of instrument.

(1881). Where, merely to correct the spelling and make more legible his holographic will, the testator has it copied, and attempts to execute the copy, and then destroys the original, carefully preserving the copy, which, however, is ineffectual for want of proper attestation, the original, notwithstanding such destruction, remains his will, and on due proof, may be admitted to probate.—Wilbourn v. Shell, 59 M. 205, 42 Am. Rep. 363.

(1881). In such case, where the copy is proved to be such by the copyist, who is disinterested, and there is proof that the testator attempted to execute it and preserve the same as his will; that the original was in form complete, and not merely preliminary or provisional; that the testator declared it to be his will, and there are other corroborating circumstances in support of the will, and no evidence going to show a revocation, proof of the will is sufficient to authorize its being admitted to probate.—Wilbourn v. Shell, 59 M. 205, 42 Am. Rep. 363.

(D) PROBATE OR RECORD OF FOREIGN WILLS.

§ 240. Instruments which may be admitted to probate or record.

In this case, the high court reversed a decree giving a right claimed under a will made in a sister state; and the reversal was on the ground that the copy of the will was not authenticated according to law; the court refused to enter a decree final for the defendant, but stated that they would either dismiss the bill without prejudice, or remand the cause, so that the complainant might get an amended transcript. The bill was remanded, and again it was a second time remanded for the same reason in this case.—(1849) Stewart v. Swanzy, 12 S. & M. 684; (1852) Stewart v. Swanzy, 23 M. 502.

(1873). Only such foreign wills as dispose of property in this state are allowed to be probated here.—Wilson v. Cox, 49 M. 538.

(1898). In proceedings to probate a will made in another state, the court should not compel the proponent to elect whether he will offer the original will or an authenticated copy.—Pratt v. Hargreaves, 75 M. 897, 23 So. 519.

(1900). If a person domiciled in Louisiana there execute what is denominated by the laws of that state a nuncupative will, the same being written on the books of a notary public, and made by law a public record, the removal of which from the state is prohibited, and such person afterwards remove to and become a citizen of this state and die here, the will can be probated in Mississippi upon the production of a duly authenticated copy from the Louisiana record.—Pratt v. Hargreaves, 77 M. 892, 28 So. 722, 78 Am. St. 551.

§ 241. Necessity of original probate in state of testator's domicile.

(1857). Generally a foreign will cannot be probated here in the first instance, and if so probated the probate may be set aside at any time, without reference to the statute prescribing five years in which to contest wills.—Bailey v. Osborne, 33 M. 128.

§ 242. Nature and situs of property.

(1858). The probate of the will, in a foreign jurisdiction, in which the testator was not domiciled, but had property, will be recognized as valid by the courts of the domicile, as to the property situated in the state where probate was made, if such property should afterwards be brought within the domicile, for each state has the power to regulate for itself the disposition of property within its limits, as it sees proper, and such disposition, if valid there will be recognized as valid everywhere.—Wells v. Wells, 35 M. 638.

(1882). It is not permissible, under Code 1871, § 1105, to probate in this state an authenticated copy of the probate in another state, of a will operating on property here, if the domicile of the testator was in Mississippi, although he executed the will and died in such other state, and although it also devised property in that state.—Bate v. Incisa, 59 M. 513.

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§ 243. Right to probate.

(1853). It is no objection to the probate here of a foreign will, devising or attempting to devise land situated here, that the testator had no title to the land, and that such a probate would cast a cloud on the owner's title. The making of a will confers only such title as the testator has, and does not enlarge his estate; and hence, if he had no title, its probate can cast no cloud on the title of the owner.—Watson v. Butler, 26 M. 178.

(1858). An authenticated copy of a foreign will having on its face the requisites of a will to pass realty according to the laws of the state, and shown to have been duly proven and recorded in the state where the testator was domiciled, may be admitted to probate in this state, and will be effectual to devise realty here.—Crusoe v. Butter, 36 M. 150.

§ 245. Admission to record of will probated in other jurisdiction.

(1849). A will probated in another state, must be authenticated like other judgments, by the certificate of both clerk and judge.—Stewart v. Swanzy, 12 S. & M. 684.

(1856). A certified transcript of the court of ordinary, in the state of Georgia, in which is embraced a copy of a will and the affidavit of the subscribing witnesses proving its execution, made in open court (before the ordinary, who is both judge and clerk), and also a statement that the will was recorded, and copies of receipts of legatees given to the executor named in the will, for legacies therein bequeathed to them, which receipts were also recorded in said court, contains sufficient, though informal evidence of the probate of the will.—Jordan v. Thomas, 31 M. 557.

(E) JURISDICTION, LIMITATIONS, AND LACHES.

§ 247. Jurisdiction of probate and proceedings relating thereto.

(1838). The chancery court has no original jurisdiction over wills.—Cowden v. Cowden, 2 H. 806.

(1843). The chancery court has no jurisdiction to grant an issue *devisavit vel non*, and to set aside a will for the insanity of the testator, or for the fraud of the executor in obtaining it, and procuring it to be probated in common form. The probate court has ample jurisdiction to give relief. In England such power did not exist in the chancery court, but in the ecclesiastical Court.—Hamberlin v. Terry, 7 H. 143.

(1843). The probate court has power to order an issue *devisavit vel non*.—Hamberlin v. Terry, 7 H. 143.

(1843). If the probate of a will has been obtained by fraud or surprise the probate courts in Mississippi have power upon a proper showing to vacate the probate thus irregularly obtained and examine the whole matter *de novo* and decide accordingly.—Hamberlin v. Terry, Sm. & M. Ch. 589.

(1843). The probate courts in Mississippi have sole jurisdiction of the subject of wills; and jurisdiction at least commensurate with that of the ecclesiastical courts of Great Britain and the courts of chancery have no power to decree the probate of a will void even though charged to have been procured by fraud. This power belongs exclusively to the probate courts.—Hamberlin v. Terry, Sm. & M. Ch. 589.

(1850). The probate of a will by the probate judge in vacation is void, but if all parties acquiesce in it for seven years, and the estate be administered on such probate, they will be estopped from denying its validity. The validity of the will cannot be contested after five years, and by analogy to this its probate ought not to be contested after that time. Hence, where a widow, after the lapse of that time, and having received the provision made for her in the will, sought to impeach the validity of the probate, and renounce the provision in her favor, it was held that she was estopped.—Saunders v. Saunders, 14 S. & M. 81.

§ 249. —— Domicile of testator.

A will must be probated and established according to the law of the testator's domicile, and in the courts of his domicile; and this is so though the testator make his will and die outside of his domicile.—(1854) Sturdivant v. Neill, 27 M. 157; (1854) Morris v. Morris, 27 M. 847; (1857) Bailey v. Osborne, 33 M. 128.

(1866). The general rule is, that the capacity of a testator to make a will, and the rules regulating the disposition of personal property by testament, depend on the law of the domicile. Hence, where the testator has by law a general power of disposition by will, it is immaterial whether there be property in the domicile which will be affected by the will or not, so far as the jurisdiction to probate the will is concerned. And the rule is the same where the testator has no such general power of disposition, but being a married woman, makes a will disposing of real and personal property in virtue of a power to do so reserved in a marriage settlement. When, therefore, a married woman having power to make a will as to real and personal estate situate in Arkansas, is domiciled here, and makes a will in pursuance of such power, the will should be probated here, though there is no property here on which it could take effect. And the order of probate should be general, since its legal effect can be determined afterwards.—Cameron v. Watson, 40 M. 191.

(1882). Where a subject of Italy, having married a resident of this state, and thereafter until she died, which event occurred in another state, she and her husband made their home on her plantation here, this state

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was their domicile for the purpose of succession, and her will must be proved here in order to be operative on property in this state. —Bate v. Incisa, 59 M. 513.

§ 252. —— Foreign wills.

(1860). The courts of this state have jurisdiction to probate in the first instance the will of a testator domiciled in another state at the time of his death, if there be at that time property belonging to the testator situated in this state.—Still v. Woodville, 38 M. 646.

§ 260. Limitations.

(1857). There is no limitation as to the period in which a will may be probated; and hence, a long continued possession of the estate, adverse to the will, is no presumption against its validity, unless it be shown that the devisee propounding the will for probate was under no disability, and that there was no impediment to the assertion of his rights, and that his acquiescence was tantamount to a disclaimer under the will, with a full knowledge of its legal character.—Fatheree v. Lawrence, 33 M. 585.

(1860). The allegations of concealed fraud in a petition to set aside a will were sufficient to bring the case within the proviso, art. 43, p. 434, of the Rev. Code, allowing parties, in cases of concealed fraud, two years from the time of its discovery by reasonable diligence, in which to commence proceedings to set aside the will.—Matthews v. Southeimer, 39 M. 174.

(F) PARTIES AND PROCESS OR NOTICE.

§ 262. Parties to proceedings in probate court.

(1847). A non-resident executor, who has failed to propound the will for probate and to ask for letters for a year after the testator's death, need not be summoned on an application, by the parties interested, to probate the will and for letters *c. t. a.*; and an appointment so made will not be erroneous. —Cox v. Cox, 8 S. & M. 292.

(1893). Where a person is entitled under a will, to one fourth of the estate of the testator, and would only be entitled to one-fifth thereof if the will were disproved, such one cannot be said to be a "person interested," within the meaning of Code 1892, § 1822, authorizing such latter to contest the validity of a will probated without notice.—Biles v. Dean, 14 So. 536, not officially reported.

(1899). The probate of a will in common form, without making all heirs at law parties, does not conclude the question of validity.—Young v. Wark, 76 M. 829, 25 So. 660.

§ 265. Parties to actions.

(1859). It is not the imperative duty of the executor to defend the validity of the will, when contested by the heirs; he may give notice of the pendency of the suit to the legatees, if adults, and to their guardians, if they be minors; and decline to incur any risk or expense on that account; or he may defend, taking the risk of establishing the validity of the will, as the condition of being indemnified out of the assets in his hands.—Kelley v. Davis, 37 M. 76.

(G) PETITIONS, OBJECTIONS, AND PLEADINGS.

§ 277. Objections to probate, answers to petitions therefor and caveats.

(1866). Where no objections are made in the probate court to the probate of a will, when it is propounded, the court may then take probate of it, but if objections be then regularly made, the court must dispose of them before proceeding to take probate of the will.—Jones v. Mosley, 40 M. 261, 90 Am. Dec. 327.

§ 280. Pleading in actions to contest or set aside will or probate.

(1860). A petition to set aside a will for a concealed fraud, which it avers was not discovered within two years from the probate of the will prescribed by the statute, need not be sworn to by petitioner or his agent.—Matthews v. Southeimer, 39 M. 174.

(1860). From the nature of the acts charged in a petition to set aside a will, they were secret and private, and not calculated to awaken suspicion or inquiry, and they, of themselves, constituted concealed fraud; and hence, it is unnecessary for petitioner to show diligence in detecting the frauds until some fact should be developed to put her upon inquiry.—Matthews v. Southeimer, 39 M. 174.

(1860). A petition seeking to set aside a will for the fraud of the executor in obtaining it, and which recognized as just a false and fraudulent debt against testator in favor of the executor, whereby most of testator's property was secured to him, is not multifarious because it charges fraud in obtaining the will, and the falsity of the debt, and seeks discovery as to both.—Matthews v. Southeimer, 39 M. 174.

(1860). A petition in the court of probate, praying an issue *devisavit vel non*, charged that the executor had, for his own purposes, caused the will to be written, and then procured it to be signed by the testator, who was ignorant of its contents; that he had a false and fraudulent debt against the testator, which he caused to be recognized by the will so obtained; that the will virtually gave testator's slaves to the executor, by directing that he should take them at a cash valuation, which he could pay by means of his fraudulent claim so recognized in it; that the will was a consummation of a course of fraud and imposition, which the executor had been practicing on the testator for several years, by pretended friendship, and by furnishing testator ardent spirits until he became imbecile, and came to his death, and the fraudulent acts of defendant were so concealed that neither petitioner nor her co-

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heirs, by reasonable diligence, could have discovered the fraud until it was developed by accident, about two months previous to the filing of the petition. *Held*, on demurrer to the petition that the petition sufficient charged fraud in the executor in procuring the will.—Matthews v. Southeimer, 39 M. 174.

§ 283. —— Plea or answer.

(1857). A plea of former adjudication interposed to a petition for an issue *devisavit vel non*, should offer to prove the matter pleaded by the record.—Carpenter v. Booker, 33 M. 45.

§ 286. —— Issues, proof, and variance.

(1855). If a general issue as to whether the writing produced be the will of the testator or not be made up, the question of fraud in procuring the will may be appropriately tried under it.—Hairston v. Hairston, 30 M. 276.

(1856). An issue *devisavit vel non* should be framed so as to try the truth of the facts stated in the petition as the grounds of avoiding the will. A general issue, "whether the writing produced be the will of the testator or not," is unnecessary, if not improper. —Payne v. Banks, 32 M. 292.

(1898). Where the probate of a will is opposed on the ground of undue influence, *devisavit vel non* is the only issue, and the question of influence is a mere matter of evidence under that issue.—Pratt v. Hargreaves, 75 M. 897, 23 So. 519.

(H) EVIDENCE.

Competency of interested persons as witnesses on probate or contest, see WITNESSES, § 131.

Competency of legatee as witness to support, see WITNESSES, § 91.

Competency of proponent as witness to support will, though legatee, see WITNESSES, § 140.

Presumption of probate from lapse of time, see EVIDENCE, § 82.

§ 287. Presumptions and burden of proof.

(1892). The burden of proof as to the validity of a will is on the proponents thereof throughout the contest of the same.—Brown v. Walker, 11 So. 724, not officially reported.

(1911). On the probate of an alleged nuncupative will which purported to devise "all" of the testator's property, an instruction was erroneous which told the jury, where there was no evidence to the contrary, that they could conclusively presume the existence of a fact necessary to be established by evidence before the jury could draw any inference therefrom and of which there was no evidence at all.—Caffey v. Tindall, — M. —, 56 So. 177.

§ 291. Admissibility.

Evidence of capacity of testator, see *ante*, § 51.

(1900). Although Code 1892, §§ 1828, 1829, contemplate the production of an original will (not a foreign one) whose probate is sought, yet, if from any cause its production cannot be had, secondary evidence of its contents is admissible, and it may be probated on such evidence.—Pratt v. Hargreaves, 77 M. 892, 28 So. 722, 78 Am. St. 551.

§ 294. —— Attesting witnesses.

(1860). Under the Revised Code of 1857, a legatee in the will, though not competent to prove its execution as a subscribing witness, except upon a forfeiture of his legacy, is, nevertheless, competent to testify to the testator's sanity, on the trial of an issue *devisavit vel non*.—Kelly v. Miller, 39 M. 17.

§ 297. —— Declarations of testator as to execution or revocation.

(1910). The declarations of a testator, made shortly before his death, that he would make no will, is incompetent on a will case as hearsay evidence.—Miller v. Miller, 96 M. 526, 51 So. 210.

§ 299. Weight and sufficiency.

(1903). In a will contest where the question involved is the capacity of the testator, it is not necessary for the contestants to prove his sanity beyond a reasonable doubt. —King v. Rowan, 82 M. 1, 34 So. 325.

§ 302. —— Execution, existence, and genuineness.

(1849). It is not necessary that the witness to a nuncupative will should testify that the testator did, in *totidem verbis*, call on a person to bear witness, etc. It is sufficient if the testator gave a person present to understand such was his will.—Parkinson v. Parkinson, 12 S. & M. 672.

(1857). The testamentary capacity and the *animus testandi* must appear by the clearest and most indisputable evidence; and hence, the negative testimony of one of two persons present and having an opportunity of hearing, to the effect that he did not hear the alleged testamentary words, is sufficient to throw such doubt upon the positive affirmative testimony of the other, proving the alleged nuncupation as to render the same inadmissible to probate.—Lucas v. Goff, 33 M. 629.

(1857). An instrument purporting on its face to be the last will and testament of E. L., and bearing date 7th September, 1833, was propounded for probate in 1856. It was signed by the testator by his mark, and under the word "Test" were subscribed the names of two witnesses. In December, 1833, and after E. L.'s death, it was filed for probate in the proper court, and one of the subscribing witnesses then made an affidavit before the clerk, setting forth facts sufficient to probate the will, except that he did not state that the will was attested in the presence of the testatrix. No order or decree was made in relation to the probate of the will, nor the

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estate of E. L., but the will was recorded in the proper book. In 1856, one of the legatees propounded the will for probate, taking it from the files of the probate court, where it had remained from the time of filing, in 1833, and produced one of the subscribing witnesses, who proved the handwriting of the other, and that he was dead. He also proved that he wrote the will, and that the name of the testator and his own name were in his handwriting. The witness had no independent recollection of the execution of the will, and the circumstances attendant thereon; nor did he then recollect whether, at the date of the will, he knew what formalities were required for the valid execution of a will, and thought it possible that he might have attested an instrument not legally executed; but he was satisfied from an inspection of the instrument of the truth of the above facts, and was also satisfied that he would not have subscribed the testatrix's name nor his own, unless he had been requested to do so by her. He also proved that the will was intended to be executed in good faith, and that it was generally understood amongst the relatives of E. L. that she had made a will. The property disposed of by the will had never been held in subordination to the will, but had been held adversely by the distributees of E. L. *Held*, that under these circumstances, the will having on its face all the formalities required by the statute to appear there, it might properly be presumed that the other incidental requisites were also complied with, and that the will was sufficiently established.—Fatheree v. Lawrence, 33 M. 585.

§ 303. —— Testimony of attesting witnesses.

(1840). It is the duty of the subscribing witnesses, to be satisfied of the sanity of testator; for the law not only requires them to attest the execution of the will, but it requires them to know whether he has capacity to make it. Hence, their testimony is entitled to greater weight than the testimony of those who had no such duty to perform, and especially of those who were not present when the will was executed. Also, great weight is to be given to the testimony of the draftsman.—Brock v. Luckett, 4 H. 459.

(1847). In 1813, A. died, having made a will, by which she bequeathed certain slaves to her children, specifying which slaves each child was to have, but providing that there should be a valuation of the slaves, and the shares of the legatees should be made equal by money, and providing also for a limitation over to her sons in case her daughter (one of the legatees) died without issue.

The daughter died in 1838, without issue, but made a will giving her slaves to her nephew, a son of one of the brothers, and the property was delivered to him.

The other sons of A. sued for the recovery of the slaves, under the provision in the will of A., limiting them to her sons on the death of the daughter without issue. The defendant denied the right of A. to make a will of the slaves, and set up a will made by A.'s husband, by which he bequeathed all his slaves to A. and her children equally, to be divided on the youngest child arriving at 13 years of age. The defendant proved by his father (one of the sons of A.), about the year 1840, that the witness's father (A's husband) died in 1789, having made a will which was duly probated, and afterwards destroyed by fire, the whole of the records having also been destroyed, that the said husband of A. was the owner of all the slaves, and his will was exactly like A.'s, except as to the limitations over, and except as to specifying the slaves each legatee was to have; and that by common consent of the legatees—being children of A., and of A.'s husband—A. was allowed to retain possession of the slaves, and that the will of A. was carried into effect, he being executor. *Held*, that the witness being only 16 or 17 years old at the death of his father (A.'s husband), his deposition taken after the lapse of half a century, from that time, was insufficient to establish the will of his father.—Newell v. Newell, 9 S. & M. 56.

(1848). A will devising both real and personal estate was attested by three witnesses, but admitted to probate on the testimony of one alone, the others being alive, and within the jurisdiction of the court. A petition was filed to set it aside for insufficiency of probate, which was dismissed in the court below. The court say, "we are inclined to hold that no will can be proved unless all the subscribing witnesses alive and within the control of the process of the court, are produced to testify. In Chase v. Lincoln, 3 Mass., it is said the legislature, in requiring three subscribing witnesses to a will, did not contemplate the mere formality of signing their names; an idiot might do this. These witnesses are placed around the testator to ascertain and judge of his capacity, and the heir has a right to insist that the testimony of all three of the witnesses be given to the jury. In Sears v. Dillingham, 12 Mass. 358, it was contended that no will can be proven unless all the witnesses are produced to testify. The court said, "this, as a general rule, is undoubtedly settled, both here and in England." The decree was reversed.—Evans v. Evans, 10 S. & M. 402.

(1850). A devisee under a will, attested by three witnesses, but only proven by one, filed his bill in chancery to recover land from parties who had purchased under sales made by the administrator. The defendant demurred. *Held*, that the demurrer was properly sustained. "The will under which the complainant set up claim was proven only by one witness. As an incipient probate, one witness might have been sufficient, but in any controversy respecting the title to the land it must be shown that the will was established by the competent number of witnesses."—Reagland v. Green, 14 S. & M. 194.

(1850). Wills of personalty, though attested by more than one witness, may be

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probated on the testimony of one alone.—Kirk v. State, 13 S. & M. 406, 1 Mor. St. Cas. 480.

(1854). The deceased had requested one G. to write his will, stating to him its contents; G. promised to do so, and return with it by a day named. After this, deceased repeatedly declared during her illness, that she wished her property to go as she had directed G. to write the will. A short time before her death, she called a witness from the fire place to her bed side, and requested the witness to hold her head down, as she wished to talk to her; and she then said that she had "requested G. to write her will, and that he had put it off, and she was afraid she would die before G. arrived with the will; and that she willed, or had willed (witness did not recollect which), a negro, Sylvia, to her daughter B., and an equal division of the rest of the property with the other children." Another witness proved she was present, and also proved the same statements as to the will; and further proved the calling of the other witness from the fire place, and the asking her to lay her head down, as she wanted to talk to her; but one of the witnesses did not prove the presence of the other witness. The nucupative will disposed of her property in the same way that she had directed G. to write it in the written will. *Held*, that the will was legally established. That though not expressly proven by two witnesses, that testator called on some person to take notice of her will, yet this was substantially proven by two witnesses, and that it was not necessary that the witnesses should prove the presence of each other.—Burch v. Stovall, 27 M. 725.

(1858). Where it appears from the face of the will that there are three subscribing witnesses, it may be proven by one, so as to pass realty, if the witness examined prove that it was duly attested by the others. And if the record of the probate state that it was duly proven by one of them and admitted to probate and it does not affirmatively appear that that witness proved only attestation by himself, and execution in his presence, it will be presumed that he testified to every fact necessary to due execution. —Crusoe v. Butler, 36 M. 150.

(1878). While the subscribing witnesses to a will are the only ones competent to prove the signing and publication thereof, others may be examined as to the mental condition of the testator; and where the court is satisfied from the testimony of such others that the testator had mental capacity, the will should be probated, notwithstanding testimony of the subscribing witnesses to the contrary.—Martin v. Perkins, 56 M. 204.

(1903). The evidence of the subscribing witnesses as to the capacity of a testator to make a will is entitled to no greater weight than that of other persons who had the same opportunities for observation.—King v. Rowan, 82 M. 1, 34 So. 325.

(I) HEARING OR TRIAL.

§ 308. Scope of inquiry and powers of court.

The probate of a will must be general, leaving the construction thereof open, and this rule applies upon the trial of an issue *devisavit vel non*.—(1856) Lusk v. Lewis, 32 M. 297; (1866) Cameron v. Watson, 40 M. 191.

(1866). When the will of a married woman, made under a power conferred by a settlement is propounded for probate, the order for probate will be general, and the question as to what property is validly devised by it will be afterwards determined upon proper proceedings for that purpose.—Cameron v. Watson, 40 M. 191.

§ 312. Mode of hearing or trial in general.

(1859). If, in a proceeding to set aside the probate of a will, the heirship of the petitioner be denied, the question thus raised is preliminary in its character, and should be determined before any trial is had as to the validity of the will; and it will be error, therefore, for the court to submit that issue and the issue *devisavit vel non* to the same jury.—Edwards v. Gaulding, 38 M. 118.

§ 315. Submission of issues to jury.

A petition seeking to annul an instrument which has been probated as a will, and to set aside the probate thereof, on the ground that it appears on its face to be a deed, and not a will, raises purely a legal question, to be determined by the court; and it ought not, therefore, to ask for an issue *devisavit vel non*, to be submitted to a jury.—(1855) Wall v. Wall, 30 M. 91; (1861) Sartor v. Sartor, 39 M. 760.

(1866). The construction and effect of a will or other writing, are questions of law for the court, and are not to be left as matters of fact to the jury. And in case of a will which is alleged to be conditional, the jury in bringing an issue *devisavit vel non*, are to determine whether it was duly executed, and whether the condition on which it was to take effect has happened; but the court is to determine whether on its face it be conditional, or not. And on the trial of such issue, the condition of the mind of the testator after its execution, is immaterial.—Magee v. McNeil, 41 M. 17, 90 Am. Dec. 354.

§ 322. Reception of evidence.

(1879). Where witnesses to an alleged nuncupative will, who have signed a written statement purporting to contain the testamentary words, and to set forth the attendant circumstances, a question whether the statement is true, addressed to one of them by the petitioner on the trial of the issue *devisavit vel non*, is leading and improper. —Broach v. Sing, 57 M. 115.

(1896). The proponents of a will need not, in the first instance, introduce all of their evidence on the issue of testamentary capacity and undue influence, but it is sufficient if they offer the will and the record

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of the probate court there concerning, and after the contestants have given their evidence of the issue, the proponents may introduce evidence in rebuttal.—Sheehan v. Kearney, 82 M. 688, 21 So. 41, 35 L. R. A. 102.

(1903). After contestants have introduced their evidence on the issue *devisavit vel non* to meet the *prima facie* case made by showing the due probation of the will the proponents, may introduce testimony in rebuttal.—Sheehan v. Kearney, 82 M. 688, 21 So. 41, 35 L. R. A. 102.

(1908). In a will contest where the executors offered the will, proved its execution, and the testamentary capacity of the testator, and the contestants had offered testimony tending to show that the will was the result of undue influence and then rested, it was error to exclude the testimony of the testator's widow that there had been no undue influence exercised by her or other beneficiaries under the will.—Jamison v. Jamison, 92 M. 468, 46 So. 83, 945.

§ 325. Demurrer to evidence.

(1879). A demurrer to evidence may be resorted to on the trial of an issue *devisavit vel non*.—Broach v. Sing, 57 M. 115.

§ 328. Instructions.

(1866). In this case, the following instruction was given to the jury: If the jury believe from the evidence, that the contestant had been always an obedient, dutiful and good child, but, that under the influence of an insane delusion, her father (the testator) concluded and believed that she had become disobedient and utterly unworthy of his regard, and utterly cast her off as a child, and that the paper in controversy was the direct offspring of such insane delusion, they should find against the will. *Held*, that the instruction was correct as a legal proposition; to minds versed in legal science, and acquainted with legal terms, it would be unobjectionable; but as a rule to be applied practically by a jury unskilled in the use of legal terms, it is objectionable in not explaining the legal meaning of the term "delusion," and what degree of it should appear to justify a verdict against the will.—Mullins v. Cottrell, 41 M. 291.

(1878). Upon an issue to establish a will which it is claimed has been destroyed, where the testimony is conflicting, it is reversible error to instruct "that everything is presumed against the destroyer." This is too broad and indefinite, and is calculated to mislead and prejudice the jury.—Bott v. Wood, 56 M. 136.

(1892). On the contest of a will an instruction to the effect that if after a thorough consideration of the evidence, the jury entertain "a doubt" as to the validity of the instrument, they should resolve such doubt against the alleged testament and in favor of the contestants thereof, is erroneous.—Brown v. Walker, 11 So. 724, not officially reported.

(1908). Instructions as to presumptions and burden of proof are immaterial where the issues on the contest of a will are whether the testator was of sound and disposing mind, and whether he was unduly influenced by the principal beneficiary, and the evidence is full and conclusive on both issues.—Hitt v. Terry, 92 M. 671, 46 So. 829.

(1908). An instruction for contestants of a will is not prejudicial which requires the proponent to prove "by a clear preponderance of the evidence" that the testator, at the time he signed the will, knew its contents.—Hitt v. Terry, 92 M. 671, 46 So. 829.

(1908). An instruction in a will contest case that the law does not require the contestants to prove that the testator was insane at the time of the execution of the will, is not subject to the objection that it excludes the idea that the will would be valid if made during a lucid interval.—Hitt v. Terry, 92 M. 671, 46 So. 829.

§ 332. —— Undue influence and fraud.

(1903). In a will contest an instruction for the contestants is reversible error which instructs the jury without qualification that in determining whether the testator had been unduly influenced, the reasonableness or unreasonableness of the will might be considered.—King v. Rowan, 82 M. 1, 34 So. 325.

§ 333. Verdict and findings by jury.

(1855). A verdict that "R. H. was of sound and disposing mind at the time of making his will, and that the same was executed and attested according to law," is substantially responsive to the following issues submitted to the jury: 1. "Whether R. H. was of sound and disposing mind at the time of the execution of the will." 2. "Whether the writing purporting to be the last will and testament of said R. H., be his last will and testament or not."—Hairston v. Hairston, 30 M. 276.

(J) JUDGMENT OR DECREE.

[*No paragraphs or references in this Digest.*]

(K) REVIEW.

§ 356. Nature and form of remedy.

(1855). The issue in relation to the valid ity of the will certified to the circuit court to be tried by a jury, should be based on the allegations in the pleadings and no issue should be so made up and certified, unless the fact therein submitted for trial be alleged in the petition asking for the issue.—Hairston v. Hairston, 30 M. 276.

§ 371½. Dismissal, withdrawal, or abandonment.

(1854). A petition was filed in the probate court for an issue *devisavit vel non*, to be sent to the circuit court, to try the question of the validity of a will, the petition alleging that the testator was incompetent to

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make a will, and that the will was obtained by fraud. A decree was made "that an issue *devisavit vel non* be made up and sent to the circuit court, at the next May term thereof, 1852, and that the cause be continued." At the next term of the probate court, the petition was dismissed on the ground, that the petitioner had declined to tender an issue as required by the former order of the court. *Held*, that this order was erroneous; that if the issue was not already sufficiently made up on the petition and answer, and by the first order of the court, it was the duty of the court to make up the issue upon the facts presented in the petition.—Kell v. Rogers, 28 M. 83.

§ 387. Determination and disposition of cause on appeal from probate court.

(1846). Where an issue *devisavit vel non* is sent from the probate court to the circuit court for trial, the sole duty of the latter court, in reference thereto, is to see the issue tried, and to certify the finding of the jury to the probate court, where a new trial can be granted or refused, and final judgment entered. If the circuit court enter judgment on the verdict it will be a nullity, and will not authorize the suing out of a writ of error to reverse it.—Wallace v. Wingate, 6 S. & M. 151.

§ 390. —— Affirmance, modification, or reversal of judgment or decree of probate court.

(1909). The findings of a chancellor in favor of testamentary capacity will be reversed, where an examination of the will shows that it was the product of a mind so completely shattered that testamentary capacity was wholly lacking, and the will shows that it was drawn in contemplation of immediate suicide.—Johnson v. Stansell, 94 M. 923, 48 So. 619.

§ 393. Review of decisions in actions relating to wills or probate.

(1860). A decree of the probate court, probating a will in common form, is not a final decree, therefore, not subject to be reviewed, or reversed by bill of review.—Murray v. Murphy, 39 M. 214.

§ 400. —— Scope and mode of review.

(1856). If the probate court, at the instance of the legatees, refuse to allow them to be made parties with the executor to an issue *devisavit vel non*, the contestant cannot complain; the error, if any, not being to his prejudice.—Graves v. Edwards, 32 M. 305.

(L) FEES AND COSTS.

§ 402. Power to award costs in general.

(1856). The costs of an unsuccessful attack on a will cannot be taxed against the estate.—Piper v. Heatherington, 32 M. 306.

(M) OPERATION AND EFFECT.

§ 417. Effect of probate on will in general.

(1860.) When a will attested and proved by the requisite number of witnesses for a will of personalty, but not by the number required for a devise of realty, is admitted to probate in common form generally, the probate will simply extend to it, as a will of personalty.—Murray v. Murphy, 39 M. 214.

§ 418. Presumptions as to probate.

(1850). No particular form of exercising the judicial function in the probate of a will is prescribed by law; it is sufficient if it clearly appear that the judicial act was done by the judge, and this may be shown by the minutes of the court reciting the probate, or by an entry made on some part of the will, showing that it was duly proved before and approved by the court, or ordered to be recorded as the will of the testator; or it may be shown by proof that letters testamentary were granted on it. The record of it after proof of its execution before the clerk, is not a probate, and the lapse of twenty years after such record, without the property bequeathed having passed in possession under it, and without any other act being done recognizing either directly or by legal intendment, its validity, will not authorize the presumption that it was duly probated.—Saunders v. Saunders, 14 S. & M. 81.

(1896). The production of a will and the record of its probate, under our statute raises the presumption that the alleged will was the free and voluntary act of the alleged testator.—Sheehan v. Kearney, 82 M. 688, 21 So. 41, 35 L. R. A. 102.

§ 421. Collateral attack on probate or judgment.

(1829). A will made by a married woman is under certain circumstances good, and if duly probated, it is operative till the probate is duly set aside; it cannot be attacked collaterally by denying the executor's right to sue for and recover her property.—Herrington v. Herrington, W. 322.

(1858). The probate court has jurisdiction to admit to probate and record an authenticated copy of a will, made and probated in another state, where the testator was domiciled; and its judgment allowing the probate of such will cannot be attacked collaterally, but only in a direct proceeding for that purpose.—Crusoe v. Butler, 36 M. 150.

(1881). Where a writing has been probated in common form as a will, it must be treated as the established will of the deceased, and in full force until overthrown in a direct proceeding.—Tucker v. Whitehead, 58 M. 762.

§ 422. Conclusiveness of probate or record.

(1839). Where the validity of a will has been contested according to law, and sustained, the decree is conclusive against all parties interested, infants as well as adults, and whether they were parties to the proceeding or not.—Scott v. Calvit, 3 H. 148.

§ 424. —— Probate in common form.

(1855). The probate of a will in common form is not conclusive even that the paper

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probated is to have effect as a will.—Wall v. Wall, 30 M. 91, 64 Am. Dec. 147.

(1859). The decree of the probate court admitting a will to probate in common form is not like an ordinary judgment or decree which protects those acting under it, until it is regularly set aside, but it is an incipient step in the execution of the will, and confers on the executor, acting in good faith, the power to proceed with its execution, until he has notice of its invalidity. The pendency of an issue *devisavit vel non*, is notice to the executor, and till it is done he has no power, except at his own risk, to pay legacies, or otherwise dispose of the assets in pursuance of the will, and contrary to the law for the administration of estates. He may, however, proceed to collect debts, and pay claims against the estate, and do all other acts beneficial to those interested.—Kelly v. Davis, 37 M. 76.

§ 431. Conclusiveness of refusal or revocation of probate.

(1859). A judgment on a verdict rendered against the validity of a will, annuls it *ab initio*, although the judgment recite that the will is "annulled from that day hence."—Kelly v. Davis, 37 M. 76.

§ 433. Admissibility, as evidence, of will or proofs, or of record or exemplified copy thereof.

(1859). The record of the probate of the will, in common form, being *ex parte*, and made without notice to the heirs, is not admissible in evidence, on the part of the executor, on the trial of an issue *devisavit vel non*.—Edwards v. Gaulding, 38 M. 118.

(1882). Under the Code of 1871, probate of a will in common form is inadmissible in evidence on an issue *devisavit vel non;* it is not *prima facie* evidence of the validity of the will.—Tucker v. Whitehead, 59 M. 594.

§ 434. Foreign probate or judgment.

(1843). Where a will made in another state, is probated there and the testator has property in this state, and a copy of the probated will is admitted to probate in this state according to the statute, in a suit for a legacy under the will brought in the courts of this state, a certified copy of the probated copy of the will from the probate court in this state will be admissible in evidence.—Montgomery v. Milliken, Sm. & M. Ch. 495.

(1845). By statute (H. & H. 388), a will probated in another state or county proven according to its laws, and which devises property in this state, may be admitted to probate and record here, and a copy from that record so made in this state is admissible in evidence in the courts of this state as copies of wills originally probated and recorded here.—Montgomery v. Milliken, 5 S. & M. 151, 43 Am. Dec. 507n.

(1848). A copy of a will made and probated in a sister state, and authenticated according to the act of congress in relation to the authentication of judgments, records, &c., of the different states, is admissible in evidence in the courts of this state in a suit to recover personalty bequeathed in it, without a previous probate here. The statute (H. & H. 338, § 13) allowing such copies to be probated here, when there are estates here devised, in them, and providing that the validity of such will shall be subject to contest as if made and probated here, was not designed to introduce a new rule of evidence on the subject; and if it were so designed, it could have no effect against the provisions of the act of congress (it does not appear from the report of the case, whether the property sued for was in this state or not at the death of the testator, or whether it had been removed here afterwards).—Melvin v. Lyons, 10 S. & M. 78.

(1849). A copy of a will made and probated in a sister state, is not admissible in evidence here, to establish title to personalty, unless it be authenticated according to the act of congress, or be probated in this state.—Ratcliff v. Ratcliff, 12 S. & M. 134.

The statute does not apply to a copy of a domestic will probated in a foreign state where it was made and the testator died, but being domiciled here; in such case as to property situated here, the original will must be probated here according to our laws, in the first instance.—(1854) Sturdevant v. Neill, 27 M. 157; (1854) Morris v. Morris, 27 M. 847.

(1856). A certified transcript of the record of a court of ordinary, for the state of Georgia, in which is embraced a copy of a will, and the affidavit of the attesting witnesses, proving its execution, made in open court, and also a statement that the will was recorded, and copies of the receipts given by the legatees named in the will, to the executor for legacies bequeathed to them, which receipts were also recorded in said court, contains sufficient, though informal, evidence of the probate of the will.—Jordan v. Thomas, 31 M. 557.

(1858). By the common law of England, "the probate of a will is merely operative as the authenticated evidence, and not at all as the foundation of the executor's title; for he derives all his interest from the will itself, and the property of the deceased vests in him from the moment of the testator's death, and the probate, when produced, relates back to that time." This rule, though probably inapplicable, under our laws, to a disposition of property which is strictly assets made by the executor before probate, does apply to a sale of realty, made by the executor, under a special power conferred by the will and not appertaining to the office and duties of an executor, in the ordinary administration of the estate; and hence, where an executor, in execution of a power conferred by a foreign will, which was duly probated where it was made, sold and conveyed lands situated here, before its probate in this state, it was held that a valid title

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passed to the grantee, which would be protected upon the subsequent probate and record of the will in this state.—Crusoe v. Butler, 36 M. 150.

(1858). The title to realty passes only according to the *lex rei sitæ*, and a foreign will of realty has no effect to pass title until probated here.—Crusoe v. Butler, 36 M. 150.

(1858). A will is no evidence of title till probated in the jurisdiction where the property disposed of was situated at the testator's death.—Wells v. Wells, 35 M. 638.

(1858). The probate in a foreign jurisdiction of the will of a testator who died there, but had his domicile in this state at the time of his death, though not effectual to dispose of his property situated here, is yet valid to dispose of the testator's property in such foreign state where he died, and the title of the devisee will be protected in this state under the foreign probate, if the property be subsequently removed hither.—Wells v. Wells, 35 M. 638.

(1888). The probate of a will in a foreign state, and subsequently, of an authenticated copy of it in this state, has only such effect here as is allowed by the laws of this state.—Sims v. Walden, 3 So. 457, not officially reported.

(1908). Under Code 1906, § 2004, authorizing the probate of an authenticated copy of a foreign will subject to contest as an original domestic will, all the rights to be derived through it must be derived from its terms administered according to the laws of Mississippi, so far as it affects property situated here, although formal proof of due execution of the will is dispensed with.—Heard v. Drennen, 93 M. 236, 46 So. 243.

VI. CONSTRUCTION.

(A) GENERAL RULES.

§ 435. Application to wills in general.

(1848). Adjudicated cases can give but little aid in the exposition of a will, unless the words in the adjudicated case relied on, and the words in the will under consideration, be the same precisely, and are used in the same connection.—Vannerson v. Culbertson, 10 S. & M. 150.

(1858). Technical rules of law, and the authority of adjudicated cases, are not to be disregarded in the construction of wills; yet the true interpretation of a will is so dependent upon the language and circumstances of each particular instrument, that adjudged cases are of less authority, and are more hazardous in their application to the construction of wills, than in any other branch of the law.—Sorsby v. Vance, 36 M. 564.

(1902). No two wills probably were ever written in precisely the same language throughout; nor did probably any two testators ever die under the same circumstances in relation to their estate, family and friends; and it would be very unsafe, as well as unjust, to expound the will of one man by the construction which a court of justice had given to that of another, merely because similar words were used in certain particular parts of it.—Lusby v. Cobb, 80 M. 715, 32 So. 6.

(1902). Of all legal instruments wills are the most inartificial, and the least to be governed in their construction by the settled use of technical legal terms.—Lusby v. Cobb, 80 M. 715, 32 So. 6.

§ 436. What law governs.

(1845). It is the law of Louisiana to give effect to the intention of the testator whenever it can be gathered from the will, and if he make a bequest prohibited by law, in this, that it exceeds the amount the law allows him to give to the legatee, the bequest will not be void entirely, but only as to that portion which exceeds the disposable amount. Thus, where a testator, having children by a former wife, gives to his widow more than one-fifth part of the usufruct of his estate (which he is prohibited from doing), the court will convert the bequest into an equivalent to the one-fifth part of the usufruct, and give that to the widow.—Montgomery v. Millikin, 5 S. & M. 151, 43 Am. Dec. 507n.

A will is to be construed according to the law of the domicile as to all property there situated at the time of his death.—(1847) Sale v. Saunders, 24 M. 24, 57 Am. Dec. 157; (1852) Newell v. Newell, 9 S. & M. 56.

In construing a will executed in a sister state, in relation to property in that state, at the testator's death, the same construction must be given which would be given by the courts of that state.—(1852) Sale v. Saunders, 24 M. 24, 57 Am. Dec. 157; (1858) Crusoe v. Butler, 36 M. 150; (1895) Adams v. Farley, 18 So. 390, not officially reported.

(1860). When the high court of the state had put a construction upon a will made in Tennessee, and the Supreme Court of that state afterwards put a different construction on the will, it was held that the latter decision could not be pleaded as conclusive, unless the title to the property had been perfected by the devisee getting possession of it in accordance with the decision.—Bridgeforth v. Gray, 39 M. 136.

(1873). A will disposing of property in two or more states should be given uniform effect as to all the beneficiaries under it. This cannot be done unless the right of the widow to renounce and elect to accept under the will, or abandon it, is left to the forum of the domicile, the place of original probate; her election, if made, must be there.—Wilson v. Cox, 49 M. 538.

(1908). A will valid in the state of the residence of the testator bequeathing shares of stock of a corporation in Mississippi will pass such shares to the beneficiary although

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the will is not valid in this respect under the laws of Mississippi.—Delta Trust &c. Co. v. Pearce, 92 M. 377, 45 So. 981.

(1909). The title to real estate is governed solely by the law of the place where the property is situated, but where the inquiry is directed solely to the ascertaining of the meaning and intention of the testator from the language employed by him in the will, the *lex domicilii* controls.—Ball v. Phelan, 94 M. 293, 49 So. 956, 23 L. R. A. (N. S.) 895.

(1909). When it is said that a testator's legal intent is to be gathered from the decisions of the court of his domicile, nothing more is meant than whatever his actual intent may have been, if he has used in his will certain technical terms to which the courts of his domicile have attached a settled judicial meaning, which has become a rule of property in that state, then such will, wherever it comes under construction in other states, will have the same meaning given to those technical words which the courts of his domicile have given them.—Ball v. Phelan, 94 M. 293, 49 So. 956, 23 L. R. A. (N. S.) 895.

§ 438. Intention of testator.

(1857). A will purporting on its face to dispose of both real and personal estate, but not attested so as to pass the former, is not, for that reason, incomplete and inoperative as to the entire estate. In such a case it is a question of fact, whether the testator intended that the testament should operate as to personalty, unless it could have effect as to realty, and if it appeared by the testimony of a subscribing witness, that the testator published the instrument as a complete testament, the presumption will be that he was ignorant of the law requiring three witnesses to wills of realty, and the testament, though insufficient to pass realty, will be valid as to the personalty.—Fatheree v. Lawrence, 33 M. 585. See also (1843) Chapman v. Brown, 7 H. 636.

(1881). The fact that a homestead is devised will not, of itself, make it liable for the debts of the testator, and language in the will, which, taken alone, would include the homestead in a charge on lands, is restricted by the appropriation of a specific fund to pay the debts.—Norris v. Callahan, 59 M. 140.

(1890). In the interpretation of every will, the prime object is always to ascertain what the real intention of the testator was.—Crossett v. Clements, 7 So. 207, not officially reported.

(1890). Where a devise bears its own clear interpretation upon its face, the Supreme Court cannot bend it to meet the exigencies of any hardships that may arise from giving it that construction which will accomplish the testator's intention.—Crossett v. Clements, 7 So. 207, not officially reported.

(1910). Any mere indistinctness in the phraseology of a will or awkwardness of an expression in the mere words used, must be so dealt with, if reasonably possible, as to effectuate and not overthrow the dominant intent of the testator.—Davenport v. Collins, 96 M. 716, 51 So. 449.

§ 440. —— Ascertainment from words of will.

See *post*, § 470.

(1848). The great rule for the interpretation of a will is, that the intention of the testator must be ascertained from the language employed, and must be carried into effect if not inconsistent with the rules of law, and the words are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected from the will. Where there is no ambiguity in the words, there is no room for construction.—Vannerson v. Culbertson, 10 S. & M. 150.

(1866). A literal construction is not to be indulged in, which would defeat an intention appearing from the whole will; but we must consider all its parts, and the circumstances under which it was made as shown on its face, and thereby ascertain the intention of the testator.—Haughton v. Brandon, 40 M. 729.

(1890). If the words of the testator are so clear and unambiguous as to leave no room for doubt as to what the testator's intention was, then the words of the will should be allowed to have their usual force and effect, and resort should not be had to circumstances arising *aliunde*, or calculations that may be made as to the value of the property devised, or consequences of inconvenience which may follow an adherence to the plain and unambiguous language of the will itself.—Crossett v. Clements, 7 So. 207, not officially reported.

§ 441. —— Situation of testator and circumstances of making of will.

(1871). On questions of interpretation, it is always competent to prove by parol, the situation of the testator, the condition, character, etc., of his property, so that the court, as nearly as may be, may realize the surroundings of the testator, his relations to the subject with which he is dealing, and thereby be better qualified to reach his meaning and purposes, through the language employed in the will to express them.—Gilliam v. Chancellor, 43 M. 437, 5 Am. Rep. 498.

(1874). In construing a will the court will look at all the circumstances which surrounded the testator and apply the terms of the instrument to its subject matter and objects. Although there may be apparent inconsistencies in several parts of the will, yet if there be clearly discerned a general intent, that should prevail and override the particular, although the latter be first expressed. The intent must control if it can be made compatible with the language used.—Watson v. Blackwood, 50 M. 15.

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(1895). Where, to a will disposing of the whole estate of the testator, a codicil is added giving pecuniary legacies to persons not otherwise provided for, and the amounts, to be paid the legatees as "mementoes of affection" of the testator for them are indicated as follows: "To my son, Jerry Hoffman, the sum of $5.00, and to my son, Rufus Hoffman, the sum of $5.00," and the relative position of the figures and the absence of the decimal mark make it uncertain whether $5.00 or $500.00 was intended by the testator, testimony as to the situation of the testator, the condition of the family, the character and quantity of the estate and the circumstances attending the execution of the codicil, is admissible to aid in its interpretation.—Schlottman v. Hoffman, 73 M. 188, 18 So. 893, 55 Am. St. 527.

(1902). It is competent in construing a will to look to the situation of the testator, his environment as related to his estate and devisees or legatees at the time of the execution of the will.—Lusby v. Cobb, 80 M. 715, 32 So. 6.

§ 442. —— Contravention of law.

(1909). Where the intent of a testator violates no law, it stands; if it violates the law, the will fails; unless the legislature has arbitrarily said, or the courts have by long construction said, notwithstanding his actual intent, a certain meaning shall be given to certain technical terms which he has used, which meaning shall save the will, although it may result in a different disposition from that which he intended.—Ball v. Phelan, 94 M. 293, 49 So. 956, 23 L. R. A. (N. S.) 895.

§ 445. Construction in favor of instrument.

A will purporting on its face to dispose of both real and personal estate, but not attested so as to pass the former, is not, for that reason, incomplete and inoperative as to the entire estate.—(1843) Chapman v. Brown, 7 H. 636; (1857) Fatheree v. Lawrence, 33 M. 585.

§ 449. —— Disposition of entire estate, or partial intestacy.

(1882). A will should be construed, if possible, so as to avoid partial intestacy, the presumption of law being that where the testator substitutes his will for the disposition the law would make, he intends to embrace all his estate.—Vaiden v. Hawkins, 59 M. 406.

(1882). A recital in the first part of a will that, certain legatees having been provided for, the testator gives them "nothing more by this instrument unless especially mentioned at a subsequent period," does not of itself show that the testator did not then purpose to complete his testamentary intentions or overcome the presumption against partial intestacy.—Vaiden v. Hawkins, 59 M. 406.

§ 452. Construction in favor of heirs, next of kin, or surviving wife or husband.

(1909). Where the language of a will necessarily confines the interest of a child of a testator to his life, the court will lay hold of very slight circumstances to raise a gift in the issue of such child, and thereby avoid imputing to the testator so extraordinary an intention as that of giving the property to the devisee over, and leaving the issue of the tenant for life unprovided for.—Ball v. Phelan, 94 M. 293, 49 So. 956, 23 L. R. A. (N. S.) 895.

(1909). Where a will is dictated under the influence of family relations, it will seldom happen that a testator will intentionally cut off the issue of a son or daughter from taking the share of the parent in his estate, for the benefit of collateral objects.—Ball v. Phelan, 94 M. 293, 49 So. 956, 23 L. R. A. (N. S.) 895.

§ 454. Language of instrument.

(1858). It is always safest, in the interpretation of wills, to adhere to the words of the instrument, without considering either the circumstances arising *aliunde*, or calculations that may be made as to the amount of property, or the consequences which may flow from any particular construction.—Curry v. Murphy, 35 M. 473.

(1859). The term "property" embraces both real and personal estate, and under it, when used in a residuary clause, realty not attempted to be disposed of specifically, will pass.—Morris v. Henderson, 37 M. 492.

§ 456. —— Ordinary or arbitrary or peculiar meaning.

(1860). The words used in a will are to be construed in their plain and natural sense, unless a different intention be manifested by the context.—Tucker v. Stites, 39 M. 196.

§ 459. —— Molding or change of language in general.

(1881). When the language of an instrument propounded as a will is plain and clear, it is not permissible to interpolate words in it to limit its operation or make it conditional.—Williams v. Ball, 2 Miss. Dec. 536.

(1881). In construing an instrument propounded as a will, the court will look at the circumstances surrounding the testator at the time it was written, but they cannot change the language employed by the writer to express his will.—Williams v. Ball, 2 Miss. Dec. 536.

(1899). Courts can no more supply defects in the execution of a will or codicil than they can add to or diminish the words of a will.—Johnson v. Delome Land &c. Co., 77 M. 15, 26 So. 360.

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§ 461. —— Substitution of words.

(1881). Where a will gives an estate to children of the testator, excepting a portion given to his wife, and there is a codicil in these words: "It is my desire and will that if any of my children shall die without any legal male descendants, then the property to which they may be entitled under the second item of my will shall go to and be distributed among my then surviving children, share and share alike, and it is my further will and desire that if any of my children shall die bearing issue, then such issue or descendants shall take the parts of my estate their father or mother (as the case may be) would have taken, had he or she survived," in order that both clauses of the codicil may be carried out, it is proper, by construction to interpolate the word "male" before the words "issue," and "descendants," occurring in the second clause.—Hudson v. Gray, 58 M. 882.

(1882). Where a will disposes of all the testator's real and personal property, and the language is, "I will to my wife all my rent and personal property," the word "rent" will be held to mean "real," it being clear from the whole instrument that such was the testator's intent.—Baird v. Boucher, 60 M. 326.

§ 463. —— Rejection of superfluous or repugnant words.

(1880). Though a word in a devise may be rejected if it be apparent from other parts of the will that it was improperly and incautiously used, it will not be rejected on a mere conjecture that the testator intended a provision similar to that in the statute regulating descents and distribution.—Caldwell v. Willis, 57 M. 555.

§ 464. —— Mistakes in writing, grammar, or spelling.

(1859). A condition annexed to a devise, will not be declared void on account of the omission of a word or phrase, necessary to render the sentence complete and grammatically accurate, if the intention can be clearly ascertained from the words used. —West v. Moore, 37 M. 114.

§ 468. Separate clauses or parts.

(1849). By the fourth clause of the will, it was provided that six slaves should be given to Sarah Truly, and it then proceeded, "I wish the property I give to Sarah Truly to be given and secured to herself and her bodily heirs. Should she marry, and at her death, should she have no issue, it is to go to her brother and sisters." By the sixth clause it was provided that "the balance of my property be divided between Sarah Truly and Martha Truly." *Held*, that the general words of the fourth clause limiting the estate given to Sarah, were broad enough to cover the devise in the sixth clause, and that Sarah Truly took the residuum under the sixth clause, subject to the limitations mentioned in the fourth.—Rucker v. Lambdin, 12 S. & M. 230.

§ 470. —— Construction as a whole.

(1858). In the construction of a will, every part and provision must be made, if possible, to harmonize, and be consistent with the other parts; a construction will not, therefore, be put upon a clause of doubtful import, which would make it irreconcilably inconsistent with another plain and clear provision of the will.—Dean v. Nunnally, 36 M. 358.

(1858). In the construction of wills, the main object is to ascertain the intention of the testator; the intention is to be gathered from the whole will, and, if legal, is to be carried out, notwithstanding it may violate technical rules which relate to the construction of words rather than the nature of the estate.—Sorsby v. Vance, 36 M. 564.

(1874). The court looks to the whole of a will to discover the intent of the testator. Although technical words may be used, their legal operation may be countervailed, if necessary to give effect to the clear intent.—Tatum v. McLellan, 50 M. 1.

(1896). The correct rule for the construction of a will is to ascertain the intention of the testator from the will itself, the whole will taken together, including the codicils, if there be any.—McGehee v. McGehee, 74 M. 386, 21 So. 2.

(1909). The fundamental rule governing the construction of all wills is to ascertain the intent of the testator, and this intent must be gathered from the language used in the will; that is to say, from the whole will, the whole scheme of the testator manifested by the will, taking into consideration and giving due weight to every word in the will. —Ball v. Phelan, 94 M. 293, 49 So. 956, 23 L. R. A. (N. S.) 895.

§ 471. —— Repugnant and conflicting provisions.

(1848). If in one part of a will an absolute estate be given, and in another there are words which clearly show that the testator intended only to give a qualified estate, then only the latter estate will pass by the will.—Lucas v. Lockhart, 10 S. & M. 466, 48 Am. Dec. 766.

(1854). In this case, the will devised a part of the testator's land to his widow for life, and a part of his slaves to her in fee, and the remainder of lands and slaves was devised to his children. In the construction of this will, a controversy arose as to whether a clause limiting the devise to the children and to the survivors in case any of them should die without issue, applied to the land alone, or to the whole of the property devised to them, and it was held to apply to the land only, upon the grounds that the words of limitation did not clearly embrace slaves, and that to apply them to the children would make the will inconsistent, and give the children a less estate than was given to the wife, and that such a provision was in disparagement of the children, and

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ought not to be inferred from doubtful words, and that the clause of limitation was in immediate connection with the land, and might be properly referred to it alone.—Funchess v. Seibe, 26 M. 634.

(1873). Where property is conveyed to a trustee for the use of a married woman for life, with remainder to her issue should she die before her husband, and a subsequent clause confers upon her the power to dispose of the property by will in case of death before her husband, the deed reciting that she has relinquished dower and otherwise aided the grantor, in view of the whole instrument, she may devise the property, and the devisee will hold the property absolutely.—Goosey v. Goosey, 48 M. 210.

(1892). Where the general purpose or scheme of the testator may be gathered from the whole will, a clause therein having reference merely to administration, if inconsistent with such purpose or scheme, will be disregarded.—Leigh v. Harrison, 69 M. 923, 11 So. 604, 18 L. R. A. 49.

§ 473. —— Partial invalidity.

(1858). A bequest valid in itself will be ineffectual if made to depend on an illegal bequest.—Lusk v. Lewis, 35 M. 401.

(1858). A bequest, though connected with, yet if not dependent on, an illegal bequest, will be good.—Lewis v. Lusk, 35 M. 401.

(1858). The invalidity of any particular trust, limitation or interest created by a will, will not destroy trusts and limitations which are otherwise valid, unless the latter are so connected with the former, that it is impossible to sustain the one without giving effect to the other.—King v. Talbert, 36 M. 367.

(1858). Where a testator, by a will insufficiently attested to pass realty, directed his executors to sell his farm and buy a new one, and to keep his property together and plant with it, the latter direction will be good, notwithstanding the invalidity of the will as to the sale of the land, for the executors may buy another farm on which to plant without the sale of the one owned by testator.—King v. Talbert, 36 M. 367.

(1859). A will is void only to the extent of its illegality.—Cheairs v. Smith, 37 M. 646.

(1911). The principle that if the ulterior limitation is void, nevertheless the will may be sustained by dropping that ulterior limitation and leaving the rest of the will to stand, is subject to the necessary qualification that the principle cannot be applied where the ulterior limitation cannot be separated without interfering with the manifest purpose of the will as shown by the whole body of the will.—Gully v. Neville, — M. —, 55 So. 289.

§ 474. Construing instruments together.

(1876). In the construction of a will and accompanying codicil the intention of the testator is to be deduced from both. Where the codicil shows a purpose to alter the will in one particular as to a devisee, there arises an implication that it is not intended to change the will in any other particular as to him. Where the testator gives the devisee a certain plantation in the codicil in lieu of a life estate in another given by the will, and does not indicate an enlargement of the estate, the devisee takes only a life estate in the latter, as in the former.—Vaughan v. Bunch, 53 M. 513.

(1876). Where one after devising to his children all of his property, adds this codicil: "I confirm to my daughter M. all that I heretofore willed, and all the stock, crop, &c., I may die possessed of, to her and the heirs of my body, requesting her to make such presents to any of my children as she may think proper, as mementos that they may esteem," the codicil only confirms to her the property previously willed to her, and gives to her the additional property mentioned in the codicil.—Barry v. Sturdivant, 53 M. 490.

§ 478. Implied dispositions in general.

(1909). In a construction of wills, there must be no implication, where that implication violates public policy or the settled rules of positive law.—Ball v. Phelan, 94 M. 293, 49 So. 956, 23 L. R. A. (N. S.) 895.

(1909). A bequest may arise from implication, but to warrant the court in so declaring, there must be something more than conjecture to support its declaration. The implication must be a necessary one, and the circumstances must be so strong, that a contrary intention cannot be supposed to have existed in the mind of the testator.—Ball v. Phelan, 94 M. 293, 49 So. 956, 23 L. R. A. (N. S.) 895.

(1909). The courts will more readily sustain a devise by implication to children upon arriving at age or marriage, where some beneficial interest has been given them during minority, than where no interest of any kind has been given them, but the principal must be guarded in its application and the terms of each particular will considered.—Ball v. Phelan, 94 M. 293, 49 So. 956, 23 L. R. A. (N. S.) 895.

§ 481. Time from which will speaks.

(1896). No testament is of any force during the life of the testator. It is ambulatory wholly and vests no present interest, absolute or conditional, subject to revocation or not. It is waste paper until death vitalizes it.—Hiserodt v. Hamlett, 74 M. 37, 20 So. 143.

§ 482. Operation as to after-acquired property.

(1852). By statute (H. C. 649, Rev. Code of 1857, p. 432), it is competent to make a

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will devising land acquired after the making of the will, just as at common law, after acquired personalty could be bequeathed. A will of realty here, just like a will of personalty, is ambulatory till the testator's death, and if general words be used in it, disposing of testator's whole property, all that he has at the time of his death—both realty and personalty—will pass.—Doe v. Wynne, 23 M. 251, 57 Am. Dec. 139.

§ 483. Effect of change in condition or circumstances occurring subsequently to the will.

(1874). One who died in 1852, by will directed that his son by a former marriage (who was not living with the family and received no benefit from the estate during the life of the widow, to whom all the other property was loaned for life or widowhood) should have a certain slave at a fixed price as a portion of his interest in the estate, and should share equally with his other children in the estate, consisting of land and slaves. The son received and used the slave for several years, and was accidentally killed. The widow died in 1872, without having married again. Meantime the slaves of the testator were emancipated by law. The will further provided that at the death of the widow the land should be sold, and the proceeds arising therefrom equally divided among the children, including said son. *Held*, that he was entitled to share in the proceeds of the sale of the land.—Watson v. Blackwood, 50 M. 15.

§ 485. Evidence to aid construction.

(1871). When the will is explicit, either the one way or the other, there is no room for the admission of extrinsic evidence.—Gilliam v. Chancellor, 43 M. 437, 5 Am. Rep. 498.

(B) DESIGNATION OF DEVISEES AND LEGATEES AND THEIR RESPECTIVE SHARES.

§ 497. Children and grandchildren.

(1859). Where a particular estate is carved out with a gift over to the children of the particular tenant, or to the children of any other person, the gift embraces not only the objects living at the testator's death, but also all who may subsequently come into existence prior to the period of distribution.—Nichols v. Denny, 37 M. 59.

(1883). The word "children" is generally a word of purchase and not of limitation, and where a will provides that the share of the testator's property, received by J., a legatee, shall "at his death descend to his children, and in the event they should not live to be twenty-one years old then it must go to my son W.; but if he (J.) should outlive his children, then he may will it to whom he pleases," the whole estate does not vest in J.; the limitation to his children is valid, and at his death they take the estate by virtue of the will.—Tate v. Townsend, 61 M. 316.

(1892). A will, after providing for a sale of land by the executor, contained the following provision: "The proceeds of said sale I give and devise to all the children of my sister, Barthenia Guinn, equally and jointly, and to their heirs and assigns forever, including any and all of her said children who may be living at the death of my sister Barthenia." *Held*, the devise is limited to the children of Barthenia, living at her death, as a class. It does not embrace grandchildren.—Ward v. Cooper, 69 M. 789, 13 So. 827.

(1907). Code 1892, § 1545, regulating the descent of property between husband and wife, and § 4496, providing for the renunciation of a will by the widow of the testator, are to be construed together, and the word "child" as used in the former section means such child as shall have a right under the law to share in the estate of his intestate father and does not include children who have contracted away the right.—Norfleet v. Callicott, 90 M. 221, 43 So. 616.

(1910). The word "children" is rarely held synonymous with "heirs" or "bodily heirs," and generally does not embrace grandchildren.—Thomas v. Thomas, — M. —, 53 So. 630.

(1910). In common parlance, grandchildren mean the children of children, and not great-grandchildren, unless there is something in the contract which requires the forced construction.—Thomas v. Thomas, — M. —, 53 So. 630.

(1910). Under a will which created a trust for the use of the sons of the testatrix for life, and then to her grandchildren to be theirs when they reached twenty-one, and in which the testatrix declared her intent to be, that part of the estate should be protected for her own children while they lived, and then for her own flesh after they were gone, the word "grandchildren" was construed to be limited to the children of her children, and not to include any great-grandchildren.—Thomas v. Thomas, — M. —, 53 So. 630.

§ 498. Issue, descendants, or offspring.

(1881). Where a will gives an estate to children of the testator, excepting a portion given to his wife, and there is a codicil in these words: "It is my desire and will that if any of my children shall die without any legal male descendants, then the property to which they may be entitled under the second item of my will shall go to and be distributed among my then surviving children, share and share alike. And it is my further will and desire that if any of my children shall die bearing issue, then such issue or descendants shall take the parts of my estate their father or mother (as the case may be) would have taken, had he or she survived," in order that both clauses of the codicil may be carried out, it is proper by construction to interpolate the word "male" before the word "issue" in the second clause.—Hudson v. Gray, 58 M. 882.

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§ 499. Collaterals.

(1902). The word "kin" standing alone in a will, means such kin as take under the statutes of descent; but where there are other words in the will saying with reasonable certainty that certain particular persons only were intended to be included in the designation, courts will accord the word the meaning that the testator attached to it. —Lusby v. Cobb, 80 M. 715, 32 So. 6.

(1902). Where a testator devised his estate to "all my blood kind in Louisiana and Texas," and at the time of the execution of the will and also of his death, he had two half-brothers and one nephew of the whole blood residing in Louisiana, and nephews and nieces and grand-nephews and grand-nieces of the whole blood residing in Texas, the word "kind" should be construed as "kin," and the half-brothers should receive their *per capita* shares of the estate.—Lusby v. Cobb, 80 M. 715, 32 So. 6.

§ 505. Heirs.

(1866). The word "heirs," when used in a will, is to be construed in its ordinary sense, and a devise to the testator's heirs, will embrace every person coming within the legal meaning of that word.—Love v. Buchanan, 40 M. 758.

(1885). *Prima facie* the word "heir" used in a will in the devise of a remainder, must be construed in its technical sense, unless there is in the will a plain demonstration that it was used by the testator in a different sense.—Irvine v. Newlin, 63 M. 192.

(1904). The word "heir," in a will, is presumed to have been employed in its technical sense, unless there is in the will a clear demonstration that testator used it in a different sense, in which case effect will be given to his intention.—Harkleroad v. Bass, 84 M. 483, 36 So. 537.

(1904). Where the manifest object of the will was to provide for the infant son of the testator and it gave him lands for life and provided "should he leave any lawful issue at his death then I will to his heirs forever and should he die without heirs" the lands were to go to the grand-niece of the testator, the word "heirs" was used in the sense of "lawful issue," and upon the death of the son without issue the grand-niece took the estate.—Harkleroad v. Bass, 84 M. 483, 36 So. 537.

(1909). The words "heirs" and "bodily heirs," in a will, are used in the sense of children.—Davenport v. Collins, 95 M. 358, 48 So. 733.

§ 521. Classes.

(1911). A devise of a remainder over to the unnamed brothers and sisters of the testator is a gift to them as a class.—Branton v. Buckley, — M. —, 54 So. 850.

§ 524. —— Time of ascertainment of class.

(1911). Under a devise of a remainder over on the death of a tenant to the unnamed brothers and sisters of the testator, the persons constituting the class are to be ascertained at the time of the death of the life tenant.—Branton v. Buckley, — M. —, 54 So. 850.

(1911). The law favors the vesting of estates at the earliest moment and generally where a contrary intent does not appear, devises to a class vest immediately upon the testator's death in the members of the class then in being, subject to open and let in members thereof who may afterwards come into existence before the date fixed for the ascertainment of the members of the class. —Branton v. Buckley, — M. —, 54 So. 850.

§ 529. Shares and division among members of class.

(1903). Where the joint will of a husband and wife provided that in case of the death of either, the property of the one first dying should vest in the survivor, unless the survivor should marry again, in which event the property of the deceased should be divided equally "between" the survivor and the children of their marriage, the survivor did not take one-half of the estate and the children the other half, but the word "between" was used in the sense of "among" and the survivor and each child took an equal portion.—Edwards v. Kelly, 83 M. 144, 35 So. 418.

§ 530. Taking per stirpes or per capita.

See *post*, § 548.

(1859). Unless a contrary intention appears on the face of the will, the rule is, that where a gift is made to the children of several persons, as a gift to the children of A, and to the children of B, or a gift to children of A and B, they take *per capita*, and not *per stirpes*.—Nichols v. Denny, 37 M. 59.

(1877). Where a will provides that "the remainder of my estate I desire shall be equally divided between my sons and daughters now living, and my grandchildren, L and M, daughters of my son deceased, and T and B, children of my daughter deceased," the parties take *per capita*, and not *per stirpes*.—Crawford v. Redus, 54 M. 700.

(C) SURVIVORSHIP, REPRESENTATION, AND SUBSTITUTION.

§ 536. Succession on death of devisee or legatee before gift takes effect in general.

(1894). Where the will of a testator devises and bequeaths his entire estate, real, personal, and mixed, in equal parts, to the wife and the six named children of the testator, and constitutes the wife trustee for the minors, it bears its own construction on its face and the death of one of the children, intestate, unmarried, and while yet a minor, invested his brothers and sisters, including those who by the will were disinherited and excluded from participation in the estate therein disposed of, with title to his undivided one-seventh interest in his late fa-

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ther's devised estate, the same being in the hands of his trustee.—Cobb v. Pense, 16 So. 419, not officially reported.

§ 537. Death of devisee or legatee as contingency.

(1911). Where the devise to a class vests immediately upon the death of the testator, it is attended by all of the incidents of a vested estate, and consequently the shares of all members of the class in existence at that time, but dying before the period fixed for the ascertainment of the members thereof, do not lapse, but devolve upon their appropriate representatives.—Branton v. Buckley, — M. —, 54 So. 850.

§ 546. Survivorship.

(1860). The testator gave a slave to H. until her death, and "then to M. and E., the infant daughters of H., or if either M. or E. should then be dead, then to the living one, and if both M. and E. be then dead, then the slave shall descend to the surviving children of H. (the first taker), equally." M. and E. both died before their mother, H., each leaving issue. *Held*, that the surviving children of H. were entitled to the slave on her death, to the exclusion of the issue of M. and E. —Tucker v. Stites, 39 M. 196.

(1901). A will devised land to the two grandsons of the testator with the proviso that if either of them died without issue the land was to go to the survivor, and if both died, it was to revert to the son and daughter of the testator. After executing a deed of trust, one grandson died without issue, the other having issue. It was held that the issue took the land by descent, subject to incumbrances placed thereon by their ancestors.—Halsey v. Gee, 79 M. 193, 30 So. 604.

§ 548. —— Persons included and shares as survivors.

(1910). Under a will which created a trust in favor of the children of the testatrix for life, and then to grandchildren on attaining twenty-one years, and in case of the death of any of such grandchildren before reaching that age, his share should go to the surviving grandchildren when reaching twenty-one years of age, and the other conditions as to the death of her children had been fulfilled, the grandchildren took *per stirpes*, so that on the death of any one of them before attaining the requisite age, his share would pass to his brothers and sisters, share and share alike, provided they reached twenty-one, and in case any one of them died without brothers or sisters surviving, his share passed to his cousins, and in case of the death of all the grandchildren before reaching twenty-one, the estate descended as intestate property.—Thomas v. Thomas, — M. —, 53 So. 630.

(D) DESCRIPTION OF PROPERTY.

§ 561. Particular description of specific real property.

(1889). Where the owner of several lots devises one of them by an accurate description, parol evidence is incompetent to show that he intended to devise a different lot, and that by mistake the wrong lot was described.—Ehrman v. Hoskins, 67 M. 192, 6 So. 776, 19 Am. St. 297.

§ 564. Rents, profits, income, or use and occupation of real property.

(1905). The provisions of a will devising certain land, that in case the testator's death should occur before January 1, 1901, the rents from the land for the year 1900 should be paid to his executor, does not, where the testator's demise occurred after January 1, 1901, indicate that the rents accruing during the year of testator's death and the crops grown on the land should not pass to the executor in accordance with Code 1892, §§ 1881, 1882, 1892.—Gordon v. James, 86 M. 719, 39 So. 18, 1 L. R. A. (N. S.) 461.

(1909). A provision in a will that the beneficiaries should be provided with a home while they lived, including everything necessary to maintain the home, included the payment of taxes and the keeping of the home in comfortable repair, but it did not include the living expenses of such beneficiaries.—Long v. Mayes, 94 M. 735, 48 So. 523.

§ 565. Personal property in general.

(1908). A will bequeathing personal property "now owned by me" does not include chattels conditionally sold by the testator. —Hunter v. Crook, 93 M. 802.

§ 575. Words of description of both real and personal property.

(1911). A devise of "all property" contained in a will passes both real and personal property.—Caffey v. Tindall, — M. —, 56 So. 177.

§ 578. After-acquired property.

(1902). A testator may devise lands acquired subsequent to the execution of his will. (Code 1892, § 4488.)—McRae v. Lowery, 80 M. 47, 31 So. 538.

(1902). A will devising real estate by a specific name(*e. g.* "Cunningham Place in Tunica County") invests the devisee with the testator's title to the lands so named at the time of his death, although only a part of the lands devised were so designated at the date of the will and the addition thereto was acquired by the testator subsequent to the time of the making of his will.—McRae v. Lowery, 80 M. 47, 31 So. 538.

(1911). The disposition of property "accruing to my estate," covers property added to the estate by purchase by the executor. The meaning of the word "accruing" is to be derived from the will taken as a whole.—Gully v. Neville, — M. —, 55 So. 289.

§ 586. Residuary clause.

A residuary bequest carries not only all that is not disposed of by the will, but all that is ill-disposed of, and all that turns out not to be disposed of, whether by a partial

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revocation of the will, lapse, or the will being void. Hence, slaves illegally attempted to be emancipated, go to the residuary legatee.—(1839) Vick v. McDaniel, 3 H. 337; (1859) Morris v. Henderson, 37 M. 492.

(1858). The testator, before his death, had made an invalid sale of land, and held the note of the purchaser for the balance of the purchase money then unpaid; the executor offered to execute a deed, if the purchaser would pay the note, which the latter refused. The executor then brought suit for and recovered the land, and held it as a part of the residuum, and the purchaser recovered back the purchase money which he had paid. By the first clause of the will, all the notes and choses in action belonging to the testator, and remaining after the payment of his debts, were bequeathed to the widow; and by the 14th clause, the residuum was given to other parties. *Held*, that the residuary legatees were entitled to the proceeds of the sale of the land, and that the widow was not entitled to re-imbursement out of said proceeds, for the note of the purchaser held by testator at his death, and which had been lost to the widow, by reason of the purchaser refusing to carry out the invalid sale. —Currie v. Murphy, 35 M. 473.

(1859). The term "property," in a will, also embraces both real and personal estate, and under it, when used in a residuary clause, realty, not attempted otherwise to be disposed will pass.—Morris v. Henderson, 37 M. 492.

By the common law, in a will of personalty, a general residuary bequest carries not only everything not disposed of, but everything that is ill-disposed of, or that by lapse, or any other casualty may fall into the residuum; while, in a devise of realty, such clause only carries the real estate not disposed of, nor attempted to be disposed of.—(1859) Morris v. Henderson, 37 M. 492; (1866) Barton v. King, 41 M. 288.

(1859). The testator, in the introductory part of his will, enumerated what he termed the "principal" part of his estate; he then disposed of the property so enumerated, and also other property not mentioned, except in the clause disposing of it, and concluded his will as follows: "All else of my property and effects I will and bequeath to my son, E." *Held*, that under the last clause, the realty of the testator not mentioned or described in the will, passed to E.—Morris v. Henderson, 37 M. 492.

(1882). Residuary words will pass the entire estate not otherwise disposed of unless clearly intended to apply to the residuum of a part only.—Vaiden v. Hawkins, 59 M. 406.

(1882). After numerous devises and bequests, the last clause of a will, which, after referring to the testator's interest in a commercial firm, adds: "I, with other assets in said house, hope to realize $100,000 from this source," calls such interest "assets," and makes a conditional charitable bequest (which afterwards lapsed), and then adds: "This being consummated, after the above appropriation out of my assets, I desire the residue to go to heirs of my sister," less cost of a monument, and then appoints executors and makes another special devise, this is a general residuary clause, and embraces the entire estate not otherwise disposed of, and not merely the residuum of the assets in such firm.—Vaiden v. Hawkins, 59 M. 406.

(E) NATURE OF ESTATES AND INTERESTS CREATED.

§ 590. Creation by will in general.

(1852). A testator after directing the payment of his debts, bequeathed to his wife, "all the balance of his property both real and personal, to hold to her exclusive benefit." *Held*, that this was a manifestation of an intention of the testator, to give his wife all the estate he had at the time of his death.—Doe v. Wynne, 23 M. 251, 57 Am. Dec. 139.

(1857). The testator by his will devised all his estate to his widow and children in equal shares, and directed that his slaves and other property should be kept together on his farm, under the control of his widow; and that distribution of the personalty should be made to each of his children as they should respectively arrive at full age or marry; and then when his youngest child should arrive at full age, or marry, his real estate should be then divided, but reserving the right to any one of the legatees to have the land sold for a division. The executors nominated in the will renounced and letters of administration were granted on the estate to the widow and her second husband, who settled up the estate and closed the administration. Afterwards, on petition of one of the devisees, a division was made of the realty under an order of the probate court and the guardian of one of the minors procured an order, to sell, and did sell the share of his ward. *Held*, that the provision in the will restricting the division of the realty till the youngest child became of age, or married, was material, and vested a valuable right in the minor distributees, and could not, therefore, be disregarded by the probate court, and that the sale made by the guardian of his ward's interest was void.—Shipp v. Wheeless, 33 M. 646.

(1896). The rule of the common law that a devise is void whenever the heir at law of the devisor would take thereunder the same estate in quality as he would otherwise take by descent, is invoked to no purpose when the will contains other provisions not consistent with the application of such rule.—Dunlap v. Fant, 74 M. 197, 20 So. 874.

§ 591. Technical words of limitation in general.

(1856). The word "estate" used in a will, means both real and personal property, unless the context show the contrary.—Andrews v. Brumfield, 32 M. 107.

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(1858). The words "estate," "effects," and words of a like general import, when used in a clause containing an enumeration of personal property, will generally be confined to estate or effects, *ejusdem generis*. with that specified, unless a different construction be required by the context.—McIntyre v. Ingraham, 35 M. 25.

§ 592. Limitation over on death of devisee or legatee.

(1880). Section 26 of the Act of 1822 (Hutch. Code, p. 610), applies only to limitations contingent on a person dying without children or descendants, and does not in any case add the words "then living" to a limitation expressly to children and descendants of the donee of a life interest, since this, instead of providing for a case of death without issue, assumes that there will be children and descendants living to take the devise.—Caldwell v. Willis, 57 M. 555.

(1895). A provision in a South Carolina will to the effect that "I devise and direct that the residue of my estate both real and personal and of what nature soever be equally divided between all my children. * * * and, if either of my children should die without issue, his or her part to return to my estate and be divided as the rest and residue of my estate," was a limitation over upon an indefinite failure and was therefore void for remoteness.—Adams v. Farley, 18 So. 390, not officially reported.

§ 595. Estates by implication in genral.

(1909). The rule that a testamentary gift to a person, and in case of his death without leaving children then over, does not raise an implied gift in the children, but that the parent takes an absolute interest, defeasible on his dying without having had or without leaving a child as the case may be, applies only in cases where first taker takes absolute interest and not any less interest.—Ball v. Phelan, 94 M. 293, 49 So. 956, 23 L. R. A. (N. S.) 895.

§ 596. Fee simple.

(1898). A devise to one for her natural life and at her death to the heirs of her body conveys the fee to the first taker.—Harris v. McCann, 75 M. 805, 23 So. 631.

(1907). A will which devises to the wife of a testator all of his property, the proceeds to be appropriated to the payment of his debts and the support of herself and his children gives the wife a perfect title to the property on his youngest child coming of age and does not create a trust for his children by precatory words.—Courtenay v. Courtenay, 90 M. 181, 43 So. 68.

(1907). A will which devises all the property of the testator to a sister, invests the sister with a fee simple title to the lands although the devise is followed by the words "at her death her heirs are to have it."—Haring v. Flowers, 91 M. 242, 45 So. 571.

(1899). Under a statute which provides that "every estate in lands devised to any person, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple, if a less estate be not limited by express words or do not appear to have been devised," a devise to one for life and after his death to his children, and, in the event of death without children then to another, the devise is in fee to such other person and his heirs.—Johnson v. Delome Land &c. Co., 77 M. 15, 26 So. 360.

§ 599. —— Implication in general.

(1909). Where a testator gave half of his property to his wife for life and then to his daughter, and gave the other half to the daughter for life and provided that on her death, without issue or on the death of the issue before marriage or before coming of age, the whole property given to the daughter "all for life" should go to others, the daughter took only a life estate and her children took the fee by implication.—Ball v. Phelan, 94 M. 293, 49 So. 956, 23 L. R. A. (N. S.) 895.

§ 602. Qualified or defeasible fees.

(1858). The testator declared it to be his desire that his widow should have his entire estate, "to have and to hold, and to sell any part thereof she might think best for her interest and the interest of his children during her natural life or widowhood," and for that period that the estate was to be kept together; and that if his widow should live until his two youngest children should arrive at full age or marry, that she should give them such property as she deemed proper; and that they should be educated out of the estate; and upon the death of the widow, he directed a division of the property among the children, and finally he directed "that D and N should take the entire business in hand, and act as executors of his will." *Held*, that the widow took a legal freehold in the property during her life or widowhood, and that his executors were not entitled to retain possession of the estate after the payment of all debts, and after the lapse of twelve months from the date of their qualification.—Dean v. Nunnally, 36 M. 358.

§ 604. Estates tail.

(1881). Under Code 1857, art. 3, p. 307, prohibiting estates in fee tail and converting them into estates in fee simple, a will which gives the property of a testator to the male descendants of his children, and excludes his female grandchildren, though good as to personalty, is void as to land devised. And as to the land, the devise in the above case cannot be maintained under the proviso of the statute, authorizing a devise to a succession of donees then living not exceeding two, because the estate limited may be held by each of the four children of the testator in succession.—Hudson v. Gray, 58 M. 882.

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(1909). A will provided that the estate of the testator should be equally divided among his wife and three children, "to be theirs and each of theirs during their natural life, and to the children and heirs of their bodies, if any they have, at the time of their death; if not, the same shall revert to my estate in gross and be again divided between my said wife and children, or such of them as shall survive, and to their heirs, share and share alike, they to take a life estate in the same only; and all the children of my deceased children, if any, to take only such share as their deceased parent would have taken; but should any of my said children die without issue before such division, such division to be made among the survivors of my said children and my said wife." Elsewhere the testator expressed a wish that his wife remain on the home plantation and have the use of the furniture and stock during her life and that at her death "the same shall be divided as hereinbefore provided in regard to other property, equally among my children." Hutch. Code, c. 42, art. 4, p. 609, § 24, provides that every estate which shall hereafter be created in fee tail shall be an estate in fee simple. It was held that on the happening of the contingency mentioned in the will, life estates would be created in grandchildren who were not in existence at the time the will was executed, and that the children of the testator were granted a fee simple title to the property devised to them.—Davenport v. Collins, 95 M. 358, 48 So. 733.

(1910). An "estate tail" within the meaning of Code 1906, § 2765, prohibiting estates tail, was not created by a will which bequeathed property in trust for the children of the testatrix for their life and then to the grandchildren on reaching 21, and in case of the death of any such grandchildren before attaining such age, or the fulfillment of the other condition as to the death of the children of the testatrix, their shares should go to the surviving grandchildren under the same conditions. This was in effect a trust by way of executory devise.—Thomas v. Thomas, — M. —, 53 So. 630.

§ 613. Life estates.

(1848). The will provided as follows: "I devise and bequeath to my wife, M, for her life, to her exclusive use during the term of her natural life, in lieu of dower and her distributive share in and to my real and personal estate, the mansion house occupied by us as a residence, and the tract of land on which it stands, and all outbuildings and improvements, together with all the family plate, and all other personalty in and about said dwelling and farm; and that upon my wife's death her land and mansion house shall go to my son, Thomas, and his heirs." *Held*, that the widow only took a life estate in the slaves and personalty, as well as in the land; and that it was no argument against this construction, that there was a bequest over of the personalty.—Vannerson v. Culbertson, 10 S. & M. 150.

(1855). A will contained the following clause: "Also, I give and bequeath to my wife, N, all my real estate, with furniture, plantation, tools, and the balance of my negroes that are not bequeathed to my children, including stock of all description, and a wagon and three men, and that I have left to my wife, N, all to work as follows: for the use of the plantation, * * * and that my son, J, be educated and raised out of the proceeds of the plantation, at the discretion of my executors, and that when my son J becomes of age, my wife, N, shall receive her dower, and that she remain on the plantation during her life, and at her death, the plantation to be equally divided among my children." *Held*, that the interest conveyed to the wife, in the land, was only her dower, with a right to remain on the plantation during life, and that no life estate in it was devised to her.—Cooper v. Benson, 28 M. 766.

(1858). The testator declared it to be his desire that his widow should have his entire estate, "to have, and to hold, and to sell any part thereof, she might think best for her interest, and the interest of her children, during her natural life or widowhood;" that his entire estate should be kept together during the life or widowhood of his widow; and if she should survive until his two youngest children should marry or attain the age of majority, that she should give them such property as in her judgment should seem best, and that these two children should be educated out of his estate; and upon the death of his widow, he directed a division of his property among his children; and finally he directed that D and N "should take his entire business in hand and act as executors of his will." *Held*, 1st. That the widow took a legal freehold in the property during her life or widowhood. And, 2d. That his executors were not entitled to retain possession of and manage the estate after the payment of his debts and the lapse of twelve months from the date of their qualification.—Dean v. Nunnally, 36 M. 358.

(1868). A devise unto John and William of "my late residence and farm. Provided, however, that the children who are now living with me, hold a home on the same until otherwise provided for," vests an estate for life in the children living with the testator, determinable upon their being otherwise provided for; and in John and William a vested remainder in fee.—Williams v. Ratcliff, 42 M. 145.

(1892). The will of a deceased husband professed to give the wife only a life estate in the property of the testator but since she would as heir at law take the whole, no less estate would be taken under the will and the law, than by the law only.—Lemon v. Rogge, 11 So. 470, not officially reported.

(1904). A provison of a will construed and held not to limit to a life estate the interest in land which under other items de-

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scended to the heirs of the testator on failure of the executors to exercise a power of sale.—Whitfield v. Thompson, 85 M. 749, 38 So. 113.

(1905). Where a testator bequeaths to his wife "all of my Wm. Holmes's place * * * also all of my stock that I may have at my demise after her demise to go to" a certain third person and her heirs, the wife takes a life estate only in both the Holmes's place and the stock.—Montgomery v. McPherson, 86 M. 4, 38 So. 196.

§ 614. —— Words necessary or sufficient in general.

(1910). A will provided that all the testator's estate should be equally divided between his wife and three children, to be theirs during their natural life, and to the children and heirs of their bodies, they might have at the time of their death, if not, to revert to his estate in gross and be again divided between the wife and children or such of them as should survive and to their heirs, share and share alike "they" to take a life estate only; and all the grandchildren to take only such share as their deceased parent would have taken. It was held that the word "they" should be construed to refer to the children of the testator, and not to grandchildren who might share in the lapsed share of a child who had died without issue, for the purpose of the will was to vest the life estate in his wife and children, and the remainder in fee to his grandchildren.—Davenport v. Collins, 95 M. 358, 51 So. 449.

§ 616. —— Devise or bequest for life with power of control or disposition.

(1856). A bequest to one for life, with directions that the property "shall be delivered to the legatee after the testator's death, as soon as possible, that he may have full control and be empowered to dispose of the same as he may think proper," vests in the legatee an estate for life only, but with the unrestricted power of disposing of the fee.—Andrews v. Brumfield, 32 M. 107.

(1874). A testator provided substantially as follows: "Having no children, I give my wife all my estate not hereinafter disposed of, to have and to hold the same during her natural life. At her death, if she die without issue by me, it is my wish, and I so direct, that my entire estate shall be sold. My wife shall have full power to dispose of one-half of my estate arising from said sale in any manner and any way she may see fit." Held, the widow took a life interest in the whole estate, with power to appoint who should take the half of the proceeds of a sale after her death.—Tatum v. McLellan, 50 M. 1.

(1907). The son of a testator who devised his property to his wife for life with power of disposition without authority from the court may maintain a bill for an accounting of personal property bequeathed to the wife and in possession of a daughter of the testator after the death of the wife.—Gibbes v. Watson, 92 M. 9, 45 So. 5.

(1907). Under a will which devised property to the wife of the testator for life with power to dispose of the same without authority from any court and directs her to invest the proceeds, unless needed for her support, the wife acquires a life estate and is entitled to the income for life and a daughter, to whom she gave the income, cannot be charged therewith in settling the testator's estate after the death of the widow.—Gibbes v. Watson, 92 M. 9, 45 So. 5.

(1910). Under a will which left to the wife of the testator the use and management of his property, and at her death the property was to go to relatives, which gave the wife the power to sell any of the property as she might deem best, and which provided for the execution of the deed by the wife and co-executors, the wife acquired a life estate in the property with the power to consume the entire estate if she so desired.—Murdoch v. Murdoch, — M. —, 53 So. 684.

(1910). A provision in a will giving the wife of the testator all of his property to have and to hold during her life and to do with as in her judgment she might deem best, gave the wife power to convey an estate in fee.—Warren v. Ingram, 96 M. 438, 51 So. 888.

§ 618. Income.

(1902). Under a will providing that the income of an estate shall be paid to certain beneficiaries for life, such increase in the value of bank stock belonging to the estate as results, after the testator's death from the action of the bank in withholding dividends and carrying the sum as surplus belongs on sale of the stock, to the life beneficiaries.—Simpson v. Millsaps, 80 M. 239, 31 So. 912.

§ 619. Annuities.

See *post*, § 729.

(1883). Although one of several legacies is to be paid to one and his children in annual instalments, and is termed in the will an "annuity," subsequent clauses devising the remainder of the estate, real and personal, "after the above legacies are paid," will be held to refer to and include the annuity, and charge it on the estate.—Heatherington v. Lewenberg, 61 M. 372.

§ 620. Maintenance.

See *post*, § 720.

(1866). The testator was worth $250,000, and he left a widow and eight children, and his estate was somewhat incumbered with debt; he had a mansion house in a city, in which he resided in considerable style, dispensing a liberal hospitality. By his will he provided for an equal distribution of his estate among his widow and children, and gave to his widow in addition, as her own prop-

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erty, his carriage and horses, five domestic servants and $300 in money, which was to make her equal to the advancements which he had made to his children; and he provided that these should go to her immediately, and that she should occupy the mansion and furniture during widowhood. He directed that his estate might be equally divided at once; each child and the widow assuming a *pro rata* share of the debts; or that it might be kept together until the debts were paid, at which time the division was required to take place. He also directed that his "widow should have ample support out of his estate until such time as may be required to enable her to have control of her own property." *Held*, that the time for which she was entitled to this support was up to the general distribution of the estate, and did not expire when she got the five slaves, specifically bequeathed to her as her own property. That it was manifest these slaves were intended as domestics, and not as a means of making a support, and that a contrary construction would leave his widow without adequate support till the general distribution, which was contrary to his clear intention. *Held*, further, that the "ample support" meant a sufficiency to enable the widow to live in the style he had been accustomed to live in, and that $2,000 per annum, out of the estate, was a reasonable allowance for her. *Held*, also that the widow's consent, given with that of all the other parties, that the property should be sold on a long credit for distribution, did not waive her right to the support, but that she was entitled to it till collections were made and a distribution consummated.—Haughton v. Brandon, 40 M. 729.

§ 622. Remainders.

(1859). Where a particular estate is carved out with a limitation over to the children of the person taking that interest, or to the children of any other person, such limitation will embrace not only the objects living at the testator's death, but all who may subsequently come into existence before the period of distribution.—Nichols v. Denny, 37 M. 59.

(1895). Under Code 1892, § 2441, providing that a conveyance of land to several shall be construed to create an estate in common, and not in joint tenancy, unless it manifestly appears that an estate in joint tenancy with survivorship was intended, a deed conveying land to three nieces "during their natural lives, and, at their death, to the descendants of their bodies in fee, if any, but, if they leave none to survive them, then in that event, to the heirs of their brothers and sisters," creates an estate in common in the three life tenants, with remainder, at the death of the survivor, to the descendants of the life tenants.—Hawkins v. Hawkins, 72 M. 749, 18 So. 479.

(1895). In such case, the statute does not convert the estate for three lives into an estate for life only of the respective grantees. The estate of the life tenants is not cut down; only the right of survivorship is destroyed. On the death of one of them, her estate in the land passes to her heirs, and the same result follows on the death of another. Not until the last life tenant dies will the ulterior limitation take effect and the fee pass. Until that event, the representatives of the life tenants hold their respective estates by descent.—Hawkins v. Hawkins, 72 M. 749, 18 So. 479.

§ 623. Cross-remainders.

(1887). Under a devise of land to the testator's four stepchildren by name, "each to have an equal share of the property but is never to be sold; is to remain in the family forever; and when either of them dies then for his or her share to be divided equally among the rest," the devisees take as tenants in common with cross-remainders between them and the ultimate limitation to the last survivor, and on the death of each devisee the survivors, and not the heirs of the decedent, take his title.—Reber v. Dowling, 65 M. 259, 3 So. 654, 7 Am. St. 651.

§ 625. Executory devises or bequests, and shifting, springing, or other future uses, or estates in the nature thereof.

(1849). A will which bequeathed testator's property to his sister and her bodily heirs, should she marry, and at her death without issue the property to go to her brothers and sisters did not create an estate tail but an executory devise.—Rucker v. Lambdin, 12 S. & M. 230.

(1910). A limitation by executory devise may be created in realty as well as personalty, or of both.—Thomas v. Thomas, — M. —, 53 So. 630.

(F) VESTED OR CONTINGENT ESTATES AND INTERESTS.

§ 629. Construction in favor of vesting.

(1839). The testator by his will, directed that all his property should be kept together by his executors till his only daughter arrived at full age or married, then to be equally divided between his wife and daughter; but if the daughter died without issue, the whole to go to the wife. The daughter died before majority, and then the widow died, leaving a second husband surviving. *Held*, that the wife had a vested interest in the property during the marriage, and that the husband was entitled to it.—Scott v. James, 3 H. 307.

(1853). The testator provided in his will that his brother "shall have a plantation and slaves formerly owned by the devisee, and now in his possession, on his paying all that he owes" the testator, "and also on his paying a debt" the testator "owes a bank on account of the property." He then directed that his brother "shall have" whatever might be realized out of certain suits and judgments. It was shown by extrinsic proof that the testator had bought this property at a sale under execution against his

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brother, and that the use and possession of it were the principal means the devisee had of paying the debts he was required by the will to pay. No other disposition was made of this property in any other part of the will. *Held*, that notwithstanding, the use of the words "shall have, &c., on his paying," &c., indicated an intent that the property should not vest till payment; yet taking the whole will together, and the circumstances surrounding the testator and the devisee at the time the will was made, it was the evident intention of the testator that the property should vest at once, and that the debts the devisee was to pay were a mere charge on the estate devised to him.—Burnett v. Strong, 26 M. 116.

(1886). The law favors vested estates and no remainder will be construed to be contingent which may, consistently with the intention, be deemed vested.—McDaniel v. Allen, 64 M. 417, 1 So. 356.

(1895). One devised to his widow an estate during her life or widowhood, in trust for herself and children, and directed an appropriation by her of the income to her support and the education and maintenance of the children, and it further directed that as the children severally became of age or married each should receive one-half of his distributive share, and the other half when it became reasonably certain that there would be no litigation against the estate, and that in the event of the death or marriage of the widow the residue not already distributed should be divided among the legatees who had not received their interest. *Held*, the will vests the entire equitable estate in the widow and children, and since it contains no provision against alienation or anticipation, or for a forfeiture, the quitclaim deed of the children to the widow, and her subsequent mortgage of the property, both executed after all the children had attained majority, and after nearly twenty years from the death of the testator, are valid, and will not be set aside at the instance of a creditor of the widow, whose judgment against her for a debt authorized by the trust was not a lien when said conveyances were executed.—Stern v. Hampton, 73 M. 555, 19 So. 300.

(1911). The law favors the vesting of estates at the earliest moment and generally where a contrary intent does not appear, devises to a class vest immediately upon the testator's death in the members of the class then in being subject to open and let in members thereof who may afterwards come into existence before the date fixed for the ascertainment of the members of the class.—Branton v. Buckley, — M. —, 54 So. 850.

§ 630. Contingency on which estate or interest depends in general.

(1860). The testator directed all his property to be kept together by his executors, until his youngest child became of age, but allowing each child to have his portion on arriving at his majority; that his plantation should be cultivated and the profits, after supporting and educating the children, should be invested in other property, "as the wants of the plantation should require;" and that, when his youngest child arrived at full age, "an equal division of all his property, real and personal, should be given to each of his children and his wife, allowing her a child's part." *Held*, that a vested estate was given to the widow and the children, to be enjoyed in severalty *in futuro*, and that, on the death of the wife before the youngest child became of age, her heirs were entitled to her share. *Held*, also, that the direction to keep the property together was material, and could be executed by the administrator with the will annexed.—Lowe v. Barnett, 38 M. 329.

(1860). The will contained these clauses: "It is my will that all my property be kept together, for the purpose of raising my children, and that my wife keep the property together until they become of age or marry; each, on coming of age or marrying, to have an equal share, according to the valuation of my estate so left." "It is further my will, that my wife retain all my property, real and personal, for the purpose above named, until my children become of age or marry, or during her widowhood; and then, that the property so left be equally divided between her and the children." *Held*, that the children took a vested interest in the estate upon the death of the testator; and that neither by the first nor second clause was the widow's distributive share taken away; and that she had a vested interest in such share, whether she married or not.—Hancock v. Titus, 39 M. 224.

(1896). When by the terms of his will, a testator who has several children devises his real estate to his wife for life, with remainder over at her death to such of his lawful heirs as may then be alive, and the children of such as may have died, *per stirpes*, and directs that the property shall not be divided or disposed of until one of his daughters attains her majority or marries, the children of the testator take by purchase, vested remainders, subject to defeasance by their deaths during the continuance of the life estate, and the descendants of such of them as have died during the same time also take by purchase as ulterior limitees and not as heirs of the testator.—Dunlap v. Fant, 74 M. 197, 20 So. 874.

§ 634. Remainders.

(1882). Under a bequest in trust "for the sole and separate use" of the testator's daughter "during her natural life, and at her death the property to vest in her children in fee simple, the children severally take vested remainders and upon a child's death its interest passes to its representatives.—Tippin v. Coleman, 59 M. 641.

(1886). Under a will, made in 1881, devising real estate to the testator's widow for life, and on her death "to be divided equally among the heirs of my body" a child of his

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does not take the same estate he would as heir, since as heir he would have taken an undivided interest with the widow and other heirs at law. Hence, he takes by purchase under the will, and not by limitation.—McDaniel v. Allen, 64 M. 417, 1 So. 356.

(1886). Under the above quoted clause of the will, the remainder limited by the testator to his heirs at law, was vested and not contingent. Those who were alive at the death of the testator took the estate and not those only who survived the tenant for life. —McDaniel v. Allen, 64 M. 417, 1 So. 356.

(1910). Under a will which created a trust of a portion of the estate of the testatrix for the sole use of her sons for life and then to her grandchildren to be theirs when they reached 21, and in case of the death of any of such grandchildren before reaching 21, their share should go to the surviving grandchildren when of proper age, but not to become theirs until they reached that age and until all the children of the testatrix were dead, the surviving grandchildren did not take a determinable fee to be divested on failure to reach the age of 21, but that all the sons must be dead and each of the grandchildren must have reached 21 years of age before they took any interest in the estate.—Thomas v. Thomas, — M. —, 53 So. 630.

§ 635. Opening of vested estates or interests to let in after-born children.

(1859). Where a remainder is limited to the children of the tenant of the particular estate, or to the children of any other person, the gift embraces not only the children living at the testator's death, but all who may subsequently be born before the period of distribution.—Nichols v. Denny, 37 M. 59.

(G) CONDITIONS AND RESTRICTIONS.

§ 640. Validity of conditions.

A devise to the testator's widow "so long as she shall continue my widow; but in the event of her marriage, then her interest to go to my heirs above named," is good, and the widow's interest terminates with her widowhood. It is not a devise in restraint of marriage, nor is the condition one *in terrorem*. The limitations over relieve it from this last objection.—(1850) Pringle v. Dunkley, 14 S. & M. 16, 53 Am. Dec. 110; (1852) Dillard v. Connoway, 25 M. 230.

§ 654. —— Effect of invalidity.

(1850). The general rule is, that a bequest upon a void condition vests the estate in the legatee discharged of the condition.—Weathersby v. Weathersby, 13 S. & M. 685; (1859) Cheairs v. Smith, 37 M. 646.

The general rule is that a bequest to a legatee upon a void condition, vests the legacy in the legatee, discharged of the condition; but if the legatee be a mere trustee to carry out the void condition, and it do not appear that the testator intended he should have any beneficial interest in the estate. then there is a resulting trust to the heir.—(1850) Weathersby v. Weathersby, 13 S. & M. 685; (1859) Cheairs v. Smith, 37 M. 646.

If the trust created by a will be declared ineffectual as against public policy, and the will sufficiently show the intention of testator, that the devisee should be trustee only without any beneficial interest in the bequest, the trust in the property will revert to the heir, and not to the trustee.—(1856) Lusk v. Lewis, 32 M. 297; (1859) Cheairs v. Smith, 37 M. 646.

(1859). A bequest was made to a legatee of a residuary interest provided he would execute a certain void trust therein provided for, with a limitation over in case of failure to perform the condition. *Held*, that on a showing that the legatee was not a mere trustee, but the subject of a special bounty, the estate remained in him discharged of the void trust and condition subsequent.—Cheairs v. Smith, 37 M. 646.

§ 655. Construction and operation of conditions.

(1853). There are no technical or appropriate words which always determine whether a devise be on condition precedent or on condition subsequent; but it is a question of intention on the part of the testator. If the language show that the act on which the estate depends must be performed before the estate can vest, the condition is of course precedent, and unless it be performed the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, the condition is subsequent; and to determine this question, reference is had not only to the particular clause making the devise, but to the whole will, and the circumstances surrounding the testator.—Burnett v. Strong, 26 M. 116.

(1859). A testatrix in her will provided that if her "son P will go to some college, and by application will acquire a good practical education, and by good conduct and steady habits until the age of twenty-four, it is my will that my estate be divided equally between my children, but if my son continue in his wild, extravagant, dissipated habits, my daughter F is to inherit all my estate, allowing to my son $300 per annum." *Held*, that the period in which P was to comply, by acquiring the education and reforming his habits, was up to his arrival at the age of twenty-four years and if he failed up to that time to perform it, the whole of the estate vested in his sister F, subject to a charge in P's favor of $300 per annum.—West v. Moore, 37 M. 114.

§ 657. —— Conditions precedent.

(1853). The courts have shown no disposition to apply the strict rules applicable to conditions precedent in covenants and other contracts, to wills, and have looked rather to the circumstances of the bequest, and the nature and object of the condition, rather

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than to the strict words, so as to give to the devisee the benefit of the testator's bounty. —Burnett v. Strong, 26 M. 116.

(1859). The testatrix by the second clause of her will, devised, "the whole of her estate, both real and personal, to her executors, for the use of her two children, P and F, and subject to such charges as she should make thereon," giving the executors the power to sell any of the property in their discretion, and directing that the estate "should be kept together until her debts were paid." The fourth clause was as follows: "And as my son P seems to be of a dissipated and extravagant disposition, it is my will that my executors do not allow him to spend anything more than for necessary food, clothing, and doctor's bill, while under twenty-one years of age; and, furthermore, if my son P will go to college, and, by application, acquire a good practical education, and by good conduct and steady habits, until the age of twenty-four, that my estate be equally divided between my children; but if my son P continue in his wild, extravagant, and dissipated habits, my daughter is to inherit all my estate, allowing my son P $300 per annum." By the fifth clause, she directed that in the event of her daughter's marriage, her portion of the estate should be secured to her children, so that they might not come to want; and if she died without issue, her brother P should inherit her estate; and if P should marry, and die without issue, that "such property as he shall receive from my estate, shall be divided between his widow and my daughter F." And, finally, she declared as follows: "My last wish is, that though this my will be not written in strict legal phraseology, it may not be the cause of any litigation whatever, but be construed as intended, to keep my children from want by saving their property, so that they cannot squander it." *Held*, that the provision in reference to P's requiring an education, &c., was a condition to be performed within the time limited, before any interest in the property, beyond the $300 a year, would vest in him. 2. That this condition was not void for uncertainty, and that if P did not comply within the time limited, the whole estate would vest in F, subject to the charge of $300 per annum, in favor of P.—West v. Moore, 37 M. 114.

§ 658. —— Conditions subsequent.

(1859). Where a will gives a present estate to a devisee or legatee, to be defeated on his failure to perform certain acts therein required of him, such performance is a condition subsequent; nor is this changed by the fact that the estate is limited ultimately to another on failure of the original devisee or legatee to perform the condition.—Cheairs v. Smith, 37 M. 646.

(H) ESTATES IN TRUSTS AND POWERS.

§ 669. Creation of testamentary trusts in general.

(1895). The evidence in the case at bar is, by the Supreme Court on appeal, held insufficient to establish a trust for the payment of debts, on the estate of a decedent. —Gwin v. Nettles, 18 So. 798, not officially reported.

§ 670. Words necessary or sufficient to create trust.

(1872). If a testator orders his real estate sold for the payment of debts, without saying who shall sell, a trust is created which the chancery court will execute. And if the executors are named in the will, they will be deemed, by implication, proper parties to make the sale.—Clark v. Hornthall, 47 M. 434.

(1904). A will created an express trust for the payment of the debts of the testator which by its various items provided: (1) for the payment of the debts as soon as it could be done without injury to the estate; (2) for the payment of an annuity to a servant; (3) that the testator's widow should have all his personal property during her life with power to sell and dispose of it as she might see fit, but in such event the proceeds should be placed in the corpus of the estate subject to the provisons of the will; (4) for the sale of incumbered real estate in another state "as soon as can be done without too great loss," with discretion to lease or sell at public or private sale and authorized the extension of the payments due on the property or the renewal or execution of other judicious loans and mortgages to pay the incumbrance; (5) full power for the executors to carry on and cultivate the lands of the testator or to lease or sell any and all real or personal property of the testator in this state which might be deemed expedient to pay debts but directing certain pieces of land to be reserved until the last; (6) that the widow should claim no allowance and charge no commissions for services rendered the estate but should be allowed a reasonable amount for the support of herself, family and household to be charged against the estate of the testator and to be decided by her own judgment; (7) that the executor should, "subject to the foregoing articles," have the entire control of the estate and the widow the entire use of the income, rents and profits thereof for her life with power to dispose of one-fourth of the estate remaining at her death by will in default of which the one-fourth should remain a part of the estate; (8) for the disposal of the remainder of the estate subject to the life estate of the widow.—Gordon v. McDougall, 84 M.715, 37 So. 298.

§ 672. —— Grants of authority or directions importing trust.

(1910). A will which created a trust in favor of the sons of the testatrix during their life and the estate was thereafter to go to grandchildren reaching 21 years of age, vested no vendible interest in the sons of the testatrix but created a trust in the exclusive management of the executor, and the net income was to be divided among the

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children of the testatrix during their lives, and on their death to the grandchildren attaining the requisite age.—Thomas v. Thomas, — M. —, 53 So. 630.

§ 673. —— Provisions for maintenance.

(1848). By the first clause of the will, the testator gave his "whole estate, both real and personal, to his wife, during her widowhood." By the fourth clause, he provided, that, "during my wife's widowhood, she is to have the entire use, profits, and control of my estate, and to her discretion do I intrust the maintenance and education of my children during that time;" and this clause also provided for the maintenance and education of the children "out of the profits of the estate, in case of the death or marriage of the widow." *Held*, that the fourth clause created a trust for the children, and the property was not liable for the widow's debts.—Lucas v. Lockhart, 10 S. & M. 466, 48 Am. Dec. 766.

§ 675. —— Precatory words.

Where property is given absolutely to another person, and the same person is, by the giver, who has power to command, recommended, entreated, or desired to dispose of that property in favor of another, the recommendation, entreaty or wish, shall be held a trust, first, if the words are so used, that upon the whole, they ought to be construed as imperative; second, if the subject (i. e., the interest or property given) of the recommendations, &c., be certain; and thirdly, if the objects or persons intended to be benefited by the recommendations be also certain.—(1846) Wade v. Am. Col. Society, 7 S. & M. 633; (1848) Lucas v. Lockhart, 10 S. & M. 466, 48 Am. Dec. 766.

(1906). A will which recited the affection and watchfulness of the testator's wife and the provisions he had made for his children bequeathed to such wife all of the balance of his estate "to be hers and to be disposed of as she may think best. I have full confidence in my said wife and have abiding faith that she will deal justly with our children," made independent provision for the wife and did not create a precatory trust.—Rector v. Alcorn, 88 M. 783, 41 So. 370.

§ 676. Implication of trusts.

(1906). A will provided that four of the children of the testatrix should arrange among themselves for the division of the home place of the testatrix and provided that another child should have an equal share with them and further declared the wish of the testatrix that the children of a deceased child should have whatever fifteen acres of land would bring well sold and that she wanted the child of another deceased child to have whatever five acres of land would bring well sold and provide for gifts over on the death of the grandchildren. It was held that the four children named were trustees for the purpose of selling and paying to the grandchildren the proceeds of twenty acres of average land well sold.—Barksdale v. Capital City Realty Co., 88 M. 623, 42 So. 668.

§ 679. Construction of testamentary trusts.

(1872). For a case in which the opinions of two judges, the other being disqualified, discuss at great length the effect of a provision in a will: "I wish all my debts to be paid as soon as possible," as conferring the power, by implication, to sell real estate to pay debts, the doctrine of powers conferred on executors, naked powers and powers coupled with an interest, the execution of a power by a survivor, improvements by a *bona fide* purchaser; but, in which case, since the two judges disagreed on the controlling questions at issue, causing an affirmance, nothing said has the force of decision, see Clark v. Hornthal, 47 M. 434.

§ 684. —— Capital and income.

(1887). A will contained the following clauses: "I bequeath all my property to my wife during her natural life, to be kept by her for the benefit of herself and my children," and "the proceeds of the property shall be used by her in the support, education and raising of my children," and "at the death of my wife the remaining estate to be divided between all my children or their legal descendants." Under this will, the wife of the testator took an estate for life, charged with a trust for the maintenance and education of the children during her life, and on her death the children took the property as then existing, subject only to be diminished by payment of debts contracted by the wife in administering the trust.—Shannon v. Davis, 64 M. 717, 2 So. 240.

(1887). In such case, upon the death of the wife, the life tenant, her administrator may take charge of the growing crops and of the personal property of the estate of the husband, for the purpose of paying off such debts as she had contracted in administering the trust. But her administrator cannot have the exempt property of the husband set aside for the use of the minor children, remaindermen, or have any allowance made out of his estate for their support and tuition.—Shannon v. Davis, 64 M. 717, 2 So. 240.

(1910). Where a testatrix directed that not less than a certain amount nor more than a stated larger amount should be set aside to create a trust for her sons, and the estate was not sufficiently large to set aside the maximum amount but was in excess of the minimum, and a gift of the residuary estate was made by the testatrix, the amount to be set aside for the trust was within the sound discretion of the executor, provided the amount set aside was not less than the minimum amount and a substantial amount was left for the residuary estate.—Thomas v. Thomas, — M. —, 53 So. 630.

§ 685. —— Purposes of trust.

(1892). A testator devised to a daughter a sum of money and an undivided inter-

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est in land, the money to be loaned, and the land to be divided and rented by her, the interest and income to be devoted by her to the support of the testator's son during the son's life, making quarterly payments to him. The testator at his death, and when the will was executed, knew that the son was insolvent. *Held*, a bill in equity by creditors of the son to subject such interest and income must fail, since the purpose of the testator, which is a lawful one, was that the daughter, as trustee, should apply a sufficiency of such income to the support of the son, from year to year, so long as he lived, free from liability for his debts.—Leigh v. Harrison, 69 M. 923, 11 So. 604, 18 L. R. A. 49.

§ 688. Effect of failure of trust.

(1856). If the trust created by a will be declared ineffectual as against public policy, and the will show the intention that the devisee shall be a trustee only, without any beneficial interest in the bequest, the trust in the property will revert to the heir and not to the trustee. Thus a bequest of slaves to persons who are strangers to and have no claim upon the bounty of the testator, "in trust for the Colonization Society," conveys no beneficial interest in the slaves to the trustees, and the trust being void, the slaves go to the heir.—Lusk v. Lewis, 32 M. 297.

§ 690. Construction of testamentary powers.

(1881). As a general rule the power to sell does not include the power to mortgage. Under a will devising land to the children of a testator, and conferring upon her husband the power to "sell and dispose of any of the property bequeathed in this will when it shall appear to him desirable to do so, having an eye to the support and education of the children, the husband, having no interest, is without authority to mortgage the land, even to obtain necessaries for the support of the children.—Stokes v. Kennedy, 58 M. 614, 38 Am. Rep. 340n.

(1882). Where a life tenant of land under a will is thereby given power to convey the fee when he thinks it best to remove from the premises, he cannot exercise the power until such contingency arises, in its absence, the attempted or pretended exercise of such power for the mere purpose of excluding a remainderman will be void.—Baird v. Boucher, 60 M. 326.

(1882). If a life tenant of land under a will is given power thereby to convey a fee simple, his deed, purporting to be of the fee and containing nothing to explain itself, will be construed as the exercise of the power.—Baird v. Boucher, 60 M. 326.

(1884). Code 1857, art. 136, p. 458, providing that if land be devised to be sold the sale shall be made by the person appointed by the will to execute the trust or by the executor, or, in the event of the death or failure of such person to act, then by the administrator *cum testamento annexo*, is not limited to cases where the title is, by the will, vested in the excutor, but applies wherever land is by its terms devoted unconditionally and absolutely to sale.—Sandifer v. Grantham, 62 M. 412.

(I) ACTIONS TO CONSTRUE WILLS.

Jurisdiction of equity to construe, see EQUITY, § 22.

§ 699. Time to sue, limitations, and laches.

(1905). A legatee who is to be given "comfortable support" during her lifetime to begin immediately upon the testator's death may file a petition in equity for the construction of the will and the determination of the amount to be paid her by the executors without regard to Code 1892, § 1922, which prohibits the bringing of an action against an executor until after the expiration of six months from the date of his letters or § 1961, which authorizes a legatee to petition for his legacy at any time after the expiration of twelve months from the grant of letters testamentary.—Owens v. Waddell, 87 M. 310, 39 So. 459.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(A) NATURE OF TITLE AND RIGHTS IN GENERAL.

§ 712. Devise or bequest to attesting witness.

(1849). Under the statute (H. C. 651), which provides that if any person shall be a subscribing witness to a will, in which a devise or bequest is made to him, and the will cannot be otherwise proven, such a devise or bequest shall be void, and such witness shall be compelled to give testimony on the residue of the will; a direct legatee or devisee under the will is competent to give evidence in behalf of the will, but he shall lose his legacy.

The statute, however, only avoids a bequest made to the witness personally, and not one made to his wife; and hence, if the legacy be to the wife, which under our statute enures to her sole and separate use, the husband will be an incompetent attesting witness, as he cannot testify for his wife.—Rucker v. Lambdin, 12 S. & M. 230.

§ 714. Devise or bequest to creditor.

(1871). A bequest or legacy to a creditor shall be presumed to be in payment and discharge of the debt, and not a gift. This rule is arbitrary, and often in conflict with the wishes of the testator, and for this reason the courts have allowed the admission of extrinsic testimony, such as the declarations of the testator, contemporaneous with the will and afterwards, to prove that the intent of the testator was the other way. But the admission of this kind of testimony has never been received with great favor; slight circumstances in the face of the will have been taken hold of to repel the presumption, such as the express declarations of the will that all debts will be paid, or words of similar import, or that the legacy

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is payable on a contingency, or is in some particular less beneficial than the debt, or where the legacy, though greater in amount, is payable at a future day.—Gilliam v. Brown, 43 M. 641.

(1871). The will was, "I desire that my executors be prompt in the payment of all my debts. I give to my dear brother W (who is now a prisoner of war), $1,500 in gold, to be paid to him promptly." The residue was given to his wife. The testator owed his brother a debt for a larger amount arising *ex delicto* rather than *ex contractu*, and it was for an unascertained amount, and was possibly payable in a different currency from gold. Parol testimony was admitted in the court below to show that the testator did not intend the legacy to be a satisfaction of the debt. The court say that it was the true intent of the will that the legacy was not such satisfaction, and the admission of the testimony, if illegal, as it tended to show what was otherwise apparent from the face of the will, was no error. And the court said further, that "it ought not to have been allowed in this case, nor in any other, where the nature of the claim and the terms of the will induced the legal conclusion that satisfaction does not exist; for to allow it would be for the useless purpose of repelling a presumption which does not arise."—Gilliam v. Brown, 43 M. 641.

§ 720. Title of devisees and legatees.

Legacies and distributive shares in an intestate's estate, are, until payment or delivery, merely choses in action; and where the right to the same property is joint between several legatees and distributees, the property retains its character of a chose in action until division or partition.—(1843) Wade v. Grimes, 7 H. 425; (1846) Henderson v. Guyot, 6 S. & M. 209; (1851) Duncan v. Johnson, 23 M. 130; (1859) Lanehart v. Jeter, 36 M. 650.

(1905). The devise of land with the specific charge thereon of payment of the purchase money, exonerates testator's personalty from its primary liability for such purchase money.—Gordon v. James, 86 M. 719, 39 So. 18, 1 L. R. A. (N. S.) 461.

(1905). One who accepts a devise charged with the payment of the unpaid purchase money on the property devised is not a purchaser for value but accepts the same position as other specific devisees and legatees.—Gordon v. James, 86 M. 719, 39 So. 18, 1 L. R. A. (N. S.) 461.

§ 728. Rents and profits, income, and accumulations.

(1856). The testator, by the first item of his will, gave to his wife and executrix, his plantation and "all his slaves after the payment of the legacies bequeathed." By item 2 he directed "that his plantation should be kept up, and the slaves and stock kept together on the same, and that the proceeds should be appropriated to the support of his family and the education of his children." By item 3, he bequeathed to each of his three children ten slaves, of average quality, with the whole lot to be delivered "as they respectively arrive at age, or marry;" and further, "that each one of his children, as they respectively arrive at age, or marry, receive one-fourth part of the residue of his estate that may have been on hand at the time the eldest arrived of age, and not heretofore disposed of by special legacies and a small legacy hereinafter mentioned; all the rest and residue he gives to his wife." After the testator's death several crops were raised, by which the value of the estate was increased, and then his eldest daughter arrived at full age. *Held*, that she was entitled, in addition to the ten slaves, to one-fourth part of the residue of the estate (slaves and special legacies excepted), as it existed on the day she arrived at full age, and was, consequently, entitled to distribution in the profits, or increased value accruing after testator's death.—Sorsby v. Vance, 36 M. 564.

(1857). M, by his will, gave to his widow $20,000, and the remainder of his estate to his then only child, A; after the birth of his child, L, he directed, by a codicil to his will, that she should have one-fourth of the net profits of his estate, until she should arrive at sixteen years of age, and after that time, should share equally with A. The widow renounced the will, and claimed her statutory portion, being one-third of the estate. *Held*, that the youngest child, L, was entitled, whilst under sixteen years of age, to one-fourth of the net profits of the whole estate, inclusive of the widow's portion, or to three-eighths of the remainder, after the widow's portion had been deducted.—Johnson v. Miller, 33 M. 553.

Under the Code of 1871 the devisee of lands rented out by the testator for the year in which his death occurs, is the landlord thereof, and entitled to collect the rent for that year.—(1875) Bloodworth v. Stevens, 51 M. 475; (1881) Tucker v. Whitehead, 58 M. 762.

§ 729. Annuities.

See *ante*, § 619.

(1883). An annuity springing alone from a will and given by it, is a legacy.—Heatherington v. Lewenberg, 61 M. 372.

(1902).) An annuity charged on the yearly income of lands to continue during the life of the beneficiary is payable at the end of each year.—Henry v. Henderson, 81 M. 743, 33 So. 960, 63 L. R. A. 616n.

§ 730. Maintenance from estate.

See *ante*, § 620.

(1844). The probate court has no jurisdiction to order a sale of legacies delivered to legatees of full age, to pay for board and maintenance furnished them by the executor, when they were minors, even when the will provided that they should be raised and

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educated under his directions.—Green v. Green, 3 S. & M. 256.

(1909). An order fixing an allowance for the support of beneficiaries is subject to modification.—Long v. Mayes, 94 M. 735, 48 So. 523.

§ 732. Property or fund out of which legacies are to be paid.

(1858). In the absence of any express direction in the will to the contrary, the payment of the testator's debts and the administration and funeral expenses, is chargeable on the residuum; and the residuary legatees have no right to call on the general and specific legatees to abate; but the residuary legacies may be exonerated from the payment of debts and expenses of administration, by a direction in the will to discharge them out of a particular part of the estate. A bequest of "all moneys and choses in action" of the testator, "which shall remain after the payment of his just debts," creates a charge upon the fund for the payment of debts, and exonerates the residuum from that burden, but not from the expenses of the funeral and administration of the estate, since they are no part of the debts of the testator.—Currie v. Murphy, 35 M. 473.

(1876). While real estate is not chargeable with the payment of pecuniary legacies, unless the intention to charge it is clearly expressed or fairly deducible from the will, where it is manifest from the whole instrument that it was the design of the testator that such legacies should be paid at all events, the implication is that the residuary legatee shall take only what remains after satisfaction of all previous disposition.—Knotts v. Bailey, 54 M. 235, 28 Am. Rep. 348.

(1880). Where land is sold by a devisee, who is also executor, under a power in the will to sell "in order to obtain money to pay the above legacies, or for any other purpose which he may think advantageous to himself," it is not, in the hands of his vendees, subject to a charge for legacies.—Turner v. Turner, 57 M. 775.

§ 733. Time of accrual of right to devise or legacy.

(1866). A devisee in a will, who dies before the testator, has no power by his will, to dispose of the devise to him in the first will—though the first testator afterwards die, without changing the devise to him. In such a case, if the devisee be a child of the first testator, the legacy or devise is not lapsed, but under our statute, it would go to the children of the deceased devisee, in the same manner as if the devisee had survived the testator, and died unmarried and intestate; and hence, his widow has no interest in it.—Pate v. Pate, 40 M. 750.

(1866). And, in such a case, if the deceased devisee by his will, devise property which he then owned, to his widow and children, and also attempt to give his widow and children an interest in the devise to him, contained in his father's will, the widow cannot get compensation out of the property which the devisee really owned, and had a right to dispose of, for her loss in the devise contained in the father's will, but she must take alone her share in the property which her husband owned, and the children will, under the statute, take the whole devise in the will of the grandfather.—Pate v. Pate, 40 M. 750.

(1902). Under a will which gave the executor power to manage and control the property and apply the income to the payment of certain legacies "as soon as practicable," and gave him the use of the money on hand in making the crop for the year, and it was shown that in order to pay all the legacies out of the proceeds of the year's crop, it would be necessary to borrow money to operate the farm for the next year, the executor was not bound to pay all the legacies out of that crop, but could postpone payment until the next crop was harvested.—Henry v. Henderson, 81 M. 743, 33 So. 960, 63 L. R. A. 616n.

(1909). Under the terms of a will charging the estate with the support of the testator's wife and children during their lives, and the life of the survivor of them, and when the number so provided for should be reduced to two or less, and the condition of the estate and the objects to be secured would justify the division of the property distributed, there could be no preliminary division where the income of the estate was not much more than sufficient to pay the charges on the property and the sum allotted for support.—Long v. Mayes, 94 M. 735, 48 So. 523.

§ 734. Interest on legacies.

(1824). Where the bequest is money, the legatee will not be entitled to interest till the lapse of twelve months from the testator's death, and then at 4 per cent, which is the English rule, and which is adopted by the court.—Brownlee v. Steel, W. 179.

(1857). Where the legatee is not a child, a general legacy of money is payable at the end of the twelve months from the testator's death, unless otherwise provided in the will, and interest will be recoverable from that time, though payment was not demanded. The rule allowing interest from testator's death, where the legatee is a child, does not extend to grandchildren.—Wheeler v. Brem, 33 M. 126.

(1857). Where the bequest is money, the legatee will not be entitled to interest till the lapse of twelve months from the testator's death and then at 6 per cent.—Wheeler v. Brem, 33 M. 126.

(1857). In cases of specific legacies of stock, or a specific money security, or slaves, the interest or hire belongs to the legatee from the testator's death, although by the terms of the will, the legacy is not to be paid or delivered until a future day.—Dowd v. White, 34 M. 510.

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(1857). The testator by his will provided as follows: "I give to my two grandsons, J and G, two slaves, F and K, but they are to remain in possession of W (one of the executors), for the term of fifteen years, and at the expiration of that time, to be divided between J and G, as the said W shall think reasonable and just." The legatees were orphans of tender age. By the residuary clause, it was provided "that all the rest and residue of the estate, not hereinbefore disposed of, should be sold for division among the legatees therein named." *Held*, 1. That an absolute gift of the slaves was made to J and G. 2. That the hire of the slaves for the fifteen years they were to remain in W's possession, neither went to him nor into the residuum, but was the property of J and G. —Dowd v. White, 34 M. 510.

§ 735. Apportionment of income on annual or other stated payments.

(1902). An annuity was charged on the income of lands to continue during the life of the husband of the testatrix and was payable at the end of each year. Such annuity was not apportionable where the husband died during the year and the beneficiary was not entitled to any portion for that year.—Henry v. Henderson, 81 M. 743, 33 So. 960, 63 L. R. A. 616n.

§ 742. Conveyance of property by devisees or legatees.

(1908). It cannot be maintained that life tenants under a will which gave land to the children of the testator for life with remainder to their children, with power in the life tenants to sell the land and invest the proceeds in other lands to be held under the same limitations, conveyed in violation of the will, and not for reinvestment, to the purchasers knowledge, so as to entitle the remaindermen to such land, notwithstanding the sale, though part of the consideration was land, title to which was taken in the names of the life tenants, with no limitation over to their children, and though part of the consideration was used to pay off liabilities of the life tenants on the purchase money of a place they had already bought, taking title in their own names, and this more especially where the will expressly mentioned the place as one to be invested in, in accordance with the will, and it did not appear that their vendee had any reason to know or believe that they would fail to settle the title accordingly.—Whitfield v. Lyon, 93 M. 443, 46 So. 545.

§ 745. Actions by devisees or legatees.

(1855). A specific legatee may maintain his action at law to recover his legacy; and the proceeds of it, if the executor has sold it, under a power given in the will.—Young v. Cook, 30 M. 320.

(1905). Where no letters testamentary have been issued, and there are no debts due from the estate to the testator, a legatee to whom a specific demand has been given may sue thereon.—Patton v. Pinkston, 86 M. 651, 38 So. 500.

(1905). Legatees may sue in chancery and recover upon a cause of action specifically bequeathed to them, if there be no executor of the will and the estate of the testator owe no debts, and this despite the fact, that one of the legatees refused to join as a complainant in the suit and was consequently made a defendant thereto.—Patton v. Pinkston, 86 M. 651, 38 So. 500.

(1905). Nor will this right be defeated by the possibility that the funeral expenses and cost of probate of the will are outstanding charges against the estate.—Patton v. Pinkston, 86 M. 651, 38 So. 500.

(1905). The powers of the chancery court are ample to do complete justice between co-distributees or co-legatees in a case where one may deny the right or resist the demands of the others.—Patton v. Pinkston, 86 M. 651, 38 So. 500.

(B) SPECIFIC, DEMONSTRATIVE, AND GENERAL DEVISES AND BEQUESTS.

§ 750. Construction of devises and bequests in general.

(1905). Neither a wife's right to, nor the extent of her interest in, the lands of the estate of her deceased husband is complicated by any consideration of the legal rights of devisees and specific legatees.—Gordon v. James, 86 M. 719, 39 So. 18, 1 L. R. A. (N. S.) 461.

§ 752. Specific bequests.

(1837). The testator gave his brother "three-eighths of all my (his) estate;" he also gave several pecuniary legacies and one specific legacy, and the residue he gave to his nephews and nieces. *Held*, that the brother's legacy was not specific, and was not exonerated from the payment of debts, and that the brother's share was three-eighths of the estate after the payment of debts. Legacies are only specific when some particular chattel, or something of a particular class, is bequeathed.—Fisk v. McNiel, 1 H. 535.

(1838). Testator gave a slave to A for life, then to revert to his gross estate, and then he gave S & W his estate. *Held*, that they were not, on the death of A, entitled to the slave as a specific legacy.—Minor v. Stewart, 2 H. 912.

(1855)). A specific legacy is subject to the bar of the statute of limitations.—Young v. Cook, 30 M. 320.

(1866). Courts in general are averse to construing legacies to be specific. To authorize this construction, the intention in reference to the thing bequeathed must be clear. When a particular fund is referred to only as pointing out a convenient mode of payment, the legacy is considered as demonstrative; but if the gift is of the fund itself, in whole or in part, or is so charged upon it as to show an intent to burden it alone with the payment of the legacy, it is considered as specific.—Malone v. Mooring, 40 M. 247.

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(1866). The testator by the fourth item of his will, gave his son John "negroes to the amount of $3,350, negro men at $800, and women at $600, and smaller ones in proportion." By the fifth item he gave his daughters each "$3,350, to be paid to them at the age of twenty or marriage; $3,000 in negroes, to be valued the same as those given to my (his) son John in item four, and $350 in money," and he also directed that the negroes given to the daughters should be in families, as many of them females as circumstances would admit; and that they should go to the daughters only for life, remainder to their children. *Held*, that those legacies were specific, and on the emancipation of the slaves, the legatees had no right to claim that they should be paid in money.—Malone v. Mooring, 40 M. 247.

(1882). Pecuniary legacies will not be construed as specific unless clearly so intended.—Vaiden v. Hawkins, 59 M. 406.

§ 754. —— Stocks, bonds, and other securities.

(1905). A specific bequest of stocks and bonds carries with it dividends which are earned and declared after the testator's death.—Gordon v. James, 86 M. 719, 39 So. 18, 1 L. R. A. (N. S.), 461.

§ 756. General bequests.

(1866). A legacy of quantity is ordinarily a general legacy, but there are legacies of quantity in the nature of specific legacies, as of so much money with reference to a particular fund for payment: and this is called a demonstrative legacy, and it is so far general, that if the fund out of which it is payable, be called in or fail, the legatee will not be deprived of his legacy, but will be permitted to receive it out of the general assets; and it is so far specific, that it will not be liable to abate with general legacies, in case of a deficiency of assets, but will only abate with other legacies charged on the same fund.—Malone v. Mooring, 40 M. 247.

(C) ADVANCEMENTS, ADEMPTION, SATISFACTION AND LAPSE.

§ 757. Advancements.

See DESCENT AND DISTRIBUTION, §§ 93-118.

(1884). A codicil to a will recites "That all notes on each of my sons and sons-in-law of which I may die possessed, shall be deducted from the moneys accruing to them or to their children." *Held*, as against minor heirs of a legatee whose husband was indebted to the estate in a large sum, that said amount was an advance to the legatee under the will.—Barnett v. Stewart, 1 Miss. Dec. 342.

(1907). Where a testator during his life makes advancements to his adult children, taking receipts from them in full of their interest in his estate, the receipts are in the nature of contracts and extinguished the rights of the parties giving them and of their heirs in the estate.—Norfleet v. Callicott, 90 M. 221, 43 So. 616.

§ 763. Ademption.

(1907). A devise of money is adeemed if after the writing of the will the legatee receives from the testator the sum of money named and executes a receipt in full for her interest in the estate although the will remains unchanged.—Norfleet v. Callicott, 90 M. 221, 43 So. 616.

§ 772. Satisfaction.

(1871). In 1864, G and D entered into a marriage contract, by which it was stipulated that in case G (the husband) should die before D, and before the net income of the joint property of G and D, then placed in partnership for planting, should make the share of the wife, upon division, worth $5,000, the deficit should be made up from G's estate, and in consideration thereof D renounced all right to any portion of G's estate. In the same year G died, and by his will provided that "C and M should administer on his estate and pay all of his just debts, and see that his contracts were fulfilled, and that his wife have a dowry of $5,000 in currency." The wife claimed $5,000 under the contract, and also $5,000 under the will. *Held*, that she could not recover both; that the legacy was intended in lieu of the jointure; but as it was evidently payable in confederate currency, and the jointure was not, that the legacy was only a satisfaction of the jointure *pro tanto*, to the extent of its value when reduced to legal tender.—Gilliam v. Chancellor, 43 M. 437, 5 Am. Rep. 498.

(D) ELECTION.

§ 778. Nature and grounds in general.

(1866). The statute of descents only applies to cases of intestacy, and hence where the husband made a will and died, the wife's renunciation of the will in the forum of his domicile was held not to produce intestacy as to her in this state, and to give her the rights of a widow domiciled here, who had renounced, but only such rights as renunciation gave her by the law of the domicile.—Slaughter v. Garland, 40 M. 172.

The right of the widow to renounce applies only to wills executed in this state.—(1872) Booth v. Stebbins, 47 M. 161; (1873) Wilson v. Cox, 49 M. 538.

(1873). By the law of Louisiana a widow has no election to renounce the will and take in lieu thereof a share of her husband's estate. Hence, his will, made in that state and devising all of his property there to her, will not affect her right to dower in his lands in this state, left undisposed of by the will. By Code 1857, art. 110, p. 452, the descent of such lands is governed by the law of this state.—Wilson v. Cox, 49 M. 538.

(1884). Where, at the husband's death, the separate estate of the widow, together with an amount realized by her upon a policy of insurance on his life, equals in value the interest she would be entitled to in her husband's estate if he had died intestate, she

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cannot, under Code 1880, § 1175, renounce his will and share in the homestead devised to another.—Osburn v. Sims, 62 M. 429.

(1900). Code 1892, § 4497, which provides that renunciation by the husband shall be unnecessary where no provision is made for him by the will of his deceased wife, has no application where he is thereby made executor, guardian of the infant devisees, with control of the estate for their benefit, and remainderman in fee in case of their death before reaching majority.—Carter v. Harvey, 77 M. 1, 25 So. 862.

§ 780. Testamentary provisions.

(1857). If there be no provision in the husband's will, she is entitled to dower in his estate, as in case of intestacy; and in such a case it is unnecessary for her to renounce the will within six months from the date of its probate, in order to entitle her to her share in the estate.—Roberts v. Roberts, 34 M. 322.

(1873). Code 1857, art. 168, p. 468, which, contrary to the common law rule, provides that a devise or bequest to the widow shall be construed to be in lieu of dower and all share in personal estate, is only applicable to wills disposing of or affecting property in this state.—Wilson v. Cox, 49 M. 538.

(1891). Under a bequest to an infant, to be paid him at majority upon condition that he will give up certain land owned by him, no time being prescribed within which he is to elect, he is entitled to a reasonable time after coming of age to make his election.—Davis v. Kriger, 69 M. 39, 11 So. 458.

(1891). In such case, where the land is afterwards sold to satisfy an outstanding incumbrance, the receipt by the legatee of the surplus proceeds of sale, though two years after majority, will not estop him from claiming the legacy, if at the time of the receipt he was ignorant of the provisions of the will, and within a few weeks thereafter, upon ascertaining the facts, filed a bill offering to refund and seeking to take under the will.—Davis v. Kriger, 69 M. 39, 11 So. 458.

§ 782. —— Provisions for surviving wife.

See DOWER.

(1856). A legacy of personal estate left by the husband to the wife can only operate to bar her claim for dower in the realty, when it appears expressly by the will itself that such legacy is expressly given in lieu of dower.—Fulton v. Fulton, 30 M. 586.

(1866). The failure of a widow to renounce a provision made for her in her husband's will, in lieu of dower, is an election by her to take the provision instead of the dower; but as in other cases of election, if it turn out that she fails to get the provision made for her, the election will be considered as having been made under a mistake, and will not be binding on her; and this rule is also recognized by the statute, Rev. Code of 1857, art. 170, which provides that, if in effect nothing shall pass by that devise, she shall not be barred thereby, it being the intent of this act that a widow accepting or abiding by a devise, in lieu of her legal right, shall be considered as a purchaser for a fair consideration. Hence, where the husband in 1860 bequeathed to the wife six slaves, and devised to her a life estate in his lands in lieu of dower, and after the war, by virtue of emancipation, the estate became insolvent, whereby it was necessary to sell the land in order to pay the husband's debts, and the widow had failed to renounce the will, it was held that she might then claim her dower upon her restoring to the state the personalty which had been actually allotted to her, and accounting for such as she had used.—Collins v. Melton, 40 M. 242.

(1872). Under Code 1857, art. 170, p. 469, a bequest of personalty to a widow, not expressly in lieu of her legal share of the real estate, is not a bar to dower in the real estate, and in such case no renunciation is necessary to entitle her to such dower.—Booth v. Stebbins, 47 M. 161.

(1873). A will disposing of property in two or more states should be given uniform effect as to all the beneficiaries under it. This cannot be done unless the right of the widow to renounce is left to the forum of the domicile, the place of original probate; her election, if made, must be there.—Wilson v. Cox, 49 M. 538.

(1873)). By the law of Louisiana, a widow has no election to renounce the will and take in lieu thereof a share of her husband's estate. Hence, his will, made in that state and devising all of his property there to her, will not affect her right to dower in his lands in this state, left undisposed of by the will. By Code 1857, art. 110, p. 452, the descent and distribution of such lands is governed by the law of this state.—Wilson v. Cox, 49 M. 538.

(1878). Where a will provides that the estate of the testator shall be kept together, and that his widow, the executrix, shall have control and management of the plantation until his son and only heir becomes of age, but that if she should marry, then the property shall be divided, and the executrix renounces the will and marries, and has dower in the lands allotted to her and remains in possession, there is nothing in the relationship of the parties to preclude her or her husband from purchasing the land at a sale made by the administrator to pay debts.—Wood v. Bott, 56 M. 128.

(1884). Where, at the husband's death, the separate estate of the widow, together with an amount realized by her upon a policy of insurance on his life, equals in value the interest she would be entitled to in her husband's estate if he had died intestate she cannot, under Code 1880, § 1175, renounce his will and share in the homestead devised to another.—Osburn v. Sims, 62 M. 429.

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(1889). Under Code 1871, §§ 1286, 1287, the rule as to a provision by the will of the husband, and its acceptance by the widow, being in lieu of her "dower in land," or "share in personalty of the estate," applies only when the widow is one of several heirs, who would be entitled, in the absence of a will, to share with her in the estate of the deceased. Where there are no children, this statute has no application, and the widow may accept under the will, and, in preference to collateral heirs, will still inherit the remainder of the estate which is not disposed of by the will.—Wall v. Dickens, 66 M. 655, 6 So. 515.

§ 784. Estates and interests to which election is applicable.

(1839-43). Where a legacy is given to an heir at law in lieu or in satisfaction of his claim on the real estate devised to another or upon condition that he would not dispute the will or that he would release all claim in the estate devised—in all these cases, if the will is ineffectual as to the real estate for the want of proper solemnities, the heir at law would be put to his election between the legacy and the void devise.—Nutt v. Nutt, Freem. Ch. 128.

(1907). The proceeds of insurance in a benevolent society which a widow took as the sole heir of her husband under the laws of the society, is not a part of her separate estate "at the time of the death of her husband," within the meaning of Code 1892, § 4499, providing for the distribution of the husband's estate in case the widow elects not to take under his will.—O'Reilly v. Laughlin, 92 M. 1, 45 So. 19.

§ 785. Persons entitled to elect.

(1899). The husband alone has the right to renounce the provision made for him in the will of his deceased wife under Code 1892, § 4496, and his creditors cannot renounce it for him.—Carter v. Harvey, 77 M. 1, 25 So. 863.

§ 786. Capacity to elect.

(1891). Under a bequest to an infant, to be paid him at majority upon condition that he will give up certain land owned by him, no time being prescribed within which he is to elect, he is entitled to a reasonable time after coming of age to make his election.—Davis v. Kriger, 69 M. 39, 11 So. 458.

(1911). A renunciation of a husband's will by a widow *non compos mentis*, may be made for her by her guardian with the approval of the chancery court.—Hardy v. Richards, — M. —, 54 So. 76.

§ 788. Mode of election and proceedings therefor in general.

(1909). Under Code 1906, §§ 2137, 5089, a proceeding by an executor for the appointment of commissioners to value the estate of a widow and that of her deceased husband, where the widow renounces the will, cannot be brought until after one year has expired from the grant of the letters testamentary.—Jones v. Jones, 94 M. 460, 49 So. 115.

(1909). Under Code 1906, § 5089, any person interested in an estate or connected with it as executor may institute proceedings to have commissioners appointed as provided for in § 5089, for the purpose of ascertaining the value of the estate of the wife and to determine what her lawful portion in her husband's estate should be. And by whomsoever the proceedings may be instituted, it is necessary to make all interested persons parties to the proceedings.—Jones v. Jones, 94 M. 460, 49 So. 115.

(1911). The election of a widow to renounce her husband's will is an *ex parte* proceeding, and the election when made by the guardian of an insane widow is of the same character, and need not be by bill in chancery.—Hardy v. Richards, — M. —, 54 So. 76.

§ 790. Time for making election.

(1843). If provision be made for the widow in her husband's will, she must renounce before the expiration of six months from the probate of the will; she is not entitled to renounce at the sixth monthly term of the probate court after probate, if it be after the full expiration of six months.—*Ex parte* Moore, 7 H. 665.

(1891). Under a bequest to an infant, to be paid him at majority upon condition that he will give up certain land owned by him, no time being prescribed within which he is to elect, he is entitled to a reasonable time after coming of age to make his election.—Davis v. Kriger, 69 M. 39, 11 So. 458.

§ 798. Operation and effect.

(1872). Under Code 1857, art. 170, p. 469, a bequest of personalty to a widow, not expressly in lieu of her legal share of the real estate, is not a bar to dower in the real estate, and in such case no renunciation by her is necessary to entitle her to such dower.—Booth v. Stebbins, 47 M. 161.

(1904). A widow who has elected to take as a distributee is entitled to a portion of the commissions of the executor returned to the estate by him as a donation.—Owens v. Owens, 84 M. 673, 37 So. 149.

(1905). Where a testator devised land, charging the devisee with any indebtedness due on account of the unpaid purchase money thereon, and the widow elected to renounce the provision made for her in the will and to demand in lieu thereof her legal portion from the estate of her husband, the wife's interest in the land was free from any incumbrance on account of the unpaid purchase money although her election was not indicated until after the assumption by the devisee of the burden of the devise.—Gordon v. James, 86 M. 719, 39 So. 18, 1 L. R. A. (N. S.), 461.

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(1905.) Where a widow has elected to renounce the provision made for her in the will and demands in lieu thereof her lawful portion in the estate of her husband, she becomes a co-tenant of the lands of the estate, and is not made a creditor of the estate by Code 1892, § 4499.—Gordon v. James, 86 M. 719, 39 So. 18, 1 L. R. A. (N. S.), 461.

(1905). Under Code 1892, § 4496, the estate of the decedent does not, on the widow's renouncing the provision made in the will and demanding in lieu thereof her lawful portion in the estate of her husband, become intestate as to the widow's share, so as to encumber that share primarily with the debts of the estate, but the widow is entitled to the same proportion of the estate which she would have taken, after the payment of the debt from the whole estate, had her husband died intestate.—Gordon v. James, 86 M. 719, 39 So. 18, 1 L. R. A. (N. S.) 461.

(1907). Where three of six children of a decedent received advancements and gave receipts extinguishing all their right in the estate, the widow on renouncing the will is entitled to one-fourth of the estate.—Norfleet v. Callicott, 90 M. 221, 43 So. 616.

(1907). Where a testator devises his homestead to his widow and directs that a sum of money should be invested, the income therefrom to be paid her during her life or widowhood and at her death or marriage the money divided between her three children by the testator and the widow renounces the will under the statute, the homestead becomes a part of the general estate but the money goes to the three children.—Norfleet v. Callicott, 90 M. 221, 43 So. 616.

(1911). Where a widow renounces a specific devise and receives one-half of the land in distribution, the remainder descends as intestate property and does not go to the residuary legatee.—Gordon v. Perry, — M. —, 54 So. 445.

(E) ABATEMENT.

§ 804. Nature and grounds in general.

(1858). If there be any valuable consideration for a testamentary gift, it will be entitled to preference in payment over other general legacies which are mere bounties; a bequest to a widow in lieu of dower, is upon a valuable consideration, and entitled to preference over mere voluntary legacies.—Currie v. Murphy, 35 M. 473.

§ 805. Insufficiency of estate in general.

(1848). Where a testator gave a pecuniary legacy, and directed that the same be invested by the executor, and the annual interest paid to the legatee till his majority, and then the principal; and the investment was actually so made by the executor, but afterwards the security failed without the fault of the executor, it was held that the estate was exonerated, and that the loss must fall on the legatee.—Bodley v. McKinney, 9 S. & M. 339.

(1905). In the case of the general legacies or bequests not charged on the realty, in an estate in which the land and personalty were not commingled by the testator, if necessary for the payment of debts, the general legacies would have to abate, even to the extent of obliteration, before any deduction could be made from the devise.—Gordon v. James, 86 M. 719, 39 So. 18, 1 L. R. A. (N. S.) 461.

§ 813. Specific devises or bequests.

(1905). The personal estate must be exhausted before the realty may be resorted to to pay debts, whether the decedent died intestate or testate, unless the will evidences a manifest intent to the contrary; and if it is necessary to resort to specific legacies, specific bequests must abate proportionately even to the extent of complete obliteration, before specific devises can be compelled to contribute to the payment of the debts.—Gordon v. James, 86 M. 719, 39 So. 18, 1 L. R. A. (N. S.) 461.

(F) LEGACIES CHARGED ON PROPERTY, ESTATE OR INTEREST

§ 819. Testamentary charges in general.

(1885). A will, the provisions of which are plain, must be executed as written, even though it becomes apparent that the result will not be what the testator desired or expected. Hence, where a testator, who died in 1862, charged his estate primarily in favor of his adult children with legacies, this provision must be carried out, though, by reason of the war, afterwards occurring, his estate is so reduced that payment in full of his legacies to the adults will leave nothing for his minor children.—Elliott v. Topp, 63 M. 138.

(1902). The surroundings of a testator at the time of the execution of his will may be considered in the determination of whether or not the testator's realty is charged with pecuniary legacies.—Stuart v. Robinson, 80 M. 290, 31 So. 903, 92 Am. St. 603.

§ 820. Charge on property of estate in general.

(1843). Where the testator in his will gave the executor a discretion to sell a portion of his realty, but did not direct an absolute sale, the realty was not thereby converted into personalty and the pecuniary legacy was not chargeable thereon unless so expressly provided by the testator.—Montgomery v. Milliken, Sm. & M. Ch. 495.

(1845). A legacy given by a will in a sister state, and charged on property situated there, cannot be collected out of property situated here, unless it be shown that the fund in the other state is insufficient.—Montgomery v. Milliken, 5 S. & M. 151, Sm. & M. Ch. 495, 43 Am. Dec. 507n.

(1882). Where one conveys land, and afterwards makes a will, giving pecuniary legacies to persons other than the grantees, and charges the land therewith, and the grantees

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give notes for the recited consideration to the legatees, these circumstances show that the execution of the deed was a part of a testamentary scheme, and the legacies will, in equity, be charged on the land, although the deed is absolute and makes no reference to the will.—Tigner v. McGehee, 60 M. 185.

(1882). The last clause of a will, after referring to the testator's interest in a commercial firm, adds: "I, with other assets in said house, hope to realize $100,000 from this source," calls such interest "assets," and makes a conditional charitable bequest and then adds: "This being consummated, after the above appropriation out of my assets, I desire the residue to go to heirs of my sister." *Held*, the word "assets" is synonymous with "property," and is applicable to the testator's whole estate as well as his interest in the firm, and the valuation of the latter does not evince an intention to charge the legacies solely upon it, and, although the use of the word "assets" and the valuation are in proximity to the said charitable bequest, the agreement from juxtaposition is overthrown by the heterogeneous character of the many provisions crowded into the last clause.—Valden v. Hawkins, 59 M. 406.

(1887). Where the language of a will is, "I bequeath to my wife my lot in the city of Natchez . . . and I also bequeath to my wife my Prospect Hill plantation," this bequest is subject to a legacy to M and J of $300 per annum. The legacy is not a charge on the lot in Natchez.—Carroll v. Botsai, 65 M. 350, 5 So. 823.

(1889). The intention to charge lands with legacies must appear either by express provision or by clear implication, but this implication need not appear alone on the face of the will. In cases of doubt, attendant circumstances, such as the character, situation and relation of the parties in interest, may be considered in the effort to ascertain the testator's intention.—Cady v. Cady, 67 M. 425, 7 So. 216.

(1889). Where such doubt exists upon the face of the will, and the legatee is a stranger or a child for whom other provisions are made, the intent to charge the real estate must more clearly appear than if the legatee is one having a natural claim upon the bounty of the testator and for whom no other provision is made.—Cady v. Cady, 67 M. 425, 7 So. 216.

(1889). A testator, the father of three children, having adopted into his family two grandchildren of his wife, who were minors and dependent upon him, specifically devised certain land to each of his children, but directed that two of his children should bear jointly the care and expense of the education and maintenance of the grandchildren, and that the latter should each receive $500 on coming of age, to be paid by said two children. He further directed his executor to sell the residue of the estate, real and personal, and, after paying debts, to pay the remainder in equal parts to his three children. *Held*, that the pecuniary legacies to the grandchildren were a charge primarily upon the lands specifically devised to the two children.—Cady v. Cady, 67 M. 425, 7 So. 216.

Where a testator, after giving legacies without creating any express trusts to pay them, blends the real and personal estate as one fund in the residuary clause, this manifests an intention to charge the legacy on the real as well as the personal estate.—(1876) Knotts v. Bailey, 54 M. 235, 28 Am. Rep. 348; (1883) Heatherington v. Lewenberg, 61 M. 372; (1889) Cady v. Cady, 67 M. 425, 7 So. 216.

A will contained the following provisions: "I give and bequeath to my stepdaughter, out of my estate, so soon as she attains the age of sixteen, the sum of $1,200, and desire that my wife, as trustee for her, shall loan said sum after that time, until my stepdaughter marries; then the same to be delivered to her." Another clause provided that the residue of the testator's estate, real, personal and mixed, should go to his wife and son, according to the laws of descent. *Held*, the legacy to the stepdaughter was made a charge on the entire estate.—(1889) Cady v. Cady, 67 M. 425, 7 So. 216; (1892) Peebles v. Acker, 70 M. 356, 12 So. 248.

(1902)). Where a testatrix while on her deathbed, knowing that she had, and would leave, neither personal property nor money, executed her will bequeathing a pecuniary legacy, and died two days later, leaving only valuable real estate, the money legacies will be a charge on the land, and this despite the fact that the realty be specifically devised.—Stuart v. Robinson, 80 M. 290, 31 So. 903, 92 Am. St. 603.

(1902). Under a will in which realty and personalty are so blended as to obliterate all distinction between realty and personalty, an annuity for the life of the legatee to be paid out of any money left at the death of the testator is a charge on the lands.—Perkins v. First Nat. Bank, 81 M. 358, 33 So. 18.

§ 821. Charge on property or interest devised or bequeathed.

(1843). Testator devised slaves to B, on condition that a certain sum of money should be paid annually to the children designated in the will, and a certain other sum should be paid them on their attaining majority, and B accepted the devise. *Held*, that his estate was, on condition subsequent, with which, if he failed to comply, the estate would be forfeited and vest in the children; and that the legacy to the children was a charge and lien on the slaves devised to B.—Beck v. Montgomery, 7 H. 39.

(1843). When there is a bequest of slaves, on the condition subsequent that certain money bequeathed should be paid to the legatee of the money, the pecuniary bequest is a charge and lien on the slaves so bequeathed; but the pecuniary legatee is not entitled to have personal security for its payment.—Beck v. Montgomery, 7 H. 39.

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(1880). Where a will gives the testator's real and personal property to one on condition that at the expiration of five years he will pay, or cause to be paid, certain pecuniary legacies, there is such a blending of the real and personal estate that the legacies are a charge on all the property alike.—Turner v. Turner, 57 M. 775.

(1890). A testator devised certain realty to his son, he to have it, "free from any incumbrance whatever, except that so long as my daughter, Polly, may live with him, he shall board her, and pay her a yearly stipend of twenty dollars." The words quoted fixed a charge upon the land so devised to the son, for the board of the daughter and the annual stipend mentioned.—Crossett v. Clements, 7 So. 207, not officially reported.

(1902). A will provided that the legal title of land devised should not vest until after the death of the husband of the testatrix and that the land should be taken charge of and used by the executor and the income applied for the benefit of the husband and then to the payment of legacies. Under these provisions the devisees were not entitled to any interest in the income earned by the lands until after the payment of the legacies.—Henry v. Henderson, 81 M. 743, 33 So. 960, 63 L. R. A. 616n.

§ 823. Personal liability of devisee or legatee of property charged.

(1884). Debts of the testator, by being charged on the land devised, do not become the personal debts of the devisee, and no personal decree can be rendered against him therefor.—Clayton v. Boyce, 62 M. 390.

§ 825. Release, waiver, or other extinguishment of charge.

(1891). Where land charged with the payment of a legacy is sold to satisfy an outstanding incumbrance, the receipt by the legatee of the surplus proceeds of sale, though two years after majority, will not estop him from claiming the legacy, if, at the time of the receipt he was ignorant of the provisions of the will, and within a few weeks thereafter, upon ascertaining the facts, filed a bill offering to refund and seeking to take under the will.—Davis v. Kriger, 69 M. 39, 11 So. 458.

§ 826. Enforcement of charge.

(1845). As a general rule, a suit for the recovery of a legacy should be brought in the jurisdiction having cognizance of the probate of the will; but when the heir has gotten possession of the fund on which the legacy is chargeable, and removes to another state with it, he may be sued there for the legacy. A legacy given by a will made in Louisiana, and charged on property situated there, cannot be collected out of property of the testator situated here, unless it be shown that the fund in Louisiana is insufficient.—Montgomery v. Milliken, 5 S. & M. 251.

(1871). A legacy charged on land is an express trust "not cognizable by the courts of common law," and, as to its enforcement in equity, is subject to the limitation of ten years prescribed by Code 1857, art. 31, p. 403.—Templeton v. Tompkins, 45 M. 424.

(1879). A trustee who is also the assignee of legacies charged on the trust fund, may retain a sufficiency to pay the same, and on a bill against him to enforce the trust, he will be regarded as paid to the extent of the fund which he has appropriated to his own use.—Tatum v. McLellan, 56 M. 352.

(1879). On a bill to enforce the payment of legacies charged on property, the court, after directing a sale of the same, should provide for the payment of the legacies in full, or *pro rata*, if the estate is insufficient. Tatum v. McLellan, 56 M. 352.

(1889). A legacy charged upon land may be enforced in the chancery court as an equitable charge, notwithstanding the statutory right to sue at law for the legacy.—Cady v. Cady, 67 M. 425, 7 So. 216.

(1892). A charge on land may be enforced by the assignee of the legacy, against one who has purchased the land at trustee's sale, under a trust deed executed by the heir and devisee of the testator.—Peebles v. Acker, 70 M. 356, 12 So. 248.

(G) DEBTS OF TESTATOR AND INCUMBRANCES ON PROPERTY.

§ 848. Contribution.

(1860). The doctrine of contribution does not apply to a case between specific legatees under a will when all the property bequeathed to them is subject to an incumbrance paramount to the title of the testator, and the property bequeathed to one of the legatees has alone been seized to satisfy the incumbrance. Thus, where A. died, giving all his estate to B., who afterwards died, leaving specific legacies of the personalty so bequeathed to him to several legatees, and afterwards a judgment was rendered against the administrator of A., which was wholly satisfied by a levy and sale of that portion of the property which B. had bequeathed to one of the legatees; it was held that this legatee was not entitled to contribution from his co-legatees, whose property, equally with his, was liable to satisfy the execution. In such a case the creditor has the right to levy his execution on any part of the property, and if he levy solely on the legacy of one, it is a misfortune for which the legatee has no remedy against his co-legatees. But it will be noted that this rule is applicable to a case only when the property of one legatee is lost by an incumbrance paramount to the title of the testator. Yet when the property of one of several specific legatees is taken to satisfy a debt due by the testator, he will have no right to contribution against his co-legatees, if there be assets enough to pay the debt independent of the legacies; or if there was a sufficiency of such assets, and they have been wasted by the executor.—Peebles v. Horton, 39 M. 406.

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(H) VOID, LAPSED, AND FORFEITED DEVISES, AND BEQUESTS, AND PROPERTY AND INTERESTS UNDISPOSED OF.

§ 849. Disposition or devolution in general.

(1889). Where lands are devised, charged with a legacy, the lapse of the devise by the death of the devisee during the lifetime of the testator, will not cause a lapse of the charge in favor of the legatee.—Cady v. Cady, 67 M. 425, 7 So. 216.

§ 851. Effect of failure of devise or bequest on limitation over or other disposition.

(1848). Where lands are devised for a particular purpose, and there is an unexhausted residuum not necessary to carry out that purpose, and the will is silent as to what disposition is to be made of that residuum, it results to the heir; but where the whole legal interest in the land is given for a particular purpose, coupled with an intention to give the devisee the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee, as it was intended to be given to him. And this is also the rule where the surplus arises, or is increased from the fact that a part of the particular purpose for which the devise was made, is illegal, and the application of the devise to it cannot be made. Hence, where a testator in Virginia, directed his lands in this state to be sold and the proceeds, so far as necessary, applied to removing and emancipating his slaves in Virginia, and in this state, and the surplus, if any, to go to the executor, he is entitled to that surplus, augmented as it may be, by his inability to remove and emancipate the slaves here.—Mahorner v. Hooe, 9 S. & M. 247, 48 Am. Dec. 706.

Under the statute of 1842 (H. C. 539, § 11), in reference to bequests emancipating slaves, it is held that the residuary legatee, and not the heir, is entitled to slaves illegally attempted to be emancipated by will.—(1860) Garnet v. Cowles, 39 M. 60, contra; (1855) Manning v. Read, 30 M. 308; (1858) Lewis v. Lusk, 35 M. 401.

§ 855. Effect of failure of limitation over or other disposition on precedent estate.

(1856). A pecuniary legacy directed to be paid after the payment of another legacy which is illegal, is also void.—Lusk v. Lewis, 32 M. 297.

§ 857. Effect of residuary provisions.

(1843). The residuary legatee of a specific fund or a particular part of the estate, is only entitled to claim whatever may fall into the residuum of that particular fund or that part of the estate, and to nothing outside of it. Hence, when the testator directed his slaves to be emancipated, and directed all his other property to be sold, and after the payment of certain charges, gave the balance of that fund to a legatee, it was held that the slaves went to the heir, and not to the special residuary legatee.—Luckey v. Dykes, 2 S. & M. 60.

(1858). Property unbequeathed will not pass by the residuary clause of a will, which especially or by general words points out the sources of the residuary fund. Thus, where B. died testate, leaving two slaves undisposed of by his will, and the residuary clause after directing the executor to sell certain lands, slaves, and the cotton, corn, cattle, horses, mules, &c., belonging to his estate, continued in these words: "The money arising from the sale of land, negroes, &c., &c., after paying my debts, and of the administration of my estate, shall be applied to the payment of the pecuniary legacies (provided for in a former part of the will), and if, after such payments, there shall be any money arising from such sale, remaining, I bequeath it, together with any other money I may have, to my daughters, M. and C." *Held*, that the two slaves aforesaid did not pass into the residuum, but went to the distributees under the law; and the fact that the executor had sold them, made no difference in this respect, and that the proceeds of the sale went as the slaves would have gone.—Barksdale v. Elam, 35 M. 172.

(I) RIGHTS AND REMEDIES OF CREDITORS OF DEVISEES AND LEGATEES.

§ 867. Right to subject interests under will in general.

(1889). A testator devised to the complainant and his aunt, E. W. Vaiden, a certain plantation, together with all stock, farming implements, provender, etc., "to use, occupy, and enjoy the same jointly; our said nephew, Cowles Mead Vaiden, (the complainant herein,) being required to supervise the same and expend no money without his aunt's approval." In the year of the testator's death, an account was opened with the firm of H. & M. in the name of E. W. & C. M. Vaiden, and "after all payments made by them had been credited on account, there remained a balance due of something over $300, which was assumed and paid by the plaintiff. In the succeeding year, a similar account was kept with this firm and after crediting all payments made by E. W. & C. M. Vaiden, there remained a balance of $2,832.91 which was also paid by the complainant. It was shown that E. W. Vaiden knew of the existence of this account and gave many of the orders upon which articles were furnished. It does not appear that she knew its extent nor is it shown that she had any information touching the large balance which remained unpaid. *Held*, that the account with the firm of H. & M. was known to E. W. Vaiden, and that she participated in the making thereof to such an extent as to bind her for its payment equally with the complainant.—Vaiden v. Hawkins, 6 So. 227, not officially reported.

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WINDING UP.

Continuance of corporation for purpose of winding up, see CORPORATIONS, § 618.

WIRES.

Of electric light or power companies, see ELECTRICITY.

WITHDRAWAL.

Action, see DISMISSAL AND NON-SUIT, §§ 4–43.
Appeal or writ of error, see APPEAL AND ERROR, § 779; JUSTICES OF THE PEACE, § 166.
Exceptions to referee's report, see REFERENCE, § 100.
Of aggression as affecting right of self-defense, see HOMICIDE, § 113.
Instructions, see TRIAL, § 296.
Instructions as cure of error, see TRIAL, § 296.
Objectionable matter in criminal trial, see CRIMINAL LAW, § 729.
Objections to account of administrator, see EXECUTORS AND ADMINISTRATORS, § 504.
Of counsel as ground for new trial, see NEW TRIAL, § 86.
Of evidence, see TRIAL, § 58.
Partner as dissolution, see PARTNERSHIP, § 263.
Pleading, see PLEADING, § 339.
Plea in equity, see EQUITY, § 171.
Plea of guilty, see CRIMINAL LAW, §§ 272, 274.
Plea of not guilty, see CRIMINAL LAW, § 301.

WITHOUT PREJUDICE.

Dismissal, see DISMISSAL AND NONSUIT, §§ 4–75; EQUITY, § 365.
Dismissal of appeal, see APPEAL AND ERROR, § 793.

WITNESSES.

This topic INCLUDES production of oral testimony at the trial of causes in general, civil or criminal; competency to testify; procuring attendance for that purpose, and production of documents by witnesses; examination of witnesses; their credibility; and corroborating, impeaching, or contradicting their testimony.

It EXCLUDES witnesses attesting or subscribing instruments in writing (see DEEDS; WILLS; and titles of particular instruments); taking and use of testimony in writing (see DEPOSITIONS; AFFIDAVITS); competency of evidence in general, and of experts or others to testify as to matters of opinion (see EVIDENCE); testimony in criminal prosecutions of accomplices, conspirators, and codefendants, and other matters peculiar to such prosecutions (see CRIMINAL LAW; and titles of particular crimes); and crime of giving false testimony (see PERJURY).

See cross-references for complete list of exclusions.

Analysis.

I. Attendance, Production of Documents, and Compensation.

§ 2. Right of accused to compulsory process.
§ 7. Subpœna.
§ 22. Damages and penalties for failure to obey subpœna.
§ 23. Compensation.

II. Competency.

(A) CAPACITY AND QUALIFICATIONS IN GENERAL.

§ 35. Capacity in general.
§ 37. Knowledge or means of knowledge of facts.
§ 38. Race or color.
§ 40. Age and maturity of mind.
§ 51. Husband and wife.
§ 52. —— Incompetency for or against each other in general.
§ 52a. —— Criminal prosecutions generally.
§ 53. —— Effect of statutes removing disqualification.
§ 60. —— Actions for divorce or annulment of marriage.
§ 61. —— Prosecutions for offenses by husband or wife against the other.
§ 65. —— Effect of death of husband or wife.
§ 66. Parent and child.
§ 67. Attorney and client.

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§ 69. Judges, jurors, and judicial officers, as witnesses to proceedings by or before them.
§ 72. —— Grand jurors.
§ 77. Examination of witness as to competency.
§ 79. Determination as to competency.

(B) Parties and Persons Interested in Event.

§ 82. Parties of record in civil actions and proceedings.
§ 84. —— Nominal and unnecessary parties.
§ 85. —— Representative or official capacity.
§ 87. Defendants in criminal prosecutions.
§ 89. —— Separate trials of defendants jointly indicted.
§ 90. —— Separate indictments for same offense.
§ 91. Interest of party or other person.
§ 92. —— Nature and extent in general.
§ 94. —— Interest of persons other than parties in general.
§ 95. —— Interest jointly with party.
§ 97. —— Liability on warranty or other liability over.
§ 98. —— Interest arising from particular obligations or transactions.
§ 100. —— Interest of agent, employe, or other representative.
§ 101. —— Liability for costs.
§ 102. —— Interest in criminal prosecution of person injured, prosecutor, informer, or detective or other officer.
§ 105. —— Balance of interest as between adverse parties.
§ 106. Husband or wife of party or other person interested.
§ 107. Testimony for or against interest.
§ 108. Testimony admissible notwithstanding interest.
§ 112. Transfer, release, or extinguishment of interest.
§ 114. Determination of liability of codefendant by dismissal, default, or separate verdict or judgment.
§ 115. Effect of statutory removal of incompetency in general.
§ 117. —— Criminal prosecutions.
§ 118. Effect of admission of testimony of adverse party.
§ 120. Consent of parties to testimony.
§ 121. Objections to competency on ground of interest.

(C) Testimony of Parties or Persons Interested, for or Against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

§ 126. Constitutional and statutory provisions.
§ 127. Actions and proceedings in which testimony is excluded.
§ 131. —— Probate or contest of will.
§ 133. —— Claim or demand against estate of decedent or incompetent person.
§ 134. —— Accounting of executor, administrator, guardian, or trustee.
§ 135. —— Determination of validity or construction of deed, will, or codicil.
§ 136. —— Determination of rights by descent or devolution from decedent.
§ 137. Parties and other persons whose testimony is excluded.
§ 139. —— Parties of record.
§ 140. —— Persons interested in event.
§ 141. —— Agent or other representative of party or person interested.
§ 142. —— Member, stockholder, or officer of corporation party or interested.
§ 143. —— Grantor, assignor, or other person from whom party derives title or interest.
§ 144. —— Surviving party to contract or other transaction or cause of action.
§ 146. —— Husband or wife of party or other person excluded from testifying.

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§ 147. Parties as against whom testimony is excluded.
§ 150. —— Grantee, assignee, legatee, heir, distributee, or other person deriving title or interest from deceased or incompetent person.
§ 157. Subject matter of testimony.
§ 159. —— Transactions or communications between witness and person subsequently deceased or incompetent.
§ 164. —— Communications or instruments in writing.
§ 165. —— Books of account.
§ 176. Effect of admission of testimony of adverse party.

(D) Confidential Relations and Privileged Communications.

§ 197. Communications to or advice by attorney or counsel.

III. Examination.

(A) Taking Testimony in General.

§ 224. Order, course, and extent of examination.
§ 225. Control of court in general.
§ 227. Oath or affirmation.
§ 234. Examination of adverse party in general.
§ 239. Leading questions.
§ 248. Responsiveness of answer.
§ 252. Use of documents, maps, plats, diagrams, or other matters to explain testimony.
§ 253. Refreshing memory.
§ 258. Testimony from memoranda or other writings.
§ 261. Recalling witnesses.

(B) Cross-Examination and Re-Examination.

§ 266. Right to cross-examine and re-examine in general.
§ 266½. Effect of cross-examination or testimony.
§ 267. Control and discretion of court.
§ 268. Scope and extent of cross-examination in general.
§ 269. Limitation of cross-examination to subjects of direct examination.
§ 270. Cross-examination as to irrelevant, collateral, or immaterial matters.
§ 274. Cross-examination of witness to character of party.
§ 275. Cross-examination of party in general.
§ 277. Cross-examination of accused in criminal prosecutions.
§ 279. Questions on cross-examination.
§ 285. Redirect examination.

(C) Privilege of Witness.

§ 294. Answer tending to subject witness to civil action or pecuniary loss.
§ 295. Answer tending to subject witness to penalty or forfeiture.
§ 296. Answer tending to disgrace witness or render him infamous.
§ 297. Answer tending to subject witness to criminal prosecution.
§ 299. Privilege of accused in criminal prosecution.
§ 302. Caution to witness.
§ 304. Effect of statutory protection of witness from use of evidence against himself.
§ 305. Waiver of privilege.
§ 306. Persons entitled to claim privilege.
§ 307. Claim of privilege.
§ 309. Effect of refusal to answer.

IV. Credibility, Impeachment, Contradiction, and Corroboration.

(A) In General.

§ 311. Grounds of credibility in general.
§ 317. Falsus in uno, falsus in omnibus.
§ 318. Corroboration of unimpeached and uncontradicted witness.

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§ 319. Right to impeach witness in general.
§ 320. Right to impeach one's own witness.
§ 323. —— Witness hostile to party calling him.
§ 330. Cross-examination to discredit witness or disparage testimony in general.
§ 331½. Competency of impeaching evidence in general.

(B) Character and Conduct of Witness.

§ 333. Character as ground of impeachment in general
§ 338. Character and reputation in general.
§ 344. Particular acts or facts.
§ 345. Accusation or conviction of crime.
§ 348. Cross-examination for purpose of impeachment.
§ 353. Competency of impeaching witnesses as to character or reputation.
§ 356. Examination of impeaching witnesses as to character or reputation.
§ 360. Rebuttal of evidence impeaching character.
§ 362. Effect of impeachment of character.

(C) Interest and Bias of Witness.

§ 367. Interest in event of witness not party to record.
§ 369. Employment by or other contractual relation with party.
§ 370. Friendly or unfriendly relations with or feeling toward party.
§ 372. Cross-examination to show interest or bias.
§ 373. Laying foundation for impeaching evidence.
§ 375. Examination of impeaching witnesses.

(D) Inconsistent Statements by Witness.

§ 379. Inconsistency of statements as ground of impeachment in general.
§ 381. Testimony subject to impeachment.
§ 387. Cross-examination as to inconsistent statements.
§ 388. Laying foundation for proof of inconsistent statements.
§ 393. Former testimony of witness.
§ 395. Evidence as to statements consistent with testimony.
§ 397. Effect of impeachment by inconsistent statements.

(E) Contradiction and Corroboration of Witness.

§ 398. Right to contradict testimony in general.
§ 399. Right to contradict testimony of one's own witness.
§ 401. —— Witness cross-examined as to matter not subject of direct examination.
§ 403. Testimony subject to contradiction.
§ 405. —— Irrelevant, collateral, or immaterial matters.
§ 406. Competency of contradictory evidence.
§ 410. Right to corroborate impeached or contradicted witnesses.
§ 411. Testimony subject to corroboration.
§ 414. Competency of corroborative evidence.

Cross-References.

Absence as ground for continuance, see Continuance, § 21.
Absence as ground for new trial, see New Trial, § 88.
Accomplices, see Criminal Law, § 508.
Admissibility of testimony at former trial without death of witness, see Criminal Law, § 542.
Attendance and examination of witnesses before grand jury, see Grand Jury, § 36.
Comments of prosecutor on failure to produce witnesses or evidence, see Criminal Law, § 721½.
Essentials of complaint charging intimidation, see Criminal Law, § 211.
Expert witnesses, see Criminal Law, §§ 449-459.
Fees as costs, see Costs, § 183.
Fees of garnishee as witness, see Garnishment, § 136.
Fines for refusal to answer questions asked by grand jury, see Grand Jury, § 36.
Indorsement of witnesses on indictment, see Criminal Law, § 628.
Instructions as to failure to call witness or produce evidence, see Criminal Law, §788.
Instructions invading province of jury, see Criminal Law, § 757.
Necessity that declarant of dying declaration be sane, see Homicide, § 213.

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Number of witnesses to will, see WILLS, § 115.
Party in sense that he may appeal, see PARTIES, § 1.
Presumptions from failure to call, see EVIDENCE, §§ 74–77.
Recall where dispute as to testimony, see TRIAL, § 18.
Right of accused to confront witnesses, see CRIMINAL LAW, § 662.
Right to appeal from judgment taxing costs, see APPEAL AND ERROR, § 148.
Separation and exclusion during trial, see CRIMINAL LAW, § 665; TRIAL, § 41.
Swearing witnesses in arbitration proceedings, see ARBITRATION AND AWARD, § 34.

I. ATTENDANCE, PRODUCTION OF DOCUMENTS, AND COMPENSATION.

§ 2. Right of accused to compulsory process.

(1884). Code 1880, § 3059, requiring accused, if he has cause for continuance when a special venire has been drawn, to present it then and not afterwards, unless a good excuse be shown for the delay, does not abridge the right of accused to have compulsory process for witnesses, as secured by Const. 1869, art. 1, § 7.—Penn v. State, 62 M. 450.

§ 7. Subpoena.

(1879). Although a subpœna for a witness on habeas corpus goes without the chancellor's order, it will support a fine for nonattendance, if issued by the clerk who issued the writ of habeas corpus.—Hamilton v. Flowers, 57 M. 14.

§ 22. Damages and penalties for failure to obey subpoena.

(1879). Although a subpœna for a witness on habeas corpus goes without the chancellor's order, it will support a fine for nonattendance, if sent out by the clerk from whom, under the chancellor's seal, the writ of habeas corpus emanates and at the court house of whose county it is returnable.—Hamilton v. Flowers, 57 M. 14.

§ 23. Compensation.

(1889). A witness is not a party to a cause in which he is summoned; fees are not taxed in his favor. He must look for his compensation to the party summoning him.—Perkins v. Delta Pine Land Co., 66 M. 378, 6 So. 210.

(1889). The mileage, tolls and *per diem* allowed a witness by statute constitute a demand against the party summoning the witness, and in the event of suit thereon, the certificate issued to him is evidence in his favor. If not demanded and paid in advance, he may sue the party at whose instance he is summoned, but he has no standing in court as a party. Nor can he appeal from a judgment taxing or retaxing costs.—Perkins v. Delta Pine Land Co., 66 M. 378, 6 So. 210.

(1892). Code 1880, § 1595, provides that a party recovering costs may file the certificates of his witnesses, the fees of whom he has paid, and have the same included in an execution for costs. This does not apply to the fees of witnesses for an unsuccessful party. They have merely a claim against him, enforceable by suit.—Hall v. Moore, 70 M. 75, 11 So. 655.

(1896). A witness for the state in a criminal prosecution who has been committed to jail to secure his appearance upon a trial of the case is not entitled to a *per diem* allowance of fees for the whole period of his detention, but only for that covered by his attendance upon the court when in session. (Code 1892, §§ 1987, to 2026, inclusive.)—Marshall County v. Tidmore, 74 M. 317, 21 So. 51.

II. COMPETENCY.

Competency of agent to prove agency, see PRINCIPAL AND AGENT, § 121.
Competency of expert witnesses, see CRIMINAL LAW, §§ 477–479; EVIDENCE, §§ 535–544.
Competency of parties or intermediate holders of notes as witnesses, see BILLS AND NOTES, § 512.
Competency of public officer to falsify official act, see OFFICERS, § 119.
Competency of public officer to testify to official act, see OFFICERS, § 119.
Competency of witness to will, see WILLS, § 116.
Effect of want of religious belief on dying declaration, see HOMICIDE, § 216.
Exceptions to competency must be taken in lower court, see APPEAL AND ERROR, § 202.
Race discrimination in matter of competency, see CONSTITUTIONAL LAW, § 222.

(A) CAPACITY AND QUALIFICATIONS IN GENERAL.

§ 35. Capacity in general.

(1822). There are four cases in which witnesses are incompetent: 1st. When the witness is insane or an idiot. 2d. When he is an atheist, or does not believe in a future state of rewards and punishment. 3d. When he has been convicted of an infamous offense. 4th. When he is interested in the result of the suit.—Phebe v. Prince, W. 131.

§ 37. Knowledge or means of knowledge of facts.

(1866). The answer of a witness should not be allowed to go to the jury, if it appear from any part of his deposition, that he had no personal knowledge of the matter testified to, and did not derive his knowledge from the admissions of a party whose admission was competent evidence.—Melius v. Houston, 41 M. 59.

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§ 38. Race or color.

That an Indian is a competent witness in a suit between white persons, see (1844) Newman v. Harris, 3 S. & M. 565; (1844) Coleman v. Doe, 4 S. & M. 40.

§ 40. Age and maturity of mind.

(1903). The supreme court, on appeal, adjudges that a child about five years of age, at the time of the alleged crime, and the only witness of the same, was competent to testify in a murder trial.—Trim v. State, 33 So. 718, not officially reported.

§ 51. Husband and wife.

See *post*, § 106.

(1860). The incompetency of husband and wife as witnesses for and against each other at common law, arises first, from their identity of interests; second, from principles of public policy. The statute of this state having removed the incompetency arising from interest, there remains no legal obstacle to the admission of the testimony of the one, in favor of the other, where it does not disclose confidential communications between them, which are excluded from public policy. —Stuhlmuller v. Ewing, 39 M. 447.

§ 52. —— Incompetency for or against each other in general.

(1845). Where property is levied on for a debt of the husband, and claimed by the wife under the statute, the husband is an incompetent witness for the wife on the trial of the issue thus made.—Moore v. McKie, 5 S. & M. 238.

On a bill by a judgment creditor to set aside a conveyance of land by the judgment debtor as fraudulent, such debtor is not a necessary party, but if he is made a defendant, the complainant cannot, under Code 1880, § 1601, introduce the deposition of his wife as evidence.—(1876) Taylor v. Webb, 54 M. 36; (1881) Leach v. Shelby, 58 M. 681.

(1881). On a bill by a judgment creditor to set aside a conveyance of land by the judgment debtor as fraudulent, such debtor is not a necessary party, but if he is made a defendant, the complainant cannot, under Code 1880, § 1601, introduce the deposition of his wife as evidence.—Leach v. Shelby, 58 M. 681.

(1901). Husband and wife are not competent witnesses against each other in a suit to set aside a conveyance by a husband to his wife as in fraud of creditors.—Virden v. Dwyer, 78 M. 763, 30 So. 45.

§ 52a. —— Criminal prosecutions generally.

(1879). Neither § 759 nor any other provision of the Code of 1871, affects the common law rule that a wife is not a competent witness against her husband on trial for crime.—Byrd v. State, 57 M. 243, 34 Am. Rep. 440.

(1897). In a criminal prosecution, the defendant therein has the option to introduce or not to introduce his wife as a witness in his favor.—Cole v. State, 75 M. 142, 21 So. 706.

(1909). The wife of an accused may not be used as a witness against him.—Finklea v. State, 94 M. 777, 48 So. 1.

§ 53. —— Effect of statutes removing disqualification.

(1858). The wife was excluded by the common law from being a witness for the husband, upon the ground that they were one person in law, and as the husband could not testify for himself, so the wife could not, her interest being indentical with his. But by the Rev. Code of 1857, p. 510, art. 190, the incompetency of any person, whether a party to the suit or otherwise, by reason of interest in the result of it, is abrogated, and the wife is therefore a competent witness for the husband.—Lockhart v. Luker, 36 M. 68.

(1859). Prior to the passage of the Act of 1857, the husband and wife were incompetent to testify for and against each other, not only on the ground of interest, but more especially on account of the privileged sanctity with which the law regards the confidential intercourse of married life; and their incompetency on this last ground is not removed by the statute. And in this case the whole testimony of the wife was ruled out, notwithstanding a part of it was in reference to what passed between her and the other party. And the conclusion of the court was that the wife was incompetent as a witness for her husband, and not that the particular testimony she gave was incompetent. —Dunlap v. Hearn, 37 M. 471.

(1859). The husband and wife were excluded from testifying for each not only on account of the identity of their interest and rights, but more especially on account of the privileged sanctity with which the law regards the confidential intercourse of married life. And hence, art. 190, p. 510 of the Rev. Code of 1857, does not remove the disability of the wife as a witness for her husband in a civil case, and she is incompetent. But by art. 193, on same page, husband and wife are made competent witnesses for each other in a criminal case.—Dunlap v. Hearn, 37 M. 471. In this case the testimony of the wife, which was excluded, did not embrace confidential communications made to her by the husband.

(1878). Since Code 1871, § 1780, relieves the husband from the common law obligation to pay the antenuptial debts of his wife, in an action thereon against her husband and herself jointly, her admissions are now competent evidence against herself. They in nowise affect his rights.——Travis v. Willis, 55 M. 557.

(1894). Under Code 1892, § 1739, husband and wife are competent witnesses for each

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other in all cases. The fact that one, being interested, is, under § 1740, incompetent to testify against the estate of a decedent, does not affect the competency of the other.—Saffold v. Horne, 72 M. 470, 18 So. 433.

§ 60. —— Actions for divorce or annulment of marriage.

(1880). Under Code 1871, § 756, making parties and persons interested competent witnesses, and under §§ 759, 760, making husband and wife competent to testify for each other in all civil or criminal cases, a wife is not competent to testify as a witness against her husband in her suit for divorce, even as to acts of personal violence, relied upon as a ground for divorce.—Anonymous Case, 58 M. 15. This is now changed. See Code 1892, §§ 1571, 1739.

§ 61. —— Prosecutions for offenses by husband or wife against the other.

(1882). A wife may be compelled to testify against her husband in a prosecution for assault and battery committed by him upon her and even if it were the privilege of the wife to testify or not, the defendant could not assign for error the action of the court in compelling her to give evidence.—Turner v. State, 60 M. 351, 45 Am. Rep. 412.

§ 65. —— Effect of death of husband or wife.

(1848). The wife of a deceased principal in a note is not a competent witness for the surety in an action on the note.—Payne v. Devinal, 11 S. & M. 400.

(1860). The widow is a competent witness on behalf of her deceased husband's executor, to prove a conversation between her husband in his lifetime and the opposing party, in relation to the subject matter of the suit.—Stuhlmuller v. Ewing, 39 M. 447.

In this case the wife was held a competent witness for the executor of her husband, to prove conversations between the husband and the alleged creditor, in relation to a contract upon which their dealings were based. And the court say, "The incompetency of husband and wife as witnesses for each other, were placed by the common law, first, on their identity of rights and interests, and second, on principles of public policy, that the statute, having removed the incompetency arising from interest, and her testimony (in this case) not falling within the class of confidential communications which, on principles of public policy, are held sacred, there remains no legal obstacle to its admission.—(1860) Stuhlmuller v. Ewing, 39 M. 447; (1870) Whitfield v. Whitfield, 44 M. 254.

§ 66. Parent and child.

(1849). A daughter is a competent witness for her mother in a suit by a third person against the mother, to recover personal estate in the hands of the mother, though the effect of her testimony is to disprove plaintiff's title, by showing it to be in the administrator of her deceased father, in whose estate she is interested as a distributee.—Parker v. McNeill, 12 S. & M. 355.

§ 67. Attorney and client.

(1843). An attorney at law, who holds acceptances for his client, to be paid out of the proceeds of judgments which he had recovered, is a competent witness for his client in a controversy between the client and a third party, to whom the client had assigned a judgment in payment of a debt due to the assignee, to show that although he had given a receipt to the sheriff for the money due on the judgment, yet the judgment was not in fact paid, he having only received the sheriff's note for the judgment.—Clark v. Kingsland, 1 S. & M. 248.

§ 69. Judges, jurors, and judicial officers, as witnesses to proceedings by or before them.

(1838). If a judge know facts, material to the issue before him, he cannot give judgment on his private knowledge; he must like a juror, be sworn to give evidence, so that the privilege of cross-examination may be allowed.—Smith v. Moore, 3 H. 40.

(1843). Though a justice of the peace will not be allowed to give evidence to deny his official act, he may show the circumstance under which it was done, though the effect may be to invalidate his official certificate.—Wood v. American Life Ins. Co., 7 H. 609.

(1895). Jurors, though trying a criminal case, may be introduced as witnesses and yet retain their places on the panel.—White v. State, 73 M. 50, 19 So. 97.

§ 72. —— Grand jurors.

(1849). Before art. 252, p. 614, of the Rev. Code of 1857, became a law it was a matter in the discretion of the court, to allow a grand juror to testify or not in relation to statements made, before the grand jury, by a person giving that body information in relation to a violation of the criminal law.—Sands v. Robinson, 12 S. & M. 704; 51 Am. Dec. 132.

(1859). By Rev. Code 1857, art. 252, p. 614, a grand juror may be examined in open court in relation to the action and proceedings of the grand jury, and the testimony of witnesses before them.—Rocco v. State, 37 M. 357, 2 Mor. St. Cas. 1280.

(1894). On a trial for unlawful retailing, the indictment not alleging any particular sale, members of the grand jury are not competent to testify that the sale sought to be proved by the state is or is not the one inquired of by the grand jury, and on which the indictment was presented.—Newman v. State, 72 M. 124, 16 So. 232.

§ 77. Examination of witness as to competency.

(1876). The accused has the right in the particular case to test the competency of a

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witness offered against him, either as to religious belief, recognition of the obligation of an oath or as to intellectual capacity. It is not enough that on another occasion, and in a different proceeding, to which the prisoner was not a party, the judge made the examination and found the witness competent.—White v. State, 52 M. 216.

§ 79. Determination as to competency.

(1871). The question of competency of the witness is to be decided by the court *in limine*.—Boylan v. Holt, 45 M. 277.

(B) PARTIES AND PERSONS INTERESTED IN EVENT.

Objection to witness or ground of interest must be made in lower court, see APPEAL AND ERROR, § 202.
Weight of testimony of party as witness, see EVIDENCE, § 589.

§ 82. Parties of record in civil actions and proceedings.

(1827). A plaintiff is not a competent witness to sustain his account, by his own account books.—West v. Poindexter, W. 303.

(1832). A party to a negotiable instrument is also competent to show any fact, as want of notice, transpiring after the paper left his hands.—Drake v. Henly, W. 541.

One of the defendants who is a maker of the note sued on, cannot be introduced as a witness by the indorser to prove payment of the debt.—(1841) Wade v. Staunton, 5 H. 631; (1844) Scott v. Watkins, 2 S. & M. 233.

A party to a negotiable instrument is competent, however, to show that the instrument has been discharged or paid.—(1842) Routh v. Helm, 6 H. 127; (1848) Williams v. Miller, 10 S. & M. 139; (1849) Gray v. Thomas, 12 S. & M. 111.

(1848). A party to a non-negotiable instrument is a competent witness to prove it void.—Williams v. Miller, 10 S. & M. 139.

Whether a party to a negotiable instrument, who has actually given the proper credit by negotiating it, is competent as a witness to impeach it by showing it to be originally void; *Quære?*—(1848) Williams v. Miller, 10 S. & M. 139; (1852) Watts v. Smith, 24 M. 77.

(1850). A person who makes a contract, acting as partner of a defendant in a suit brought to enforce it, is not a competent witness for defendant.—Randolph v. Govan, 14 S. & M. 9.

(1853). A judgment debtor is not competent for the creditor to disprove garnishee's answer, denying indebtedness.—Standifer v. Welby, 26 M. 145.

(1853). The judgment debtor is not a competent witness for the garnishing creditor to prove that the garnishee is indebted, notwitstanding his answer denying it, he being directly interested in subjecting the debt of the garnishee to the judgment.—Standifer v. Welby, 26 M. 145.

(1856). A complainant in an original or cross-bill cannot be examined, either for a co-complainant or defendant.—Servis v. Beatty, 32 M. 52.

(1856). The judgment debtor is a competent witness in favor of his garnishee, to show that he had assigned the debt, before the garnishment was served.—Byars v. Griffin, 31 M. 603.

§ 84. —— Nominal and unnecessary parties.

The nominal plaintiff, if willing to testify, is a competent witness for defendant, but he is not compelled to testify against his will.—(1846) Smith v. Francis, 7 S. & M. 507; (1849) Blundell v. Vaughn, 12 S. & M. 625; (1849) Coopwood v. Foster, 12 S. & M. 718.

(1852). The payee in a note payable to bearer in whose name the suit was brought as nominal plaintiff, was held a competent witness to show that its consideration had failed; the form of the action itself showing that the legal title still remained in the payee.—Watts v. Smith, 24 M. 77.

§ 85. —— Representative or official capacity.

(1847). Where a party to a suit is a public officer, in whom an official right to sue is vested by law, he is a competent witness, as he has no personal interest and is not liable for costs.—Ellis v. Carlisle, 8 S. & M. 552.

(1849). Whether the next friend of an infant, who sues for him in the probate court to recover a legacy, is a competent witness for the infant; *Quære?* Yet, if he is not competent, his testimony, if prejudicial to the infant, will not cause a reversal of the decree in the infant's favor.——Quinn v. Moss, 12 S. & M. 365.

§ 87. Defendants in criminal prosecutions.

(1881). The introduction by the state of a declaration of accused, which is not a confession or an admission of a pre-existing crime or act, but a part of the *res gestæ*, did not, under Code 1880, § 1603, entitle the accused to testify.—Howze v. State, 59 M. 230.

(1881). When admissions or confessions of the accused are introduced by the state, he has the right to testify as to them, but he cannot testify generally because of the fact that the state's witness is the person on or against whose property the offense was committed.—Williamson v. State, 59 M. 235.

§ 89. —— Separate trials of defendants jointly indicted.

(1859). Where the indictment, though joint, charges the prisoners with the commission of separate and distinct offenses, and not with the joint commission of the same offense, it seems they are competent

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witnesses for each other, either before or after conviction.—Strawhern v. State, 37 M. 422, 2 Mor. St. Cas. 1338.

(1859). After one is convicted, he is competent for another, jointly indicted, if not rendered infamous by the conviction; and where the punishment or conviction is a fine, it is immaterial on the question of his competency whether it has been paid or not. —Strawhern v. State, 37 M. 422, 2 Mor. St. Cas. 1338.

(1883). Code 1880, § 3071, making co-defendants competent witnesses for each other when tried separately, did not affect their competency as against each other, which existed as before.—Evans v. State, 61 M. 157.

(1894). Where defendants are jointly tried, neither, over his objection, can be made to testify, even for the other.—Holman v. State, 72 M. 108, 16 So. 294.

§ 90. —— Separate indictments for same offense.

(1818). Where two defendants are tried together, though on separate indictments for the same offense, one is not a competent witness for the other, unless no proof of guilt is offered against the defendant proposed as a witness.—State v. Blennerhassett, W. 7, 1 Mor. St. Cas. 1.

§ 91. Interest of party or other person.

The interest which renders a witness incompetent, must be direct and positive, and not remote and contingent, and it must be also an interest in the event of the suit in which he is called to testify.—(1822) Phebe v. Prince, W. 131; (1841) Carter v. Graves, 6 H. 9.

(1822). A witness is incompetent if he erroneously believe that he is interested, but not if he believe his interest is merely honorary, not legal.—Phebe v. Prince, W. 131.

A distributee of an estate is an incompetent witness for the administrator where the effect of his testimony is to increase his share.—(1841) Carter v. Graves, 6 H. 9; (1848) Dillard v. Wright, 11 S. & M. 455.

(1843). A vendor of land who has taken a deed of trust to secure himself the purchase money is not a competent witness for the vendee when the sale is attacked as fraudulent to prove its fairness or testify in relation to it, he being directly interested in upholding the sale in order to enforce payment of the notes secured by the deed of trust.—Pope v. Andrews, Sm. & M. Ch. 135.

(1846). The assignor of a bond for title, without any covenant of warranty, is not a competent witness in a controversy between his creditors on the one side, attacking the assignment for fraud, and the assignor on the other, to prove that the assignment was fraudulent; for he is interested in subjecting the property to the payment of his debts, and not being bound by any covenant of warranty, there is no equipoise in his interest.—Ellis v. Ward, 7 S. & M. 651.

(1848). Whether a principal in a note signed by the surety in blank as to the amount, and delivered to the principal for a particular purpose, is competent to show that in negotiating the note he exceeded the authority thus given; *Quære?*—Torrey v. Fisk, 10 S. & M. 590.

(1849). In an action of replevin by a tenant for life, to recover property of which he has been wrongfully dispossessed, if it be shown that the defendant took possession of the property at the instigation of another, the instigator is not a competent witness for the defendant to show title in himself, and thus defeat plaintiff's action.—Lloyd v. Goodwin, 12 S. & M. 223.

(1849). The judgment debtor is a competent witness for the claimant in a trial of the right of property levied on under execution, to show that the property belongs to the claimant, and not to him; and this, though there be proof tending to show that the witness had made a fraudulent conveyance of his property to defeat his creditors. —Mizell v. Herbert, 12 S. & M. 547.

(1854). If the witness could in any event be a loser by the success of the plaintiff, or a gainer by his defeat, he is interested and incompetent to testify for defendant.—Dunbar v. Chevalier, 28 M. 161.

(1858). A person who would be liable to the plaintiff in case he fail to recover, but against whom in case of recovery by plaintiff, the defendant would have no recourse, is incompetent as a witness for the plaintiff. —Kirkland v. Carr, 35 M. 584.

(1870). A party transferring negotiable paper will not be allowed to give testimony to impeach it.—Partee v. Silliman, 44 M. 272.

(1882). On an issue *devisavit vel non*, the proponent, although the principal legatee, is competent as a witness to support the will.—Tucker v. Whitehead, 59 M. 594.

(1901). The testimony of a witness cannot be ignored merely because such witness is interested in the result of the suit.— Broome v. Duncan, 29 So. 394, not officially reported.

§ 92. —— Nature and extent in general.

A sheriff is an incompetent witness to impeach his return.—(1838) Van Campen v. Snyder, 3 H. 66, 32 Am. Dec. 311; (1844) Planters' Bank v. Walker, 3 S. & M. 409.

(1840). Interest in the question involved does not disqualify where there is no interest in the result of the suit.—Clapp v. Mandeville, 5 H. 197.

(1853). Thus, where a lessee sued a sublessee on a parol contract for rent, the lessor and owner is not incompetent for the plaintiff, though it appear that if the defendant's

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(sub-lessee) note had been taken for the rent, it was to have been made payable to the witness.—Estice v. Cockerell, 26 M. 127.

(1845). A grantor in a deed conveying four slaves for the consideration of love and affection and ten dollars, with warranty of title, is not an incompetent witness to sustain the title of the grantee, by reason of his warranty. The inconsiderable and trifling amount of the pecuniary consideration, compared with the value of the property, showing that it was nominal, and inserted under the idea that the naming of a pecuniary consideration was necessary.—Moore v. McKie, 5 S. & M. 238.

(1851). The current of authority is now against the exclusion of a witness where his interest is remote and merely doubtful; the better opinion is to admit him and let the objection go to his credibility.—Kilpatrick v. Bush, 23 M. 189.

§ 94. —— Interest of persons other than parties in general.

(1834). If a witness has no interest in the record as instituted, he is not incompetent, though his interest may be affected by the result of the suit.—Probate Judge v. Green, 1 H. 146.

(1851). Where an administrator has committed a *devisavit* by wrongfully removing personal property of the estate to another state, and it there gets into the possession of a third party, he is not competent for the distributee in a suit by him to recover it, for he is directly interested in the distributee's success, which would to that extent relieve him from liability.—Kilpatrick v. Bush, 23 M. 199.

(1854). An administrator, who has given his note as such, is not a competent witness in a suit by the payee to enforce its collection out of the assets of the estate, to prove on behalf of the complainant that the note was given for a just debt of the estate, or for money borrowed by the administrator and afterwards applied to the debts of the estate. For he is directly interested in establishing the claim, as it would release him from a direct personal responsibility to the payee, and make his ultimate liability to the estate depend upon the uncertain issue of a litigation thereafter to be waged with the distributees.—Woods v. Ridley, 27 M. 119.

(1856). The master of a vessel is a competent witness to establish a claim against the owners in favor of a third party.—Steamer General Worth v. Hopkins, 30 M. 703.

(1856). An inhabitant and taxpayer of a municipal corporation is a competent witness for and against the corporation.—Mann v. Yazoo City, 31 M. 574.

§ 95. —— Interest jointly with party.

(1834). A partner cannot by any act of his, or his associates, so far divest himself of his interest in the partnership, as to make him a competent witness in a matter relating to the partnership business, whilst he was a member.—Collins v. Flowers, 1 H. 26.

(1845). A partner is a competent witness, if not sued in that character, against his co-partners, and is competent to establish the co-partnership when denied. (Collins v. Flowers, 1 H. 26, and Scott v. Watkins, 2 S. & M. 255, were rulings in relation to the competency of a partner as a witness for his associates.)—Lake v. Munford, 4 S. & M. 312.

(1846). A person purchasing the interest of a partner, and binding himself to pay his vendor's share of the partnership debts, is not a competent witness in a suit against the other partner on a partnership liability, to prove that the same has been paid.—Perry v. Randolph, 6 S. & M. 335.

(1850). One partner is not a competent witness for another, when the latter is sued on a partnership liability; nor is he competent, having made the contract as partner, to disprove the alleged partnership.—Randolph v. Govan, 14 S. & M. 9.

(1855). One of several sued as partners, is incompetent on behalf of the plaintiff to prove the existence of the partnership and the consequent liability of the others, because he is interested in the recovery by plaintiff against his co-defendants.—Garner v. Myrick, 30 M. 448.

§ 97. —— Liability on warranty or other liability over.

(1843). The surety on an attachment bond is not interested in the collateral trial had upon an issue contesting the answer of a person summoned as garnishee in the case, and hence, is a competent witness for the plaintiff, to show an indebtedness by the garnishee to the attachment debtor, which the latter denied in his answer.—Peters v. Moss, 1 S. & M. 331.

(1852). T. made an obligation, and the defendants bound themselves to see it performed, but this was done without the request of T., and upon a distinct and separate agreement with the obligee. *Held*, that T. was a competent witness for the defendants, who were sued upon their guaranty thus entered into.—Thornton v. Dabney, 23 M. 559.

§ 98. —— Interest arising from particular obligations or transactions.

(1849). A bailee of money or a debtor is not a competent witness for the bailor or creditor, to establish that he has paid the money in his hands or due by him to a third person, the defendant, as the success of the party calling him would relieve him from liability.—Jackson v. Crawford, 12 S. & M. 545.

(1850). A party assigning a note, even without recourse, if he represent to the assignee that it is on a good and valid consid-

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eration, is a guarantor that it is so, and is therefore incompetent for the assignee to prove the validity of the consideration.—Brodnax v. Brodnax, 13 S. & M. 369.

§ 100. —— Interest of agent, employe, or other representative.

(1843). In an action to recover for goods sold to defendant, a witness was called for the plaintiff to prove that he purchased the goods as agent of the defendant. He answered on his *voir dire* that he was not interested in the suit; that he did not know if plaintiff succeeded whether he would be liable to defendant or not; that he had acted as the agent of the defendant in purchasing the goods on the authority of a written order, which he was, at that time, unable to locate. *Held*, that his answer did not show him to be incompetent from interest.—Austin v. Feamster, 1 S. & M. 166.

(1846). While, as a general rule, the agent is a competent witness for the principal, in matters about which he acted as agent, yet when the judgment, if rendered in accordance with the agent's testimony, would procure a direct benefit to himself, he is not competent. Hence, where certain payments were made by a debtor of the principal to an agent, he is not competent, for the principal, to show that he applied the payments to a debt due by the person making them to himself; since the effect of this evidence would be to allow him to retain in his possession the means to pay a debt due him, and at the same time exempt him from responsibility to the principal, by furnishing the principal a judgment for the whole debt, undiminished by this payment.—Poindexter v. La Roche, 7 S. & M. 699.

(1848). Whether an attorney, who is to receive a commission on the sum collected in a particular case, is a competent witness for his client in that case; *Quære?* But if that would disqualify him, his interest must be affirmatively shown, or it will not be presumed to exist.—Arthur v. Mitchell, 10 S. & M. 326.

§ 101. —— Liability for costs.

(1818). The prosecutor on an indictment is a competent witness for the state, notwithstanding his contingent liability for costs, if the prosecution should turn out frivolous or malicious.—State v. Blennerhassett, W. 7, 1 Mor. St. Cas. 1.

(1843). Where all the joint makers of a note were sued in the same action, and an order was made without objection that one be allowed to sever on his defense and trial, another joint maker is not a competent witness for the one so allowed to sever: 1st, because he is liable for costs; and 2d, being a party to and having notice of the suit, a judgment against the defendant on trial would be evidence against the witness in a subsequent suit for contribution.—Commercial &c. Bank v. Lunn, 7 H. 414.

(1843). A witness is not competent if he be liable for the costs.—Commercial &c. Bank v. Lunn, 7 H. 414.

(1843). An administrator who revives a suit of a deceased complainant is not a competent witness on behalf of his intestate because he is liable for costs.—McIntyre v. Ledyard, Sm. & M. Ch. 91.

(1843). A defendant charged with colluding with his co-defendant in regard to the transaction sought to be impeached cannot be a witness for his co-defendant, especially where he is liable for costs.—Pope v. Andrews, Sm. & M. Ch. 135.

The judgment debtor's liability for costs will make him incompetent, though his interest be otherwise equally balanced.—(1844) Scott v. Watkins, 2 S. & M. 233; (1855) Cason v. Robson, 29 M. 97.

(1849). The judgment debtor would be incompetent as a witness for the claimant in a trial of the right of property levied on under execution, to show that the property belongs to the claimant if said judgment debtor were in any way liable for costs.—Mizell v. Herbert, 12 S. & M. 547.

(1854). When several are sued as partners in replevin, and one alone gives the replevin bond, the others are not competent witnesses, for they are liable for the costs, and also for the damages for the taking and detention.—Wilson v. Clark, 27 M. 270.

(1855). When the interest of the witness is an exact equipoise, except that he is liable for costs on one side, that destroys the equipoise, and makes him incompetent.—Cason v. Robson, 29 M. 97.

§ 102. —— Interest in criminal prosecution of person injured, prosecutor, informer, or detective or other officer.

(1841). The owner is a competent witness for his slave, who is prosecuted for a capital offense.—Isham v. State, 6 H. 35, 1 Mor. St. Cas. 195.

(1855). In criminal, as well as civil cases, a person interested in the event of the suit or prosecution, as where he is to receive a part of the penalty or forfeiture, as a general rule is not a competent witness.—Murphy v. State, 28 M. 637, 1 Mor. St. Cas. 765.

§ 105. —— Balance of interest as between adverse parties.

If the witness be equally interested on both sides, he is competent for either; but if it preponderate on one side, he is incompetent for that side.—(1841) Carter v. Graves, 6 H. 9; (1843) Austin v. Feamster, 1 S. & M. 166; (1846) Hunt v. Chambliss, 7 S. & M. 532; (1846) Ellis v. Ward, 7 S. & M. 651; (1848) Arthur v. Mitchell, 10 S. & M. 326; (1849) Dean v. Young, 13 S. & M. 118; (1855) Cason v. Robson, 29 M. 97; (1856) Fatheree v. Fletcher, 31 M. 265.

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(1841). An execution against a distributee was levied on personal property, which was claimed by the executor, as a purchaser from the distributee in payment of the distributee's debt to the estate. *Held*, that the distributee was not a competent witness for the executor, as his interest was not an equipoise; for although, if the executor failed, the property would go to the payment of the distributee's debt; yet if the executor succeed, the property would go also to pay the distributee's debt to the estate, and in addition the distributee would get his distributive share in the property. But this would not be so if the distributee had already received his share of the estate, including the debt he owed it, for then his interest would be equally balanced.—Carter v. Graves, 6 H. 9.

(1843). A witness whose interest is equally balanced, or whose interest is against the party calling him, is competent. Hence, in an action of ejectment, where both parties claim under the same grantor, he is a competent witness for the defendant to show that certain lands ambiguously described in the deed, is really embraced within it, he having afterwards conveyed the same lands to the plaintiff's lessor. For his interest is against the defendant, as he is liable on his warranty to plaintiff, in case defendant succeed; or at all events his interest is equally balanced, he being liable to both parties.—Doe v. Jackson, 1 S. & M. 494, 40 Am. Dec. 107n.

(1848). But if his testimony is to the effect that a payment made to him (and claimed as a credit by the defendant on the debt litigated in that suit) was not to be credited on that debt, except on a condition that has not happened, and on failure of that condition, the payment was to be a satisfaction by defendant for the plaintiff, of the attorney's fee, in a former suit on the same debt, which had been dismissed in consideration thereof, then his interest is equally balanced and he is a competent witness.—Arthur v. Mitchell, 10 S. & M. 326.

(1850). A witness whose interest is direct and certain on the side that calls him, and is contingent and uncertain on the other side, is not competent. Hence, a grantor who has made two deeds with warranty of title, with an exception from the sale in the first, in which the land in controversy may or may not be embraced (as may be shown by extrinsic evidence), is not a competent witness for the last in an action of ejectment for the land between these parties, to show that the land conveyed in the last deed was within the exception from the conveyance in the first. For, in case the last grantor loses, the witness would certainly be liable to him on his warranty, and in case the first grantor loses, the witness would still have the right to show that the land was not sold because embraced in the exception.—Pool v. Myers, 13 S. & M. 466.

(1855). Where both parties claim title to the property in controversy from the same grantor, under different conveyances, executed by him to them, the grantor is as much liable to one party as to the other, upon failure of the title conveyed by him, and he is therefore indifferent in point of interest and may be a witness for either to impeach the title of the other, but it seems this rule does not apply, if the consideration for one conveyance was greater than that for the other.—Noel v. Wheatly, 30 M. 181.

(1856). Where both parties claim title to the property in controversy from the same grantor, under different conveyances, executed by him to them, the grantor is as much liable to one party as to the other, upon failure of the title conveyed by him, and he is therefore indifferent in point of interest, and may be a witness for either to impeach the title of the other.—Fatheree v. Fletcher, 31 M. 265.

§ 106. Husband or wife of party or other person interested.

Competency, see *ante*, § 51.

(1849). The husband is a competent witness for a bank in which the wife is a stockholder.—Routh v. Agricultural Bank, 12 S. & M. 161.

(1899). Direct evidence that the wife of the accused who was not present at the murder, stated that her husband had committed it, was properly refused and it was improper for the court to permit a witness to testify that he first heard of the murder on the gallery of the defendant's home and that the defendant's wife, daughter and himself were the only persons present. That which cannot be properly proved directly cannot be proved by indirection.—Garner v. State, 76 M. 515, 25 So. 363.

§ 107. Testimony for or against interest.

A witness is not incompetent, if his interest be adverse to the party calling him, not even if he be a nominal plaintiff.—(1849) Blundell v. Vaughan, 12 S. & M. 625; (1849) Coopwood v. Foster, 12 S. & M. 718; (1849) Dean v. Young, 13 S. & M. 118; (1852) Watts v. Smith, 24 M. 77.

(1849). A person receiving payment of a debt for a creditor, is a competent witness for the creditor to prove that he had no agency to receive payment, and consequently that it was invalid, his interest being adverse to the party calling him.—Dean v. Young, 13 S. & M. 118.

(1849). The judgment debtor is a competent witness for the claimant in a trial of the right of property levied on under execution, to show that the property belongs to the claimant and not to him. The interest of the witness is adverse to the claimant.—Ewing v. Cargill, 13 S. & M. 79.

§ 108. Testimony admissible notwithstanding interest.

(1840). An interest voluntarily acquired, by a witness, or acquired by the procure-

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ment of the party who objects to him, subsequent to the event about which he is called on to testify, does not disqualify him.—Clapp v. Mandeville, 5 H. 197.

(1855). The illicit traffic with slaves has always been difficult to suppress, as it was generally done in secret. The legislature has passed stringent laws to suppress it, and finally gave the prosecutor one-half the fine on conviction. Owing to the difficulty and necessity, it is to be presumed that the legislature did not intend by that provision to narrow the means of detecting guilt, but to stimulate and encourage efforts to that end, and hence, that they intended to capacitate the prosecutor as a witness.—Murphy v. State, 28 M. 637, 1 Mor. St. Cas. 765.

(1855). If the statute creating the offense can receive no execution unless a party interested be allowed as a witness, this will be construed as a legislative capacitation of such party as a witness; so cases of necessity, where no other evidence can reasonably be expected; and so, if a person who is to receive a reward, either from the state or private party, is competent.—Murphy v. State, 28 M. 637, 1 Mor. St. Cas. 765.

§ 112. Transfer, release, or extinguishment of interest.

(1837). A release of interest in a corporation, by one of its members, makes him a competent witness for the corporation.—Smith v. Natchez Steamboat Co., 1 H. 479.

A trustee cannot, by releasing his individual interest in a trust deed to his co-trustees, and renouncing his trust, make himself a competent witness, without the consent of the *cestui que trust*, or by decree of a court of equity.—(1840) Ferriday v. Selser, 4 H. 506; see (1850) Selser v. Ferriday, 13 S. & M. 698.

(1842). The maker of a note, after judgment has been rendered against him, is no longer interested in a suit on the note against the indorser, and may be a witness for the indorser to prove its payment.—Routh v. Helm, 6 H. 127.

(1843). It will be error to refuse a party calling an interested witness, the privilege of releasing him, so as to make him competent.—Englehard v. Slater, 7 H. 538.

(1844). A partner is not a competent witness for his co-partner, unless they mutually execute general releases to each other.—Scott v. Watkins, 2 S. & M. 255.

(1844). A witness called by the defendant, stated upon his *voir dire* that the debt sued on was a partnership debt, he and the defendant being the partners. The defendant then executed to the witness a release of all claim for contribution on that account. *Held*, that this did not make him competent; the witness ought also to have executed a general release to the defendant.—Scott v. Watkins, 2 S. & M. 255.

(1845). The sureties on a claimant's bond, given under the statute for the trial of the right of property, are incompetent witnesses for the claimant; but if objections be made on that account, the claimant has the right to execute a new bond in lieu of the original, and thus restore their competency as witnesses.—Moore v. McKie, 5 S. & M. 238.

(1850). Where a deed was made to two trustees to secure debts of the grantor, and among them a debt on which one of the trustees was indorser, that trustee is an incompetent witness in a trial of the right to the property so conveyed, to establish the legality and fairness of the conveyance. And this is so, even after he has resigned his office as trustee, and released his interest to the co-trustee, who was asserting the claim under the trust deed, for he could not release the interest of the creditor on whose debt he was indorser.—Selser v. Ferriday, 13 S. & M. 698.

(1857). If a release from liability appear in the deposition of an otherwise interested witness, taken on behalf of the releasor, it will be presumed to have been accepted by the witness, so as to make his deposition competent evidence.—Cooper v. Granberry, 33 M. 117.

(1857). A vendor, with covenants of warranty of title, may be made a competent witness for vendee, by a release from the vendee of his liability on the warranty.—Cooper v. Granberry, 33 M. 117.

(1878). An indorser of a note, if released by want of notice, is competent for either party, but if he is still liable he is not competent for the holder.—Partee v. Silliman, 44 M. 272.

(1891). On settlement of accounts, an administrator is competent to testify in his own behalf as to what occurred after the death of the intestate. (Haralson v. White, 38 M. 178, explained.)—McDonald v. McDonald, 68 M. 689, 9 So. 896.

§ 114. Determination of liability of co-defendant by dismissal, default, or separate verdict or judgment.

(1854). The court should not direct a verdict to be entered in favor of one of several defendants sued in *tort*, so as to allow him to testify, except only in a case where there is no evidence to show, or from which the conclusion might be drawn, that he is liable.—Wilson v. Clarke, 27 M. 270.

(1854). On the trial of an action of trespass against several defendants, if there be no evidence at all tending to inculpate one of them, it is competent for the court to direct the jury to retire and acquit him, so that he may be examined as a witness in the cause. But if there be evidence tending to show that defendant is guilty, such a direction cannot be given; nor, in a doubtful case, can the jury be permitted to retire to determine whether a particular defendant

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has been proven guilty of the trespass with a view of allowing him to testify. But if at the instance of the defendant, this course be taken in a doubtful case, and the jury return a verdict of guilty against that defendant, without assessing any damages, this verdict will not be permitted to have any effect to defeat the plaintiff's right to recover against the other defendant as well as against that defendant, whatever damages he may be entitled to, without prejudice from that verdict. For though the proceedings were irregular, yet having taken place at the instance of the defendants, they cannot complain of it, and it will not be permitted to have any effect beyond what was intended by the parties, viz.: to ascertain whether that defendant was a competent witness.—Bell v. Morrisson, 27 M. 68.

§ 115. Effect of statutory removal of incompetency in general.

(1870). Though persons interested are competent under the Act of 1857, yet they must be examined orally in court; their depositions cannot be taken.—Anderson v. Gregg, 44 M. 170.

§ 117. —— Criminal prosecutions.

(1848). Under the statute of this state, providing that no conviction for any offense, excepting perjury and subornation of perjury, shall disqualify or render such person incompetent to be a witness in any case, civil or criminal, but the conviction should only go to his credibility; it was held that a principal found guilty of murder and condemned to be hanged, was a competent witness against a person indicted as accessory before the fact to the same murder. The statute was designed to remove disability; mere conviction never disqualified; it was the judgment which disqualified; the statute must, therefore, be considered to have reference to the judgment.—Keithler v. State, 10 S. & M. 192, 1 Mor. St. Cas. 403.

(1848). Under the statute of this state, providing that no conviction for any offense, excepting perjury and subornation of perjury, shall disqualify or render such person incompetent to be a witness in any case, a condemned principal is a competent witness against the accessory, and the jury are the judges of his credibility.—Keithler v. State, 10 S. & M. 192, 1 Mor. St. Cas. 403.

§ 118. Effect of admission of testimony of adverse party.

(1882). Under Code 1880, § 1603, one accused of murder can testify in his own behalf, if the dying declarations of the person alleged to have been murdered are introduced by the state.—Owens v. State, 59 M. 547. (Now accused is a competent witness in all cases. Laws 1882, p. 109; Code 1892, § 1741.)

§ 120. Consent of parties to testimony.

A witness is not incompetent, if his interest be adverse to the party calling him, if he do not object himself.—(1843) Englehard v. Slater, 7 H. 538; (1843) Austin v. Feamster, 1 S. & M. 166; (1843) Doe v. Jackson, 1 S. & M. 494.

The nominal plaintiff, if he do not object, is a competent witness for defendant.—(1846) Smith v. Elder, 7 S. & M. 507; (1849) Coopwood v. Foster, 12 S. & M. 718; (1849) Blundell v. Vaughn, 12 S. & M. 625.

§ 121. Objections to competency on ground of interest.

(1841). If the interest of a witness be discovered on his examination on his *voir dire*, objection should be then made, and the witness not allowed to testify; if discovered on his examination in chief, objection should be then made, and he be not allowed to testify further; but if discovered on cross-examination, objection may be properly made, for the first time, by asking an instruction to the jury to disregard his testimony.—Carter v. Graves, 6 H. 9.

(C) TESTIMONY OF PARTIES OR PERSONS INTERESTED, FOR OR AGAINST REPRESENTATIVES, SURVIVORS, OR SUCCESSORS IN TITLE OR INTEREST OF PERSONS DECEASED OR INCOMPETENT.

§ 126. Constitutional and statutory provisions.

In the demand of a claimant "against the estate of a deceased person," he is incompetent as a witness. The term "estate of a deceased person," is used in its broad and popular sense to signify property of all kinds which one leaves at his death. Any right asserted against property, real or personal, left by a decedent, as accrued to the claimant by virtue of dealings with the deceased, renders such claimant incompetent as a witness to maintain in his own behalf such assertion of right.—(1876) Jacks v. Bridewell, 51 M. 881; (1877) Rothschild v. Hatch, 54 M. 554.

The amendment of 1878 (Laws, p. 190), prevents the evil of a transfer of a claim after the death of the debtor, and in a suit by the transferee, the proving it by the original claimant who had assigned it for the purpose of being made a competent witness, which, as was shown in (1877) Rothschild v. Hatch, 54 M. 554, might formerly be done. —(1880) Gordon v. McEachin, 57 M. 334.

§ 127. Actions and proceedings in which testimony is excluded.

(1870). In a case where the surviving partner pleaded *non est factum* to a note made by the deceased partner, upon the ground that the latter acted without authority in making the note, the liability of the deceased partner not being disputed, the plaintiff in a suit on the note against the survivor, is competent to prove the declarations made by the deceased partner, which went to show that the note was a partnership transaction. For in that case, the effect of the testimony is not to establish the plaintiff's claim against a deceased person,

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but against the survivor. But it was said, the rule might be different, if the issue involved the liability of the deceased partner. —Faler v. Jordan, 44 M. 283.

(1879). In a suit between the owner of land and the heirs of a purchaser by a warranty deed from one who is deceased, there being no controversy between the complainant and deceased, the former is not an incompetent witness to establish his right to the land. The fact that the estate of the deceased may be made liable on the warranty in the event of his success in the suit, does not render him incompetent. One can only be excluded from testifying to establish his own claim against the estate of a deceased person, where he is a witness against the estate in the suit in which he proposes to testify.—Love v. Stone, 56 M. 449.

(1891). Plaintiff's deposition taken during the lifetime of the defendant and pending suit is not made competent because defendant, being a woman, was entitled to rebut the same by having her own deposition taken, which, in case of her death, could be read in evidence by her legal representative. —Hewlett v. Ragsdale, 68 M. 703, 9 So. 885, 13 L. R. A. 682.

§ 131. —— Probate or contest of will.

(1860). The executor of a will, who is also the principal legatee and devisee under it, is a competent witness to sustain the will, under our statute, Rev. Code of 1857, p. 510, § 17.—Kelley v. Milles, 39 M. 17.

§ 133. —— Claim or demand against estate of decedent or incompetent person.

(1859). Under the Act of 1857, a party cannot be a witness in his own behalf, in a suit instituted in the circuit court to establish his claim against a decedent to any amount. The proviso in that act allowing him to prove his claim to the amount of $50, applies only to suits before a justice of the peace.—Griffin v. Lower, 37 M. 458.

The proviso to art. 190, p. 510, of the Rev. Code of 1857, which prohibits a party from establishing his own claim against the estate of a decedent, by his own oath, to a greater amount than $50, extends not only to cases where the claim sought to be established is a fixed debt, but also to all cases in which the surviving party litigates with the representatives of the deceased party, any right or claim whatever, and the survivor in such a suit (when the amount in controversy is over $50) cannot be a witness to establish any fact in support of his demand, if he be plaintiff, or if he be defendant, to defend the demand of his adversary.—(1860) Lamar v. Williams, 39 M. 342; (1860) Otey v. McAfee, 38 M. 348.

(1873). Under Code 1857, art. 190, p. 510, the incompetency of a party to testify in his own behalf against the estate of a deceased person in a case involving over $50, though not so expressly restricted, is limited to cases arising before the death of deceased. —Witherspoon v. Blewett, 47 M. 570.

(1873). Under Code 1871, § 758, which makes one incompetent as a witness to establish his own claim against the estate of a decedent, the mere fact that the witness may be incidentally benefited by the result of the suit does not render him incompetent. To be incompetent, his testimony must be for the purpose of establishing his claim against the estate. Hence, in an action against the estate of one who had promised to pay the debt of another, the original debtor is a competent witness.—Sweatman v. Parker, 49 M. 19.

The exclusion of a claimant "against the estate of a deceased person," as a witness under the statute is not confined to cases in which the controversy is between one who would testify to his "claim" and "right," and the administrator or executor of a deceased person, but extends to every assertion of such right by one to any part of the estate left by a deceased person and claimed by such persons, or sought to be subjected to his demand, by reason of an alleged transaction between such person and the deceased.—(1876) Jacks v. Bridewell, 57 M. 881; (1876) Green v. Mizelle, 54 M. 220; (1890) Jackson v. Smith, 68 M. 53, 8 So. 258.

(1883). Under Code 1871, § 758, which makes one incompetent as a witness to establish his own claim against the estate of a decedent, the adversary party is not incompetent merely because the estate of such decedent may become ultimately liable in another suit by reason of the result in the one pending.—Combs v. Black, 62 M. 831.

(1891). Under Code 1880, § 1602, which makes one incompetent as a witness to establish his own claim against the estate of a decedent, the deposition of a plaintiff, taken during the lifetime of the defendant and pending suit, cannot be read on the trial after defendant's death and revivor against his personal representative.—Hewlett v. Ragsdale, 68 M. 703, 9 So. 885, 13 L. R. A. 682.

(1899). An administrator, although a distributee of his intestate's estate, is a competent witness to establish a claim of his intestate against the estate of another decedent. He is not incompetent, under Code 1892, § 1740, providing that a person shall not testify as a witness to establish his own claim or defense against the estate of a deceased person.—Cock v. Abernathy, 77 M. 872, 28 So. 18.

Under the express provisions of Code 1892, § 1740, a person may not testify to establish his own claim against the estate of a deceased person where such claim originated during the lifetime of the decedent.—(1886) Townsend v. Kennard, 1 Miss. Dec. 222; (1904) Jones v. Jones, 37 So. 449, not offi-

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cially reported; ;(1904) Moore v. Crump, 84 M. 612, 37 So. 109; (1905) Stanton v. Helm, 87 M. 287, 39 So. 457.

(1886). In such case, though the proceeding be against certain personalty (which had been set apart to the widow by the appraisers as a part of estate of deceased at the time of his death), plaintiff cannot recover.—Townsend v. Kennard, 1 Miss. Dec. 222.

§ 134. —— Accounting of executor, administrator, guardian, or trustee.

(1859). An executor or administrator is not a competent witness to sustain any item of credit in his account, nor to exonerate himself from any sum with which the heirs and legatees may seek to charge him.—Haralson v. White, 38 M. 178.

(1880). Under Code 1871, § 758, and the Act of 1878 (Laws, p. 190), creditors of an estate are not incompetent as witnesses, on the trial of exceptions to a final account as to the propriety of the executor's action in paying their demands which were not probated. But the executor is not a competent witness to establish his own claim against the estate which existed in the lifetime of the deceased.—Gordon v. McEachin, 57 M. 834.

(1892). On exceptions to the account of an administrator, a surviving partner of the intestate is a competent witness to prove the correctness of an open account in favor of the partnership against the deceased partner, which had been paid by the administrator on an accounting. He is not testifying to establish his own claim against the estate within the meaning of Code 1880, § 1602.—Jones v. Warren, 70 M. 227, 14 So. 25.

§ 135. —— Determination of validity or construction of deed, will, or codicil.

(1908). In a suit by an heir of a deceased grantor to set aside a deed to another heir, for undue influence, the latter was an incompetent witness in her own behalf under Code 1906, § 1917, providing that a person shall not testify as a witness to establish his own claim or defense against the estate of a decedent.—Burnett v. Smith, 93 M. 566, 47 So. 117.

§ 136. —— Determination of rights by descent or devolution from decedent.

(1899). In an action to foreclose a mortgage on the estate of the decedent, in which the relationship to such decedent of one claiming to be his widow and another claiming to be his child is involved, the depositions of the alleged widow and the alleged child are admissible in evidence to establish such relationship. Code 1892, § 1740, making a claimant against an estate incompetent to testify as to his own claim, applies only where there is a money demand against the estate or a claim for recovery of property, in a suit instituted or participated in by such witness.—Covington v. Frank, 28 So. 20, not officially reported.

§ 137. Parties and other persons whose testimony is excluded.

(1873). A party to a contract made with one since deceased, is incompetent to testify as a witness in behalf of himself and others, in a suit growing out of such contract.—Buckingham v. Walker, 48 M. 609.

§ 139. —— Parties of record.

(1844). An administrator who is also the son of his intestate is not a competent witness to prove that his intestate did not execute a note upon which it was attempted to render him liable.—M'Intyre v. Ledyard, Sm. & M. Ch. 91.

In a suit by one for the use of another against the administrator of a deceased person, the nominal plaintiff is a competent witness for the usee.—(1871) Hedges v. Aydelott, 46 M. 99; (1872) Anderson v. Leland, 46 M. 290.

(1871). Under Code 1857, art. 190, p. 510, the nominal plaintiff in a suit on a note who has no interest therein, and who took the note merely as agent for the usee, is competent to testify against the estate of the deceased maker.—Hedges v. Aydelott, 46 M. 99.

(1871). Contingent liability for costs of a suit is not such "a demand or claim" as will incapacitate a nominal plaintiff who has no other interest, from testifying against the estate of a decedent.—Hedges v. Aydelott, 46 M. 99.

(1879). Where a surviving partner is sued on a contract made by him with the plaintiff during the existence of the firm, the plaintiff may testify as to a conversation of such survivor in relation to the contract, although the conversation occurred in the lifetime of the deceased partner.—McCutchen v. Rice, 56 M. 455.

Complainants are incompetent witnesses to establish their own claim as devisees of the original owner of lands against persons who claim under a conveyance from such original owner. Code 1892, § 1740.—(1890) Jackson v. Smith, 68 M. 53, 8 So. 258; (1893) Neblett v. Neblett, 70 M. 572, 12 So. 598.

§ 140. —— Persons interested in event.

(1849). If the suit be against a third party to recover property, a distributee is competent for the defendant to show that the title is not in plaintiff, but in the estate; for in the result of that suit the distributee has no interest.—Parker v. McNeill, 12 S. & M. 355.

(1849). An executor is not, by reason of his being entitled to commissions, interested in establishing the will so as to prevent his being a competent witness; he has no interest in the commissions at the time of attestation, since he is entitled to none, except he administer, and then, only as compensation for services actually rendered.—Rucker v. Lambdin, 12 S. & M. 230.

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(1854). A residuary legatee was offered as a witness for the executor, and to render her competent she executed a release to her co-legatees, of an amount of her interest in the estate equal to the demand against the executor in the suit, and the costs, and this was to take effect whether the suit were gained or lost; and the executor also executed to the witness a release from all demands for contribution in that case. *Held*, she was still incompetent for the executor, 1st. Because, if the suit were decided against the executor, the effect of her release would not be to exempt her remaining interest in the estate from liability for the judgment, as all the estate was so liable in law. 2d. The release executed by the executor did not release her from liability to the co-legatees for contribution.—Dunbar v. Chevalier, 28 M. 161.

In an action by an administrator to recover property, or a claim arising out of dealings between the deceased and defendant, as that of the decedent, the defendant is not a competent witness in his own behalf. (1871) Boylan v. Holt, 45 M. 277; (1876) Rushing v. Rushing, 52 M. 329.

(1876). In an action of replevin by an administrator against husband and wife, the husband, on stating that he never had nor claimed any interest in the property, is a competent witness in behalf of his wife. (Reinhardt v. Evans, 48 M. 230, distinguished.)—Rushing v. Rushing, 52 M. 329.

(1880).To work a disqualification of an interested witness, the estate of the decedent must be directly affected by the pending suit; that it may ultimately be affected in some other suit is immaterial.—Fennell v. McGowan, 58 M. 261. See also (1879) Love v. Stone, 56 M. 449.

(1882). On an issue *devisavit vel non* the proponent, although the principal legatee, is competent as a witness to support the will. —Tucker v. Whitehead, 59 M. 594.

(1885). To exclude a party as a witness to prove his own claim or right, it must be against the estate of a deceased person in the suit in which he proposes to testify and the fact that the estate of a deceased person might be prejudicially affected is not sufficient to exclude him.—Eakin v. Gwin, 1 Miss. Dec. 30.

(1886). Where witness transfers his claim to plaintiff who brought suit on same against the estate of a deceased person, it is proper, on cross-examination, to ask witness the consideration of the transfer.—Townsend v. Kennard, 1 Miss. Dec. 222.

(1894). One who delivers money to a bank cashier for deposit, and afterwards recovers the amount by suit against the bank, is not incompetent, under Code 1892, § 1740, as a witness to maintain its suit for reimbursement against the estate of the cashier, who has meantime died, and who, it is claimed, failed to pay the money in.—Jones v. Bank of Carrollton, 71 M. 1023, 16 So. 344.

(1899). If the mortgagee of a deceased person brings suit to foreclose the mortgage, persons whose heirship is denied are competent witnesses to prove relationship. They are within Code 1892, § 1738, authorizing interested persons to testify, and do not come within the provisions of Code 1892, § 1740, excepting from the previous section those who seek to establish their own claims to or defenses against the estate of a deceased person, which originated during the lifetime of the decedent.—Covington v. Frank, 77 M. 606, 27 So. 1000.

(1900). A merchant transferred his stock of merchandise to certain creditors in consideration of the respective amounts which he owed them. Two of the three assignees of the goods sold their interests to the third, such third assignee giving notice for the purchase money. Immediately thereafter the purchaser erected a sign in front of the store bearing his own name and that of the assignor as agent and a privilege license was taken out in the name of the assignee owner. The business was conducted by the assignor until the death of the assignee which occurred three years later, and while so conducting the business he contracted the debt which has been probated against the estate of the assignee and which is here contested. On the trial, the claimant was allowed over the objection of the contestants to testify in support of his claim against the estate. This under Code 1892, § 1740, was error.—Davis v. Viener, 27 So. 877, not officially reported.

§ 141. —— Agent or other representative of party or person interested.

(1887). In an action for the breach of a contract made with an alleged agent of a railroad company, the declarations of the alleged agent are inadmissible to establish the breach of the contract.—Memphis &c. R. Co. v. Cocke, 64 M. 713, 2 So. 495

§ 142. —— Member, stockholder, or officer of corporation party or interested.

(1879). The president of a corporation is a competent witness to establish its claim against the estate of a deceased person, though relating to transactions and conversations occurring in the lifetime of the deceased.—Mitchell v. Tishomingo Sav. Inst., 56 M. 444.

§ 143. —— Grantor, assignor, or other person from whom party derives title or interest.

(1877). In Reinhardt v. Evans, 48 M. 230, it was held that Code 1857 (p. 510, art. 190), making the testimony of one incompetent to establish his own claim against the estate of the decedent for a sum exceeding $50 applied, although the witness has assigned the claim without recourse and suit was being prosecuted thereon by his assignee. But this

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case was overruled by Rothschild v. Hatch, 54 M. 554, which held that Code 1871, § 758, providing that no one shall testify to establish his own claim against the estate of a deceased person which originated during the life of the decedent, does not apply where the witness has assigned his claim, though by gift, before suit. Competency under this statute relates to the time when the witness testifies.

(1877). In a suit by creditors of the testator to subject land conveyed by the executrix, the vendee is a competent witness to establish his claim.—Buckingham v. Wesson, 54 M. 526.

(1879). Under Code 1871, § 758, amended by the Act of 1878 (Laws, p. 190), relative to testimony against the estate of deceased persons, where a claimant of land has assigned his title after the death of the party in possession, in an action of ejectment by his assignee against the heir of the deceased possessor, he is incompetent to testify to a permissive entry and holding under him by such possessor.—Jones v. Sherman, 56 M. 559.

(1887). The grantor of a claim to land asserted against the estate of the decedent, if the claim was transferred before the death, is not disqualified by Code 1880, § 1602, to testify as a witness to establish such claim, in a contest between the estate of the decedent and the grantee of the claim. —Snell v. Fewell, 64 M. 655, 1 So. 908.

(1890). Where one in possession of personal property as owner, mortgages it to another, after the death of the grantor a third person asserting a prior title to the property claimed to be superior to the mortgage, is incompetent as a witness to establish his own claim.—Jackson v. Smith, 68 M. 53, 8 So. 258.

(1905). A defendant, claiming land as against the estate of the decedent, cannot, under Code 1892, § 1140, establish a claim which originated in the life time of the decedent, by the testimony of a person through whom the title is alleged by him to have passed and from whom the defendant purchased after the death of the decedent.—Liverman v. Lee, 86 M. 370, 38 So. 658.

§ 144. —— Surviving party to contract or other transaction or cause of action.

(1882). One is not competent as a witness to establish his own claim against the estate of a deceased person, by showing that the deceased was a member of a firm against which plaintiff asserts his demand, the issue being whether deceased was a partner.—Boyd v. Ricketts, 60 M. 62.

(1883). In an action by surviving partners the defendant is a competent witness as to the transaction had between himself and the deceased member of the firm.—Combs v. Black, 62 M. 331.

(1894). A son cannot testify that a chattel sued for was given him by his father, since deceased, during the latter's lifetime. (Code 1880, § 1602.)—Cockrell v. Mitchell, 15 So. 41, not officially reported.

§ 146. —— Husband or wife of party or other person excluded from testifying.

See *ante*, §§ 51, 106.

(1886). Where a wife conveys land, her separate property, her husband joining in the conveyance, and after the death of the grantee, the husband and wife file a bill against his devisees to have the conveyance canceled on the ground that it was obtained by fraud, the wife, under Code 1880, § 1602, is not a competent witness. The husband, however is competent.—Ellis v. Alford, 64 M. 8, 1 So. 155.

§ 147. Parties as against whom testimony is excluded.

(1876). A wife, though executrix of an estate, is competent to establish a claim against it in favor of her husband, paid during her administration and attacked on final settlement.—Barry v. Sturdivant, 53 M. 490.

(1877). A wife is not competent as a witness to prove her claim against her deceased husband's estate, arising out of dealings with him while living. But she is competent to prove her transactions as executrix of his will, although the creditors of her husband, with whose representatives she is in litigation, are dead.—Buckingham v. Wesson, 54 M. 526.

§ 150. —— Grantee, assignee, devisee, legatee, heir, distributee, or other person deriving title or interest from deceased or incompetent person.

(1889). In a suit between a widow and a legatee under the will of her husband, where the ownership of a note executed to the latter in his lifetime is the matter in controversy, the widow is not competent as a witness to prove her right to the note under a gift from her husband.—Buie v. Buie, 67 M. 456, 7 So. 344.

(1893). Where the subject matter of a suit is the estate of a decedent, and the deposition of defendant has been read to establish an offset which he claims accrued after the death of the decedent, but, from a view of the whole evidence, it appears that the offset in fact originated in defendant's favor before said death, the deposition should be excluded.—Ragsdale v. Meridian Land Co., 71 M. 284, 14 So. 193.

(1896). Notwithstanding the death of the grantor in a deed, the testimony of the grantee in his own behalf is admissible to establish the delivery of the instrument, as against one claiming under the same grantor by a subsequent special warranty deed, a failure of the latter title imposing no liability on the estate of the decedent. —Horne v. Nugent, 74 M. 102, 20 So. 159.

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(1903). Under Code 1892, § 1740, a widow is a competent witness as against a legatee of her deceased husband to establish an equitable assignment of a life insurance policy from the deceased to his infant son.—Cockrell v. Cockrell, 83 M. 385, 36 So. 390.

§ 157. Subject matter of testimony.

(1856). If plaintiff in ejectment claim title as heir of his father, a relative of the father, who will be next of kin to the father in case plaintiff were illegitimate, is competent in that action to prove the illegitimacy.—Spears v. Burton, 31 M. 547.

In a suit against the maker of a note by an assignee of the deceased payee, the defendant is a competent witness to prove payment to the payee before the transfer.—(1879) Love v. Stone, 56 M. 449; (1883) Combs v. Black, 62 M. 831; (1890) Cole v. Gardner, 67 M. 670, 7 So. 500.

(1893). Rent for a term of years on land, and which, on the death of the lessor, follows the reversion and passes to his devisee, is part of the estate of the decedent within the meaning of Code 1892, § 1740, and, in a suit therefor by the assignee of such devisee, the defendant is an incompetent witness to establish an offset which originated in his favor against such deceased lessor during his lifetime.—Ragsdale v. Meridian Land Co., 71 M. 284, 14 So. 193.

(1900). Grantors may not testify as to the identity of land in a suit to reform the deed by the heirs of the grantee. In such a case it is not material that the decedent conducted the transaction out of which the claim arises by an agent who is living and has testified in the case.—McCaughan v. Hardy, 78 M. 598, 29 So. 397.

§ 159. —— Transactions or communications between witness and person subsequently deceased or incompetent.

(1904). The testimony of the heirs of the husband to a contract between him and his wife made shortly before and in contemplation of their marriage to the effect that the surviving husband or wife should take only a life estate in the property of the other is not incompetent against the estate of the wife under Code 1892, § 1740, which provides that no one shall testify to establish his own claim against the estate of the decedent which originated in the lifetime of the deceased since in such a case the question is one of inheritance and not a claim which originated in the lifetime of the wife.—Steen v. Kirkpatrick, 84 M. 63, 36 So. 140.

(1876). A plaintiff in a proceeding to enforce a mechanic's lien, is not a competent witness in his own behalf to prove his claim, which originated during the lifetime of the decedent, who was the owner of the land.—O'Leary v. Burns, 53 M. 171.

(1876). In an action by the trustee in a deed of trust to recover of a third person the value of the incumbered property bought from a grantor, the latter is a competent witness to prove that the deed has been paid, although the beneficiary is dead. This is not testifying to establish his own claim against the estate of a deceased person.—Stadeker v. Jones, 52 M. 729.

(1877). In ejectment against heirs claiming by descent, plaintiff is incompetent to testify as to admissions by the ancestor tending to show permissive holding for plaintiff.—Rothschild v. Hatch, 54 M. 554.

(1877). In a suit where legatees seek to charge the executor with the amount of a note given to the testator by the deceased wife of the executor for land which he holds as tenant by the curtesy, he is incompetent to testify to anything in reference to the note occurring in the lifetime of the testator. It matters not that the wife was incapable of executing the note, since the executor holds the land.—Troup v. Rice, 55 M. 278.

(1894). Under Code 1892, § 1740, providing that one shall not testify to establish his claim or defense against a decedent, the maker of a note sued by the administrator of an assignee thereof is incompetent to testify that the note was without consideration and procured by fraud of the original payee.—Wetherbee v. Roots, 72 M. 355, 16 So. 902.

(1904). Where a married woman died leaving a will and the surviving husband sought, under Code 1892, § 4496, to renounce the will and take a share of her estate in opposition to which was pleaded an antenuptial contract empowering the wife to dispose of her property by will as she should see proper, the husband was incompetent as a witness to impeach the contract as a forgery under Code 1892, § 1740, providing that a person shall not testify to establish his own claim against the estate of a decedent.—Watson v. Duncan, 84 M. 763, 37 So. 125.

§ 164. —— Communications or instruments in writing.

In a suit against the estate of a decedent, a witness, though incompetent to establish his own claim, may testify to the loss of a written instrument upon which he bases his claim, thus laying the foundation for the introduction of testimony of other persons to prove its contents.—(1884) Harper v. Lacey, 62 M. 5; (1890) Cole v. Gardner, 67 M. 670, 7 So. 500.

§ 165. —— Books of account.

(1882). Although a physician who sues his patient's administrator, is incompetent to testify as to the debt, he may introduce his books of account, and since they alone are not competent, his oath may be received as supplementary proof to the court on the question of their competency.—Bookout v. Shannon, 59 M. 378.

(1892). An account on the books of the partnership against the deceased partner is not a claim against his estate required to be

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probated and registered under Code 1880, § 2206; nor, before an accounting of the partnership assets, is it subject to the statute of limitations.—Jones v. Warren, 70 M. 227, 14 So. 25.

§ 176. Effect of admission of testimony of adverse party.

(1877). Where, after a second, and before the third trial of a case, plaintiff dies and the action is revived in the name of her administrator, and on the third trial her testimony as given in a former trial is admitted in evidence, defendant is a competent witness as to matters embraced in such testimony. While the exclusion of the defendant as a witness would be within the letter, it would not be within the spirit of Code 1871, § 758.—Strickland v. Hudson, 55 M. 235.

(D) CONFIDENTIAL RELATIONS AND PRIVILEGED COMMUNICATIONS.

§ 197. Communications to or advice by attorney or counsel.

See *post*, § 305.

(1837). The unsolemn and extra-judicial admission made in a private conversation by an attorney, to the effect that he had received payment of a debt in his hands for collection is admissible in evidence against the client to show the payment.—Wenans v. Lindsey, 1 H. 577.

(1848). Communications from clients to attorneys are privileged on grounds of public policy, with a view to the safe and pure administration of justice. The privilege is not restricted to cases where the communications were made with reference to legal proceedings, either pending or in contemplation, but it extends to all cases where they are made to an attorney with a view to procure his action in that capacity, or his advice as a lawyer, though there has been no retainer. Hence, if a party apply to an attorney to write a deed, and make to him a representation that the deed was intended to secure his property from his creditors, and the attorney thereupon decline the employment, the communication is privileged.—Crisler v. Garland, 11 S. & M. 136, 49 Am. Dec. 49.

(1852). An attorney, who drew up a mortgage will not be permitted to disclose the statements of his client, showing that it was fraudulent.—Parkhurst v. McGraw, 24 M. 134.

(1852). It is the duty of an attorney to protect his client by refusing to disclose confidential communications, and it was remarked by the court in this case, that the fact that the attorney appeared to have been a willing witness to make such disclosure, thus showing himself faithless to his client, was a circumstance reflecting upon his credibility as a witness.—Parkhurst v. McGraw, 24 M. 134.

(1852). If, touching matters that come within the ordinary scope of professional employment, an attorney receive a communication either directly from his client, or indirectly on his account; or if he commit to writing, in the course of his employment, on the client's behalf, matters which he knows only through his professional relation to his client, he is not only justified in withholding such matters, but bound to do so. And this protection applies to every communication which the client makes to his legal adviser, with a view to defending or enforcing his rights, and is not limited to communications in reference to proceedings at law, either pending or in contemplation.—Parkhurst v. McGraw, 24 M. 134.

(1871). When a party supposing he has a valid claim against another, consults his attorney on the subject, and is advised that the evidence is not sufficient to establish it, and under that impression admits to the other that he has no claim against him, but subsequently brings suit to enforce the demand, the testimony of the attorney as to the advice given, is inadmissible to explain the motives of the plaintiff's admission that he has no claim. Such disclaimer, is however, no legal bar to the action.—Gilliam v. Brown, 43 M. 641.

The entire professional intercourse between attorney and client is to be protected by secrecy. This is a privilege of the client, and is not for the attorney's benefit. It extends to all that passes between client and attorney in the course and for the purpose of the business.—(1873) Randel v. Yates, 48 M. 685; (1876) Lengsfield v. Richardson, 52 M. 443.

(1873). When an attorney is employed merely as a scrivener to draft an instrument, and no advice is sought or given, he may testify in relation to the facts of the transaction.—Randel v. Yates, 48 M. 685.

III. EXAMINATION.

(A) TAKING TESTIMONY IN GENERAL.

Examination of witnesses in equity, see EQUITY, § 351.
Examination of witnesses to deposition, see DEPOSITIONS, § 63.
Examination of expert witnesses, see CRIMINAL LAW, § 482; EVIDENCE, §§ 547–558.
Harmless error in examination, see APPEAL AND ERROR, § 1048; CRIMINAL LAW, § 1170½.
Hypothetical questions to experts, see EVIDENCE, § 551.
Review of discretion of court as to examination of witnesses, see APPEAL AND ERROR, § 971.

§ 224. Order, course, and extent of examination.

(1845). On the trial of an issue on the plea of payment, the defendant may commence the interrogation of the witness by asking him about a sale which is the consideration of the indebtedness claimed by defendant, for this may be proper introductory matter to prove payment.—Tinnin v. Garrett, 4 S. & M. 207.

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§ 225. Control of court in general.

(1908). A defendant on a trial for murder, whose sole defense is insanity, is entitled to a reversal of a conviction where he was unduly restricted in his examination of witnesses touching his mental condition at the time of the killing.—Brock v. State, 92 M. 712, 46 So. 67.

§ 227. Oath or affirmation.

(1872). Under Code 1857, art. 194, p. 138, validating as to third persons the acts of *de facto* officers, it is not ground for a new trial that the witnesses in a criminal case were sworn by one acting at the term as deputy clerk, though not regularly appointed and sworn.—Mooley v. State, 46 M. 501.

(1898). By the common law, evidence is given only on oath.—Barr v. State, 23 So. 628, not officially reported.

(1898). It is the duty of the court to see that the oath is administered to the witness, that the defendant has a right to presume that a witness taking the stand has been sworn, and that a party convicted on unsworn evidence has not enjoyed the protection of the laws to which he is entitled.—Barr v. State, 23 So. 628, not officially reported.

§ 234. Examination of adverse party in general.

(1844). A party, whether interested or not, cannot be compelled to testify against his will. An executor is a party, and cannot be compelled to testify, unless he is willing to do so.—Duncan v. Watson, 2 S. & M. 121.

(1856). A defendant may be examined as a witness by the complainant; and where he has no interest in the matter, upon which it is proposed to examine him, he may be examined for his co-defendant; but in no case can a complainant be examined as a witness, either for a co-complainant or a co-defendant. And this rule applies, also, to a complainant in a cross-bill, who is proposed to be examined in reference to facts therein alleged, and concerning which a discovery was sought.—Servis v. Beatty, 32 M. 52.

(1857). It is a rule of chancery practice, that if the complainant examines as a witness a material defendant in the cause, no decree can be rendered against that defendant, nor against his co-defendants, whose interests are so involved with his, that a decree against them would affect his rights, unless the bill be admitted by the answer, or be taken for confessed. The reason of this rule is, "that there cannot be a decree for or against a man on his own evidence," and "the complainant cannot compel the defendant to assist in the same cause, and also, to act adversely to him;" but this rule, though well settled, is extremely technical, and it is not to be extended beyond the strict reason on which it is founded; and hence, where the deposition of such a defendant has been taken, if the complainant is entitled to relief, upon the pleadings and other evidence in the cause, the deposition will be suppressed, and a decree rendered in favor of the complainant.—Stanton v. Green, 34 M. 576.

(1857). A fraudulent conveyance to defeat or hinder creditors, though void as to them, is good as between the parties, and the fraudulent grantee is still liable for the purchase money, though the conveyance be set aside at the instance of a creditor. Hence, he is a material defendant, whose rights would be affected by a decree annulling the conveyance, and if examined by the complainant in relation to the fraud, a decree cannot be rendered for the complainant, unless his answer confess the complainant's case, or the bill be taken for confessed, or there be other proof in the record, sufficient to entitle complainant to relief, without reading the deposition of such defendant.—Stanton v. Green, 34 M. 576.

(1857). If a material defendant be examined by the complainant, he cannot have relief against that defendant on his own evidence.—Stanton v. Green, 34 M. 576.

§ 239. Leading questions.

See *post*, § 356.

Leading question in taking depositions, see DEPOSITIONS, § 44.

A leading question is one which directly suggests the answer which is desired, or which embodies a material fact and admits of an answer by a simple affirmative or negative, though neither the negative nor affirmative answer be directly suggested.—(1831) Torrance v. Hurst, W. 403; (1847) Turney v. State, 8 S. & M. 104, 1 Mor. St. Cas. 305, 45 Am. Dec. 74n; (1853) Stringfellow v. State, 26 M. 157, 1 Mor. St. Cas. 691, 59 Am. Dec. 247.

(1847). Leading questions, as a general rule, are not to be propounded to a witness on his examination in chief. But there are exceptions to this rule: 1st. Where the witness is manifestly reluctant and hostile to the party calling him. 2d. Where he has exhausted his memory without stating the particular fact required,—when it is a proper name or other fact, which cannot be arrived at by a general inquiry. 3d. Where the witness is a child of tender years, whose attention cannot be otherwise called to the point. Leading questions should not be allowed, even on cross-examination, where it is manifest the witness is in the interest of the party propounding them.—Turney v. State, 8 S. & M. 104, 1 Mor. St. Cas. 305, 47 Am. Dec. 74n.

(1847). But the allowance of leading questions in the examination in chief, is a matter in the discretion of the court before whom the trial is had; but this discretion is not an absolute and arbitrary discretion, but is subject to legal rules, and it exists only in the exception to the general rule, forbidding the propounding of leading questions. When these exceptions do not apply, there is no discretion in the court to allow leading ques-

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tions, and they must be excluded; and where the record shows that the exception did not exist, and that a leading question was, nevertheless, allowed, the appellate court has the right to interpose and correct the error.—Turney v. State, 8 S. & M. 104, 1 Mor. St. Cas. 305, 47 Am. Dec. 74n.

(1847). On a trial of an indictment for rape, the prosecutrix stated that the violence had been committed on her seven months previous to the finding of the indictment, which latter period was, so far as the record showed, the first date at which she had made the disclosure of the injury done to her. It also appeared that the prisoner had been her guardian from a very early age, and was her stepfather, and that she was sixteen years old at the time of the alleged crime. She was asked by the prosecution, "Did the prisoner then or at any subsequent time say anything to you in relation to the matter to dissuade you from disclosing it? State when and where and what he said." *Held*, that this question was leading and illegal. And the following questions were also held illegal and leading: "Did the prisoner, at any time subsequent to the transaction, say anything to you about what punishment the laws of Mississippi would impose on you, or him, or on both? State it all." 2d. "If the prisoner, in any antecedent conversations, offered property or other advancement to you to attach you to him, say so."—Turney v. State, 8 S. & M. 104, 1 Mor. St. Cas. 305, 47 Am. Dec. 74n.

(1853). If in the examination of a witness, the object be to direct his mind with more expedition to what is material, and if the question propounded relate merely to introductory matter, it is not objectionable, though in form it be leading.—Stringfellow v. State, 26 M. 157, 1 Mor. St. Cas. 691, 59 Am. Dec. 247.

(1853). Under the authority of Turney's Case, which the court says lays down a more stringent rule against leading questions than the court announced in this case, the following question was held illegal and leading: "Did you carry property from Bunch's Bend, in Issaquena county, as the property of Decatur Whitly." In this case the indictment was for the murder of Decatur Whitly, and there was no direct proof that he had been killed or that the killing was in Issaquena county. The question was intended to show that Decatur Whitly was in Issaquena county about the time of the killing, and from that to raise an inference in favor of the venue. And it was held that if the answer could conduce to that proof, it was leading and illegal.—Stringfellow v. State, 26 M. 157, 1 Mor. St. Cas. 691, 59 Am. Dec. 247.

(1879). Where witnesses to an alleged nuncupative will who have signed a written statement purporting to contain the testamentary words, and to set forth the attendant circumstances, a question whether the statement is true, addressed to one of them by the petitioner on the trial of the issue *devisavit vel non*, is leading and improper.—Broach v. Sing, 57 M. 115.

(1901). Where the description of land in controversy was read to a witness and he was asked if he was acquainted with the land, the question was not open to the objection that it was a leading question or that it assumed a material fact to be true.—Hopper v. Overstreet, 79 M. 241, 30 So. 637.

§ 248. Responsiveness of answer.

(1906). Where the answer to a proper question is not responsive, the party objecting to the answer should move to exclude.—Mississippi Cent. R. Co. v. Hardy, 88 M. 732, 41 So. 505.

§ 252. Use of documents, maps, plats, diagrams, or other matters to explain testimony.

(1878). On a trial for homicide a diagram of the locality of the killing introduced by the state, if used and referred to by witnesses on both sides as being correct, will be regarded as sufficiently proven, though there was not the usual preliminary proof as to its correctness. The defendant having made no objection at the time to its introduction and use, is presumed to have acquiesced therein.—Gavigan v. State, 55 M. 533.

§ 253. Refreshing memory.

(1848). When a witness speaks in his deposition of a fact, as within his recollection, but states he only remembers the date of it, by reference to a letter written by him, which is in his possession, but does not attach the letter or a copy of it to his deposition, his answer will, nevertheless, be competent.—Henderson v. Ilsley, 11 S. & M. 9, 49 Am. Dec. 41.

(1877). A witness may refresh his memory by reference to papers and correct errors in his testimony.—Meyer v. Blakemore, 54 M. 570.

(1881). Although a witness is very old, and his memory is much impaired, if he is enabled by means of a contemporaneous written account of the occurrence about which he testifies—made and preserved by himself—to give an intelligent account of it, he should be allowed to testify, although he admits that he knows nothing of the occurrence except as his memory is refreshed by the memorandum. And such testimony is admissible, although the memorandum is not introduced, if the witness holds it and refers to it when interrogated, and testifies that he knows that he correctly noted the facts thereon.—Cooper v. State, 59 M. 267.

(1885). It is not error for the court to permit the inspection of a report made by a witness, from which he refreshes his memory in giving testimony, by opposing counsel, nor error to permit the cross-examination of the witness in regard thereto.—Louisville &c. R. Co. v. Thomas, 1 Miss. Dec. 317.

(1900). Before a witness may use a memorandum to refresh his memory and to testify therefrom, it must appear: (1) That the witness once had knowledge of the event; (2) that the memorandum was made by the witness or at his direction; and, (3) that

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it was made at the time of the occurrence of the event to which it relates.—Alabama &c. R. Co. v. Coleman, 78 M. 182, 28 So. 828.

(1902). A memorandum used by a witness to refresh his memory as to the quality and quantity of cotton in each of a large number of bales is properly admitted for the purpose of assisting the jury.—Alabama &c. R. Co. v. Fried, 81 M. 314, 33 So. 74.

§ 258. Testimony from memoranda or other writings.

(1888). A witness, even though he has no independent recollection of what was said, may read to the jury a newspaper report of an interview formerly had between himself, a newspaper reporter, and accused relative to the facts of the alleged offense, if he knows that it was taken down by him at the time substantially as stated, and published as reported by him, and he is willing to adopt the report as his testimony; and this, notwithstanding, he cannot affirm that the report is verbally accurate, or that it contains all that the prisoner said.—Jackson v. State, 66 M. 89, 5 So. 690, 14 Am. St. 542.

(1900). A witness without personal knowledge of a transaction, cannot testify thereto from a memorandum made by another.—Alabama &c. R. Co. v. Coleman, 78 M. 182, 28 So. 828.

§ 261. Recalling witnesses.

(1876). A trial judge cannot settle disputes as to the testimony of a witness, nor side with either party. When differences arise, the limit of his power is to recall the witness, and even this should be sparingly exercised.—Duff v. Snider, 54 M. 245.

(1888). Where a witness has been examined and dismissed, and a subsequent witness upon the same side is questioned, on cross-examination, as to new matters, about which, however, he is not informed, but about which the first witness is conversant, it is right to allow the first witness to be recalled and examined in reference to such matters.—Mississippi &c. R. Co. v. Gill, 66 M. 39, 5 So. 393.

(1896). Where counsel in an action against a railroad for failing to maintain cattle guards (Code 1892, § 3561) inadvertently failed to establish that plaintiff's land was crossed by the road and was inclosed, or such evidence, though admitted, was not disclosed by the reporter's notes, the court should have permitted plaintiff at the close of defendant's evidence to recall a witness to testify to such facts.—French v. Canton &c. R. Co., 74 M. 542, 21 So. 299.

(B) CROSS-EXAMINATION AND RE-EXAMINATION.

Cross-examination of experts, see CRIMINAL LAW, § 489; EVIDENCE, § 558.

§ 266. Right to cross-examine and re-examine in general.

(1856). The right of a party to cross-examine a witness who has been introduced and examined by his antagonist, is founded on the clearest principles of reason and justice, and is rarely if ever denied. There is nothing in the nature of an investigation in relation to the propriety of a change of venue in a criminal case, which abridges or limits the right of cross-examination, and in such proceedings it should be allowed.—Mask v. State, 32 M. 405, 1 Mor. St. Cas. 948.

§ 266½. Effect of cross-examination or testimony.

(1856). When a witness is introduced on the stand, it is for the purpose of telling the whole truth of the matter relevant to the issue; and his whole testimony, whether given in response to interrogatories propounded by the party introducing him, or the other, is the testimony of the former. And hence the right of cross-examination, being allowed for the purpose of eliciting the whole truth from the witness, is not restricted to what the witness has testified to in his direct examination, but extends to every matter relevant to the issue.—Mask v. State, 32 M. 405, 1 Mor. St. Cas. 948.

§ 267. Control and discretion of court.

(1906). In a prosecution for homicide, the court may not require the defendant to disclose, in advance, the purpose for which he desires to prove certain facts upon the cross-examination of a witness for the state.—Brown v. State, 88 M. 166, 40 So. 737.

§ 268. Scope and extent of cross-examination in general.

(1866). Where the conversation of one party is introduced in evidence by the other, the former has the right to have all that conversation detailed in evidence; and this rule applies wherever a party, introducing a witness to prove a conversation, allows him to state the result of another conversation, so as to give to the party whose conversation has been thus introduced, the right to have both conversations fully stated to the jury.—McIntyre v. Harris, 41 M. 81.

(1876). Where a witness for the defense, on examination in chief, details part of a conversation between himself and the accused in reference to the deceased, which occurred before the killing, the evidence being incompetent and subject to exclusion, the defendant cannot, on re-examination, over the state's objection, bring out the remainder of the conversation. Otherwise if a part of the conversation had been brought out by the state.—Russell v. State, 53 M. 367.

(1890). If the prosecution introduces evidence of statements made by the accused immediately after the killing, the latter is entitled to bring out, by other witnesses if necessary, the whole statement, or to prove the statement to have been different.—Brabston v. State, 68 M. 208, 8 So. 326.

(1893). Wherever the fact of a former difficulty may be proved by the state, the accused should be permitted to show its character.—Foster v. State, 70 M. 755, 12 So. 822.

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(1899). A witness testifying on the question of the value of land may be cross-examined as to sales of similar land, in the vicinity of that in question, made about the same time for sums less than given in his opinion. —Board of Levee Com'rs for Yazoo-Mississippi Delta v. Dillard, 76 M. 641, 25 So. 292.

(1905). Where the state in a trial for murder reserves a witness to the homicide and introduces him only in rebuttal he is subject to full cross-examination and it will be error to confine the cross-examination of him to matter in surrebuttal.—Walton v. State, 87 M. 296, 39 So. 689.

(1905). Where the state in a murder trial reserves a witness to the homicide and introduces him only in rebuttal he may be asked on cross-examination whether he testified at the committing trial.—Walton v. State, 87 M. 296, 39 So. 689.

§ 269. Limitation of cross-examination to subjects of direct examination.

(1888). When one who has been put off for failing to produce a ticket, testifies on direct examination that he then had a ticket, and had not sold it or given it away, and had it after leaving the car, it is error to refuse to allow the defendant to cross-examine him as to what had become of the ticket. —Louisville &c. R. v. Maybin, 66 M. 83, 5 So. 401. See also (1856) Mask v. State, 32 M. 405.

§ 270. Cross-examination as to irrelevant, collateral, or immaterial matters.

(1898). The test whether a fact inquired about in cross-examination is collateral is, would the cross-examining party be entitled to prove it as part of his case, tending to establish his plea.—Garner v. State, 76 M. 515, 25 So. 363.

(1904). The defendant in a murder case and his wife having testified that she did not, after the killing, say to him in the presence of third persons, "if you had listened to me you would not have gone down there and the man would not have been killed," it was error to allow the state to contradict them since their testimony on the subject related to a collateral matter.—Davis v. State, 85 M. 416, 37 So. 1018.

§ 274. Cross-examination of witness to character of party.

(1905). A witness on a prosecution under Code 1892, § 968, for assaulting and beating with a stick and having in possession a pistol with intent to intimidate, who has testified in the defendant's behalf that he was marshal of the town where the offense for which the defendant is at bar, was committed and that such defendant had been arrested, tried, and fined in both the mayor's and justice's courts may properly be asked on cross-examination as to the amount of the fines imposed.—Tuberville v. State, 38 So. 333, not officially reported.

§ 275. Cross-examination of party in general.

(1906). In replevin to recover a schooner under a written contract it was not improper to ask the defendant as a witness whether he signed or executed a written contract, whether it was not in duplicate, and, on his denying both, whether he had not compared the contract offered by the plaintiff with a copy given by the witness to his counsel.—Mellini v. Duly, 88 M. 219, 40 So. 546.

§ 277. Cross-examination of accused in criminal prosecutions.

(1889). If, on the trial of one for unlawfully selling liquors, the prosecution has directed its evidence to one particular occasion, it is error to question defendant on cross-examination, as to a sale on another and distinct occasion; and if this is done, a conviction will be set aside.—Bailey v. State, 67 M. 333, 7 So. 348.

(1897). Code 1892, § 1746, allowing a witness to be examined touching his conviction of any crime, his answer contradicted and his conviction established by other evidence does not prevent a witness from being asked on cross-examination whether he has not confessed that he has been in the penitentiary. The record of conviction has to be produced only where it is proposed to show the fact of conviction.—Jackson v. State, 75 M. 145, 21 So. 707.

(1904). A defendant in a criminal case who testifies in his own behalf may not be cross-examined touching statements made by him in a certain conversation after the court had properly excluded the testimony of other witnesses concerning the conversation.— Thompson v. State, 84 M. 758, 38 So. 389.

(1907). Under Code 1906, § 1923, which provides that any witness may be examined as to whether he has been "convicted" of a criminal offense, a witness may not be asked as to whether he has ever been "charged" with a criminal offense.—Starling v. State, 89 M. 328, 42 So. 798.

§ 279. Questions on cross-examination.

See *ante*, § 239.

(1852). A witness may, on cross-examination, be asked leading questions.—Bole v. State, 24 M. 445, 1 Mor. St. Cas. 593.

§ 285. Re-direct examination.

(1852). As a general rule, a party calling a witness is bound at his peril to interrogate the witness on the examination in chief, in the first instance, as to all material matters; and if any material question be omitted, it cannot be put in the examination in reply; the rule on that point is, that no new question can be put, unconnected with the subject of the cross-examination, and which does not tend to explain it. But courts of original jurisdiction have a discretion to depart from this rule, when the facts or circumstances of a particular case warrant it; and an appel-

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late court will not reverse for a departure from the rule, except in extreme cases.—Sartorius v. State, 24 M. 602, 1 Mor. St. Cas. 624.

(1882). Where a witness has not been asked specifically in reference to certain facts, it is improper to contradict him in respect to the same and then to deny him the right to explain.—French v. Sale, 60 M. 516.

(1887). In an action of damages against a railroad company, where, for the purpose of showing bias, after a witness for the plaintiff is asked by the defense if he had not brought a similar action against the company, plaintiff in his redirect examination should be allowed to ask the witness if defendant had not settled with him for the damages claimed in his action. The latter question is made proper by the first.—Illinois Cent. R. Co. v. Haynes, 64 M. 604, 1 So. 765.

(C) PRIVILEGE OF WITNESS.

Comments of prosecutor on failure of accused to testify, see CRIMINAL LAW, § 721.
Instructions as to failure of accused to testify, see CRIMINAL LAW, § 787.

§ 294. Answer tending to subject witness to civil action or pecuniary loss.

(1849). The clerk who issues in blank a commission to take the deposition of a witness, is a competent witness to prove that it was so issued in blank, as to the name of the commissioner, and that other names had been inserted after it was issued by him. His answer stating the issuance of it in blank, will not subject him to a criminal prosecution, nor to a penalty, nor will it be derogatory to his character; and if it could render him liable civilly for damages, this is no reason for excusing him.—Hemphill v. McBride, 12 S. & M. 620.

§ 295. Answer tending to subject witness to penalty or forfeiture.

(1849). When the answer of a witness to a question, would render him liable to a penalty, &c., this is no ground for excluding him as a witness in the cause; it can have no other effect than to excuse him from answering the objectionable question.—Hemphill v. McBride, 12 S. & M. 620.

§ 296. Answer tending to disgrace witness or render him infamous.

(1902). On the cross-examination of the defendant's wife in a murder case it was error to permit the state to show that the witness was the mother of two children not born in wedlock.—MackMasters v. State, 81 M. 374, 33 So. 2.

§ 297. Answer tending to subject witness to criminal prosecution.

A witness may object to answering a question which may criminate him.—(1859) Newcomb v. State, 37 M. 383, 2 Mor. St. Cas. 1303; (1870) Head v. State, 44 M. 731, 2 Mor. St. Cas. 1700.

(1859). Where a witness refuses to answer a question propounded upon the ground that the answer might criminate him, no inference, prejudicial to his credit, can be drawn from his refusal; and the courts should so instruct the jury.—Newcomb v. State, 37 M. 383, 2 Mor. St. Cas. 1303.

(1876). A witness cannot be required to deliver inculpatory evidence. But where a witness proposes to testify against the accused in a criminal trial, the defendant cannot object upon the ground that the evidence would criminate the witness. In such case, it is a privilege personal to the witness to testify or not, and the accused cannot interpose the objection.—White v. State, 52 M. 216.

(1884). Officers and clerks of an election, as witnesses, may refuse to answer questions in reference to the conduct of the election, tending to subject them to criminal prosecution, and it is proper for the court to allow them to decide for themselves as to this.—Word v. Sykes, 61 M. 649.

§ 299. Privilege of accused in criminal prosecution.

(1905). A defendant becoming a witness in his own behalf is subject to impeachment on cross-examination by proof of a previous conviction of crime the same as other witnesses.—Williams v. State, 87 M. 373, 39 So. 1006.

(1907). The testimony of an accused before a grand jury may not be received against him where he did not voluntarily go before the grand jury and testify.—Cooper v. State, 89 M. 429, 42 So. 601.

(1908). The provision of Const. 1890, § 26, that a defendant may not be compelled to give evidence against himself is not violated by compelling the accused for purpose of identification to put his foot in a a track near where the crime was committed.—Magee v. State, 92 M. 865, 46 So. 529.

§ 302. Caution to witness.

It is the duty of the court to advise witnesses of their right to decline to answer any question, by replying to which they might tend to incriminate themselves.—(1859) Newcomb v. State, 37 M. 383, 2 Mor. St. Cas. 1303; (1870) Head v. State, 44 M. 731, 2 Mor. St. Cas. 1700.

(1904). Where the mistress of the accused was asked who was father of her children, the court should advise her as to her right to decline to answer incriminating questions.—Ivy v. State, 84 M. 264, 36 So. 265.

§ 304. Effect of statutory protection of witness from use of evidence against himself.

(1910). A foreign corporation compelled to produce letters and papers relating to violations of the anti-trust law is entitled to immunity from prosecution in consequence

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of such disclosure under Code 1906, §§ 5017 and 5018, granting such immunity to corporations under subpœna *duces tecum* for the deposition served the same purpose that a subpœna *duces tecum* would have done in forcing the production of the incriminatory papers.—Cumberland Tel. &c. Co. v. State, — M. —, 53 So. 489.

(1910). The immunity granted by Code 1906, §§ 5013 and 5014, providing that no person called as a witness in any prosecution to enforce the anti-trust law shall be excused from testifying on the ground that his evidence may criminate himself, but the testimony so given shall not be used against him, is not applicable to corporations. The statute grants immunity to individuals only, and this though § 5090, of the Code declares that the term "person" used in a statute shall apply to corporations.—Cumberland Tel. &c. Co. v. State, — M. —, 53 So. 489.

§ 305. Waiver of privilege.

(1887). The privilege from exposure of communications between a client and his attorney is for the protection of the client, and if he waives it, there is no ground for such protection. One who testifies against others jointly indicted with him, having voluntarily become a witness, waives all privilege against incriminating himself, and against disclosing communications between himself and his counsel touching the offense charged. —Jones v. State, 65 M. 179, 3 So. 379.

§ 306. Persons entitled to claim privilege.

The right to decline to answer on the ground of self-incrimination is a privilege personal to the witness and not even the party calling him, can claim it in his behalf, should he choose to waive it.—(1859) Newcomb v. State, 37 M. 383, 2 Mor. St. Cas. 1303; (1870) Head v. State, 44 M. 731, 2 Mor. St. Cas. 1700; (1876) White v. State, 52 M. 216.

(1870). It is competent on cross-examination to ask a witness "What is your avocation?" and the other party has no right to object to it; the witness may decline to answer where it would tend to criminate him, or bring him into disgrace or reproach; but this is the privilege of the witness, of which it is the duty of the court to advise him.—Head v. State, 44 M. 731, 2 Mor. St. Cas. 1700.

§ 307. Claim of privilege.

(1879). Where plaintiff, as a witness, objects to testifying in respect to the defense that he had not paid his privilege tax, if it is upon the ground that he might be subjected to criminal punishment, this specific objection must be urged in order that defendant may show that the prosecution would be barred, or make the proof necessary to his defense by a witness other than plaintiff.—Decell v. Lewenthal, 57 M. 331, 34 Am. Rep. 449.

§ 309. Effect of refusal to answer.

(1859). The fact that a witness refuses to answer a criminating question, is the ground of drawing no inference prejudicial to his credibility, and courts are careful so to inform the jury.—Rocco v. State, 37 M. 357, 2 Mor. St. Cas. 1280.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

Credibility question for jury, see APPEAL AND ERROR, § 987; CRIMINAL LAW, §§ 742, 1159; TRIAL, § 140.
Instructions as to credibility, see CRIMINAL LAW, § 785.
Instructions as to credibility of testimony of accused, see CRIMINAL LAW, § 786.
Jury sole judges of credibility, see CRIMINAL LAW, § 742.
Newly discovered evidence to impeach witness, see NEW TRIAL, §§ 105, 107.
Province of court as to instructions on credibility, see TRIAL, § 187.
Review of question of credibility of witnesses, see APPEAL AND ERROR, § 994.
Weight and sufficiency of evidence as to credibility of witnesses, see CRIMINAL LAW, § 553.

(A) IN GENERAL.

§ 311. Grounds of credibility in general.

(1905). The jury are authorized to believe a witness guilty of deliberate and wilful false swearing where after the occurrence from which the cause arose, he made a written statement of the facts of the case for defendant, which did not include an incident as to which he testified, and his testimony as to where a person was at the time was in irreconcilable conflict with that of other witnesses.—Anderson v. Cumberland Telephone &c. Co., 86 M. 341, 38 So. 786.

(1905). Where a grantor who has conveyed by warranty deed is properly permitted to testify that he informed his grantee at the time of the execution of the deed that the estate was less than that purported to be conveyed, the fact that he does testify as indicated might perhaps have a bearing on the credibility of the witness and the proper weight to be given his testimony.—Ladmer v. Stewart, 38 So. 748, not officially reported.

§ 317. Falsus in uno, falsus in omnibus.

It is proper to refuse an instruction that if a witness has sworn falsely to any material fact, his testimony is to be disregarded entirely. In the first place, the false swearing must be wilful, and even then it only goes to the credibility of the testimony; it is not for the court to say that it must be disregarded. —(1876) White v. State, 52 M. 216; (1878) Finley v. Hunt, 56 M. 221; (1903) Peoples v. State, 33 So. 289, not officially reported.

The maxim, *falsus in uno falsus in omnibus*, is applicable only where the witness intentionally gives false testimony.—(1884) Vicksburg &c. R. Co. v. Hedrick, 62 M. 28; (1907) Bell v. State, 90 M. 104, 43 So. 84.

(1892). Where the testimony of the only witness for defendant is uncontradicted,

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and not improbable or unreasonable, it is error to give an instruction, at the instance of plaintiff, that if any witness has knowingly testified falsely in a material matter, the jury may disbelieve him.—Louisville &c. R. Co. v. Tate, 70 M. 348, 12 So. 333.

(1904). In determining the weight to be given to the testimony of each witness, the jury may take into consideration the reasonableness or unreasonableness of the testimony; and if they believe from the evidence that any witness has wilfully sworn falsely to any material matter in the case, then they may disregard the whole testimony of such witness or witnesses if they believe it untrue.—Miller v. State, 35 So. 690, not officially reported.

(1907). Whatever may be thought of the correctness of the final result, a verdict, on sharply conflicting testimony, will be reversed when rendered following an instruction to the effect that the jury "are the sole judges of the evidence, and, if they believe that any witness has testified falsely in any particular, then they may believe said witness, or disregard his or her testimony, as they may see proper," such instruction not predicating that the testimony of the witness should be corruptly or designedly false, or even that it should be material, to authorize the discredit of the whole of his testimony.—Gibson v. Yazoo &c. R. Co., 43 So. 674, not officially reported.

§ 318. Corroboration of unimpeached and uncontradicted witness.

(1857). Where two witnesses are in direct conflict on the main point in controversy, and one is sustained in every instance when he testifies as to material but incidental facts, by the other witnesses cognizant of them, and the other is contradicted in many instances by the other witnesses, the former is sustained and the latter discredited, as to the main fact on which they differed.—Fox v. Matthews, 33 M. 433.

(1910). Testimony to uphold the character of a witness for truth and veracity, is not admissible when the character of the witness has not been directly assailed.—Brewer v. Mullins, — M. —, 52 So. 257.

§ 319. Right to impeach witness in general.

(1891). Impeaching testimony is incompetent where there has been no direct testimony upon which to base the same.—Clark v. State, 9 So. 820, not officially reported.

§ 320. Right to impeach one's own witness.

(1871). The court cannot instruct the jury that a party, by introducing a witness indorses him; it can only charge that he cannot impeach him.—Jarnigan v. Fleming, 43 M. 710, 5 Am. Rep. 514.

(1881). The only legitimate effect of the impeaching evidence is to subtract from or overthrow the testimony of the witness. Hence, a plaintiff in an action for personal injuries, whose witnesses testify that they were not present when he was injured and therefore know nothing either favorable or unfavorable to him, cannot impeach their credibility by asking whether they have stated differently to certain persons.—Moore v. Chicago &c. R. Co., 59 M. 243.

(1887). Where one indicted for the same offense testifies against accused, and, on cross-examination, says he did so under promise of immunity made by attorneys for the prosecution, the state cannot introduce the attorneys to disprove this; it cannot thus support the evidence given on direct examination and attack the credibility of its own witness by proof of irrelevant facts.—Madden v. State, 65 M. 176, 3 So. 328.

(1893). Where a witness called by the state in a murder trial denies all knowledge of the homicide, the prosecution is not justified in attempting to discredit him by an examination, in which it is shown that he had previously made a different statement, and had testified favorably to the state before the grand jury.—Chism v. State, 70 M. 742, 12 So. 852.

§ 323. —— Witness hostile to party calling him.

(1881). While generally one cannot impeach his own witness, he may, when entrapped into calling one who is unfriendly and by whose testimony he is surprised, prove other and different statements. Where the circumstances suggest a presumption that he knew beforehand how he would testify, some evidence of surprise will be required.—Moore v. Chicago &c. R. Co., 59 M. 243.

(1893). It is only where the testimony of a witness is adverse to the party calling him, and such party shows that he is surprised by his testimony, having had reasonable ground to believe he would testify in his favor, that such party is allowed to discredit the witness by proof of contradictory statements. The rule cannot be invoked if the witness does not testify adversely, but merely denies knowledge of the case.—Chism v. State, 70 M. 742, 12 So. 852.

(1898). Where the defendant is surprised by the testimony of one of his witnesses and such witness shows on cross-examination that he is hostile to the defendant, the defendant may discredit the testimony given by such witness on cross-examination.—Bacot v. Hazlehurst Lumber Co., 23 So. 481, not officially reported.

§ 330. Cross-examination to discredit witness or disparage testimony in general.

(1859). In a bastardy case the prosecutrix may be asked, on cross-examination, if about the time of conception she had not sexual intercourse with other men. This is allowed to show the impossibility of fix-

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ing the paternity of the child in case there were other connections about that time; but she cannot, for the purpose of assailing her credibility, be interrogated as to her want of chastity at other times.—Anonymous Case, 37 M. 54.

§ 331½. Competency of impeaching evidence in general.

(1858). It is no objection to the introduction of the testimony of a witness impeaching the character for truth and veracity of another witness, on a trial for murder, that the first witness had never heard the character of the latter called in question, until after the killing.—Mask v. State, 36 M. 77, 2 Mor. St. Cas. 1100.

(1901). Testimony incompetent on direct examination cannot subsequently in the same trial be let in under the guise of impeaching testimony.—Brister v. Joseph Bowling Co., 29 So. 830, not officially reported.

(B) CHARACTER AND CONDUCT OF WITNESS.

§ 333. Character as ground of impeachment in general.

(1889). Where no foundation has been laid in the examination of the witness himself for evidence attacking his credibility, evidence of facts calculated to discredit him is incompetent, unless the facts are such as, of and by themselves, to throw discredit on his testimony, as that he had accepted a bribe, or is of generally bad reputation for truth and veracity, &c.—Cheatham v. State, 67 M. 335, 7 So. 204, 19 Am. St. 310.

§ 338. Character and reputation in general.

(1850). An examination into the general character of a witness is not allowable; the examination must be confined to his general character for truth and veracity.—Newman v. Mackin, 13 S. & M. 383.

(1881). The credibility of a witness in a murder case cannot be impeached by showing his general bad character, except for veracity. It is not allowable to show that he has aided in the commission of murder or that he sympathized with its commission. (Head v. State, 44 M. 731, overruled in part.)—Smith v. State, 58 M. 867.

(1893). It is competent to show the bad character of a witness for truth in a neighborhood where he had lived for many years, and from which he had removed two years before.—Norwood v. Andrews, 71 M. 641, 16 So. 262.

(1905). The testimony of a witness to the effect that he knew the general reputation of the accused for peace and that it was good should not be excluded because he afterwards stated that he never heard the reputation of the accused discussed.—Sinclair v. State, 87 M. 330, 39 So. 522, 112 Am. St. 446.

§ 344. Particular acts or facts.

(1886). It is not competent, on a criminal trial, for the purpose of attacking the credibility of a witness, to show that he has testified in many other state cases at the same term of court.—Lea v. State, 64 M. 294, 1 So. 244.

(1889). Mere offers of a bribe or other inducement to testify, not accepted by the witness, are incompetent as evidence to discredit him.—Cheatham v. State, 67 M. 335, 7 So. 204, 19 Am. St. 310.

(1896). A witness cannot be impeached by showing that she had, some time prior to trial during which she testified, been arrested in a house of prostitution. (Whitfield, J., reserving opinion.)—Tucker v. Tucker, 74 M. 93, 19 So. 955.

(1907). The state may not show in a criminal prosecution on a cross-examination of a witness that he claimed a reward for arresting the accused.—Smith v. State, 90 M. 111, 43 So. 465, 122 Am. St. 313.

§ 345. Accusation or conviction of crime.

(1890). Under Code 1880, § 1607, providing that the record of conviction of any witness of a "crime" may be given in evidence as affecting his credibility, and § 3105, declaring "any violation of law" a crime, the record of a conviction of a witness for the larceny of a hog without felonious intent, a mere misdemeanor, is admissible.—Heim v. State, 67 M. 562, 7 So. 487.

(1903). A witness cannot be impeached by parol evidence that he had been convicted of petit larceny.—Peoples v. State, 33 So. 289, not officially reported.

(1904). Under Code 1892, § 1746, permitting a witness to be asked whether he has been convicted of crime in order to determine his credibility, testimony of a conviction cannot be given by others until the witness has first denied the same.—Cook v. State, 85 M. 738, 38 So. 110.

(1904). The examination of a witness as to his conviction of a crime may extend to misdemeanors, as well as to felony under Code 1892, § 1746, which authorizes the examination of any witness as to his conviction of crime since Code 1892, § 1502, defines "crime" when used in any statute to mean any violation of law liable to punishment by criminal prosecution.—Lewis v. State, 85 M. 35, 37 So. 497.

(1908). During his trial for assault with intent to murder, the defendant took the stand in his own behalf, and was permitted to be asked on cross-examination whether he had ever been convicted of any crime, an inquiry altogether proper. He was then asked if he had served a term in the penitentiary, to which an objection was overruled and exception taken. This question was followed by another as to whether his conviction was for an assault and battery

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with intent to kill, the latter being answered in the affirmative. Further inquiry was then made as to whether this conviction was not for cutting a white man's throat to which an objection was overruled and exception taken. This was plain error. But for the statute, no questions along this line could have been asked at all, and the statute must be strictly construed in favor of a defendant. It only permits a witness to be examined as to his "conviction of any crime," his answers to be contradicted, "and his conviction of a crime established by the other evidence." This all goes to the credibilty of the witness; but it was clearly error to inflict upon the defendant the question as to whether he was put in the penitentiary for cutting a white man's throat.—Dodds v. State, 45 So. 863, not officially reported.

§ 348. Cross-examination for purpose of impeachment.

(1905). It is reversible error to permit the state on a trial for murder to show on the cross-examination of an important witness for the defense that she is the mother of a bastard.—Davis v. State, 87 M. 337, 39 So. 522.

(1910). Under Code 1906, § 1923, allowing the examination of witnesses as to their conviction of crime, a witness may be cross-examined as to his conviction of more than one crime.—Brown v. State, 96 M. 534, 51 So. 273.

§ 353. Competency of impeaching witnesses as to character or reputation.

(1858). The exception to the general rule admitting hearsay evidence of matters of general interest, which excludes the admission of declarations made *post litem motam*, applies only to the principal matters in controversy and in issue in the suit, and not to collateral and incidental questions arising during the progress of the trial; and hence it is no objection to the admission of the testimony of a witness, impeaching the character of another witness, on a trial for murder, that the former never heard the character of the latter called in question till after the homicide was committed.—Mask v. State, 36 M. 77, 2 Mor. St. Cas. 1100.

(1859). The court will not, unless under peculiar circumstances, undertake to determine by a preliminary examination, whether a witness to character has sufficient knowledge to enable him to testify, and hence, what is the neighborhood of the party whose character is the subject of inquiry, whether it be circumscribed or extended, and what weight is to be given to the witnesses, living near or remote, and the sufficiency of their knowledge of his character, are matters to be considered and determined by the jury.—Powers v. Presgroves, 38 M. 227.

(1884). A witness as to general reputation of one for truth need not know what a majority or any given proportion of his neighbors think of him; it is sufficient if he knows what is generally thought of him by those among whom he resides, and with whom he is chiefly conversant. It is, however, not sufficient that the witness professes merely to state what he has heard others say, for such others may be few in number. There must be general concurrence in an estimate of the reputation, to make it general reputation.—Pickens v. State, 61 M. 563.

A witness, to impeach the character of another for veracity by general reputation, should be compelled to answer as a preliminary matter, whether or not he knows the general reputation of the person for truth and veracity in the community or neighborhood in which he resides, or has resided. If he answers in the negative, his examination on that topic should close; if in the affirmative, he may be examined further as to whether the general reputation is good or bad, and whether from such general reputation he would believe the witness under oath, and the source and extent of the information of the witness may be tested by cross-examination. If it appears that he does not understand the nature of the questions, he should be instructed that he is not to express his own opinion as to the character of the person, or to speak of particular facts tending to show good or bad character.—(1884) Pickens v. State, 61 M. 563; (1885) French v. Sale, 63 M. 386.

§ 356. Examination of impeaching witnesses as to character or reputation.

(1893). Where a predicate has been laid for contradiction, the impeaching witness should be asked, in general terms, what the witness sought to be discredited said, without resort to leading questions. While there are exceptions—as, where the mind of the witness cannot be directed to the subject of inquiry without specification, or where particular expressions were used—the general rule is that it is not necessary or proper, in questioning the impeaching witness, to repeat the words employed in examining the witness sought to be impeached.—Rucker v. State, 71 M. 680, 14 So. 534.

(1901). A witness who testifies that the general reputation of a third person for truth and veracity is bad, should not be permitted to testify that he would be more likely to believe a person in whom he had no confidence, if he was testifying to a matter in which he had no personal interest. General reputation is not established by this method of proof.—Benson v. State, 79 M. 538, 31 So. 200.

(1901). Where a witness testifies that the general reputation of a third person for truth and veracity is bad, it is improper to permit him to testify that if the third person were in a position to see the thing he had testified about, and was corroborated by circumstances, witness would believe him. A character witness should not tes-

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tify as to the effect of facts.—Benson v. State, 79 M. 538, 31 So. 200.

§ 360. Rebuttal of evidence impeaching character.

(1896). Where the defendant attempts to impeach one of the plaintiff's witnesses by showing that such witness had, at one time, been arrested in a brothel, and the court rules the evidence inadmissible, but permits the plaintiff, on re-examination, to bring out circumstances, offered to show, and tending to show, that the witness had, on the occasion referred to, been entrapped into the house of ill fame by the machinations of the defendant and others closely related to him, such defendant should, on re-cross-examination be given the privilege of inquiring into the whole matter.—Tucker v. Tucker, 74 M. 93, 19 So. 955, 32 L. R. A. 623.

§ 362. Effect of impeachment of character.

(1889). Evidence of statement by witness, admitted for the sole purpose of impeaching him, cannot be considered or used during the trial for any other or different purpose.—Allen v. State, 66 M. 385, 6 So. 242. See (1885) Vicksburg &c. R. Co. v. McGowan, 62 M. 682, 52 Am. Rep. 205n.

(C) INTEREST AND BIAS OF WITNESS.

§ 367. Interest in event of witness not party to record.

(1893). In an action of ejectment for a strip of land, depending upon the location of a disputed boundary line, in order to show the interest of a witness, it is competent, on cross-examination, to prove that he has an agreement to fix the boundary line between defendant's land and his own according to the result of the suit.—Archer v. Helm, 70 M. 874, 12 So. 702.

§ 369. Employment by or other contractual relation with party.

(1887). In an action against a railroad company, a witness for defendant having denied on cross-examination that he had, at a certain time and place, stated to complainant that he and other employes of defendant had to tell as favorable a tale as possible in order to hold their jobs, it is competent for complainant to introduce evidence that he had so stated, since this tends to show bias; and it is not necessary to first in-
—, 54 So. 721.
quire of the witness whether he is biased.—Illinois Cent. R. Co. v. Haynes, 64 M. 604, 1 So. 765.

§ 370. Friendly or unfriendly relations with or feeling toward party.

(1902). On a prosecution for murder, it was not improper to ask a witness for the state, the brother of the accused, whether or not he was in deadly enmity with the accused and at various times carried a gun to shoot him. This testimony bore on the credibility of the witness.—Mackmasters v. State, 81 M. 374, 33 So. 2.

§ 372. Cross-examination to show interest or bias.

(1859). Anything tending to show that a witness is under bias or feeling for or against a party to the issue, may be shown to the jury, to enable them properly to weigh his testimony; and hence, on a trial for murder, a witness for the defendant may be examined as to whether she had made a statement to the effect "that if the accused did not kill deceased, she would not own him for a son," and if she deny making the statement, another witness may be called to disprove her answer.—Newcomb v. State, 37 M. 383, 2 Mor. St. Cas. 1303.

(1910). In a prosecution for killing the husband of the accused, it was proper on the question of the motive of the stepchildren of the accused for changing their statements as to the cause of the death, to show by such stepchildren, that they had been told that they would be beneficiaries under an insurance policy if the accused was convicted.—Upchurch v. State, 96 M. 586, 51 So. 810.

(1911). The clause in Code 1906, § 1923, allowing cross-examination of witnesses to show interest is merely declaratory of the common law.—McClelland v. State, — M. —, 54 So. 251.

(1911). Under Code 1906, § 1923, authorizing the examination of any witness as to his interest, the state on the cross-examination of a husband and wife testifying for one accused of crime, may show that the husband had been jointly charged with the accused before the committing board for crime and was discharged by the magistrate.—McClelland v. State, — M. —, 54 So. 251.

§ 373. Laying foundation for impeaching evidence.

(1866). The bias of a witness cannot be shown till after such witness has been examined.—Mullins v. Cottrell, 41 M. 291.

§ 375. Examination of impeaching witnesses.

(1911). In a prosecution for unlawfully retailing liquors, evidence was admissible on the question of the credibility of a state's witness which tended to show that he was a detective employed to ferret out violations of the liquor law.—Pederre v. State, — M.

(D) INCONSISTENT STATEMENTS BY WITNESS.

§ 379. Inconsistency of statements as ground of impeachment in general.

(1850). It is not competent, in order to discredit a witness in a criminal case, to introduce the statement of the witness as taken down by the judge who tried the case on *habeas corpus*, unless the statement was read over to him, and signed by the witness, the judge not being required by law to take down the whole evidence, but only its

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substance when desired by one of the parties.—Nelm v. State, 13 S. & M. 500, 1 Mor. St. Cas. 509, 53 Am. Dec. 94n.

(1870). To discredit a witness it is competent to prove that he had made discordant statements at other times and places. —Head v. State, 44 M. 731, 2 Mor. St. Cas. 1700.

(1876). The credibility of a witness cannot be impeached by introducing a memorandum of his testimony at a former trial made by a stranger, the witness himself not having been first questioned as to it. Where the evidence is conflicting, the result possibly depending upon the credibility of the witness, the improper admission of such memorandum is reversible error.—Scarborough v. Smith, 52 M. 517; (1906) Bowles v. State, 40 So. 125, not officially reported.

(1885). Where, in an action against a railroad company for killing a child on the track, a servant of the company, stationed on the train as a "lookout," denies that he saw the child, and further testifies that he does not remember, though he does not deny having told others to the contrary, his statement to such others that he did see the child is admissible to attack his credibility.—Jamison v. Illinios Cent. R. Co., 63 M. 33.

(1898). Letters written by a witness, containing statements different from those given in testimony by him, are competent for the purpose of descrediting him, although not competent as evidence of the facts therein recited.—Bacot v. Hazlehurst Lumber Co., 23 So. 481, not officially reported.

(1900). Where a witness on cross-examination denied having made a certain statement, it was error on calling a witness for impeachment, to exclude all of the statement except one clause.—Dean v. State, 78 M. 360, 29 So. 95.

(1911). Evidence is admissible of statements made by a witness out of court which conflict with those testified to by him. —Gables v. State, — M. —, 54 So. 833.

§ 381. Testimony subject to impeachment.

(1882). It is permissible to cross-examine a witness as to matters that are collateral or immaterial, but not to impeach him in reference to such matters. However, where the court permits such cross-examination against objection and then admits impeaching testimony which is not objected to, error cannot be assigned for admission of the impeaching testimony.—Tucker v. Donald, 60 M. 460, 45 Am. Rep. 416.

(1901). In a controversy between the creditors of the judgment debtor and the claimants of a stock of goods seized under execution by the creditors evidence that the debtor, prior to his taking charge of the goods, said he had bought the stock and would resume business is incompetent, irrelevant, and immaterial.—Brister v. Joseph Bowling Co., 29 So. 830, not officially reported.

Evidence may not be received in rebuttal to contradict defendant's statement as to immaterial matter.—(1906) Ehrman v. Whelan, 40 So. 430, not officially reported; (1909) Cooper v. State, 94 M. 480, 49 So. 178.

(1906). On a trial for murder, a witness had been produced by the state and had given his testimony, in which, on cross examination, he had been asked by the defendant whether he had not gone to a certain person before the trial and inquired of him what he (the witness being examined) had testified to on a previous trial of the case. The answer was, "No." The defense then, in rebuttal, produced the person, above referred to, and asked him the following question: "State whether or not the witness (naming him) came to you just before he was put on the stand, or at any time immediately preceding the trial of this case at the December term, 1902, and asked you what he swore to in this case, or what his evidence was in this case, at the trial which preceded that, at the hearing of this case on the *habeas corpus* trial." In the opinion of the Supreme Court, an objection to this question on the ground that it was an attempt to impeach the witness on an immaterial matter, was properly sustained.—Scott v. State, 39 So. 1012, not officially reported.

§ 387. Cross-examination as to inconsistent statements.

A witness on cross-examination may be asked if he did not on a former designated occasion, state, that he knew nothing of the matter in controversy between the parties.—(1836) Goode v. Linecum, 1 H. 281; (1870) Head v. State, 44 M. 731, 2 Mor. St. Cas. 1700.

(1902). Proper predicate being laid, the unsworn statements of a witness for the defense, contradictory of his testimony on a material matter, although made out of court and in the absence of defendant, are admissible, on cross-examination by the prosecution, to discredit him, but they cannot be made the basis of argument by the state's attorney for any other purpose.—Middleton v. State, 80 M. 393, 31 So. 809.

§ 388. Laying foundation for proof of inconsistent statements.

(1859). In a prosecution for murder, the mother of the defendant, who is a witness for him, may be asked on cross-examination, if to a person and at a time and place designated, she did not say "that if the prisoner did not kill the deceased, she would not own him for her son." And if she deny making this statement, a witness may be introduced to show that she did make it.—Newcomb v. State, 37 M. 383, 2 Mor. St. Cas. 1303.

(1879). It is error to permit the written testimony of a witness given on a former investigation to be introduced for the purpose

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of discrediting his testimony, without first giving him an opportunity to explain it. But this court will not reverse for such error when the verdict is right in the whole case. —Cavanah v. State, 56 M. 299.

(1879). It is error to permit a letter written by a witness to be introduced for the purpose of discrediting his testimony, without first giving him an opportunity to inspect and explain it. But this court will not reverse for such error where the verdict is right on the whole case.—Mitchell v. Tishomingo Sav. Institution, 56 M. 444.

(1885). Evidence of statements of a witness to contradict his testimony, is inadmissible unless a foundation has been laid and the attention of the witness called to the conflicting statements, and this, although the testimony sought to be contradicted is the admitted testimony of an absent witness, contained in an affidavit for a continuance as to which there has been no opportunity for cross-examination.—Fulton v. Hughes, 63 M. 61.

(1886). Where one seeks to impeach his own witness because of fraud or surprise, he must, as in other cases, before proof of contradictory statements are admitted, lay the foundation by calling the attention of the witness to the time, place and persons before whom such statements were made, and afford him opportunity for explanation. —Dunlap v. Richardson, 63 M. 447.

(1887). The witness cannot be asked, on cross-examination, whether he had not at various times made different and contradictory statements to certain persons in regard to matters testified to by him, without specifying the time, place and persons referred to.—Jones v. State, 65 M. 179, 3 So. 379.

(1892). In laying the predicate for the impeachment of a witness, he should be apprised of the time, place and persons present when the supposed conversation took place; and, on the examination of the impeaching witness, he should be confined to the inquiries propounded in the predicate, and should not be asked or permitted to state generally what took place on the occasion inquired about.—Bonelli v. Bowen, 70 M. 142, 11 So. 791.

(1901). Upon his trial for homicide, the defendant laid a predicate to contradict a witness for the state by asking him whether he did not tell a certain third person, at a particular time and place that he (the witness) had taken a pistol off the person of the deceased after he was killed, such witness replying that he did not. The defendant afterwards put the third person, above mentioned, on the witness stand, and offered to show by him that the witness, sought to be impeached, made the statement in question to him, and the Supreme Court, on appeal, adjudges that the rejection of this offer was erroneous.—McCall v. State, 29 So. 1003, not officially reported.

§ 393. Former testimony of witness.

(1844). Where a witness has been examined in a criminal case by a justice of the peace, and his deposition reduced to writing, and afterwards lost, it is competent, in order to impeach the testimony of the witness, to show by the justice, what the witness testified on the trial before him. The justice may testify from his recollection of what the witness said, and need not undertake to state the substance of what was reduced to writing. The deposition (by the law as it then was) was not required to be returned to the circuit clerk's office, nor to be preserved as a record, and was but a memorandum of the justice of the peace as to what the witness said, and proof of what the witness did say, is necessarily proof of the contents of the lost deposition.—Pearce v. Furr, 2 S. & M. 54.

(1879). While great latitude is allowed on cross-examination to show bias of the witness, and while a conflicting statement made by a witness on a former trial may be proved to discredit him, it is inadmissible to prove the comment of counsel on the former trial as to the improbability of the statement, in order to show motive for the change in testimony. The fact of such contradictory statement, and not the reason for it, is the subject of inquiry. For the same reason it is incompetent, as showing a motive for the witness to change his testimony, to prove that an expert witness who has testified did not testify on the former trial.—Cannon v. State, 57 M. 147.

(1897). One who has testified to defendant's whereabouts at the time of the robbery, for which defendant is being prosecuted, may be impeached by showing that at another trial the witness had testified that at the time of the crime the accused was in another place.—Magee v. State, 21 So. 130, not officially reported.

(1903). The official stenographer's report of the testimony of the defendant on a former trial for the same offense showing the time, place and circumstances under which it was heard is sufficiently authenticated by a certificate of that officer to the effect that the report is a true transcript of the testimony delivered in the case.—Mackmasters v. State, 83 M. 1, 35 So. 302.

(1908). Under Code 1906, there is no authority for a justice of the peace to reduce to writing the testimony of witnesses at a committing trial and certify the same to a circuit court. The provision authorizing such reduction in Code 1892, § 1463, was not carried into Code 1906.—Scott v. State, 92 M. 833, 46 So. 251.

(1908). A justice of the peace may testify as to contradictory statements made by a witness on a trial before him where the facts in both cases are identical.—Hicks v. State, 47 So. 524, not officially reported.

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§ 395. Evidence as to statements consistent with testimony.

(1870). To re-establish the credibility of a witness whose testimony has been impeached, or to support what he has sworn to on the trial, evidence is not admissible to prove that he has made the same statements to third persons that have been sworn to by him as a witness.—Head v. State, 44 M. 731, 2 Mor. St. Cas. 1700.

§ 397. Effect of impeachment by inconsistent statements.

(1905). The impeachment by the contradictory statements of the testimony of one or more witnesses who testified to certain facts does not impeach or affect the testimony of other witnesses who testified to the same matters.—Korter v. Gulf &c. R. Co., 87 M. 482, 40 So. 258.

(E) CONTRADICTION AND CORROBORATION OF WITNESS.

§ 398. Right to contradict testimony in general.

(1882). It is permissible to cross-examine a witness as to matters that are collateral or immaterial, but not to impeach him in reference to such matters. However, where the court permits such cross-examination against objection, and then admits impeaching testimony which is not objected to, error cannot be assigned for admission of the impeaching testimony.—Tucker v. Donald, 60 M. 460, 45 Am. Rep. 416.

(1896). Though a witness for the defendant in a murder trial has denied, on cross-examination, that she said to the wife of the deceased, beside his dead body, on the day of the homicide, in the presence of certain persons named, "I sent you word not to let your husband come down here; they made up a plot to kill him three weeks ago," such testimony being wholly incompetent, it is error to allow the state to introduce the contradictory testimony of one of the persons named as present at the time.—Williams v. State, 73 M. 820, 19 So. 826.

§ 399. Right to contradict testimony of one's own witness.

(1859). A party introducing a witness may contradict him as to material facts stated by him, by calling other witnesses to prove the contrary, for the object of such testimony is not to impeach or discredit the witness, though that may be the consequential and incidental effect of it. But it is well settled that a party cannot impeach his own witness by general evidence, nor can he on re-examination, impeach him by asking him if he is interested in the result of the suit. —Fairley v. Fairley, 38 M. 280.

(1860). The rule that if a material defendant be examined by the complainant, he cannot have relief against that defendant on his own evidence is technical and abolished by the Rev. Code of 1857.—Burks v. Loggins, 39 M. 462.

(1904). The state cannot contradict its own witness by showing his previous statements, unless it is entrapped into introducing a hostile witness and in such a case only by showing statements which are material to the main issue.—Dunk v. State, 84 M. 452, 36 So. 609.

(1904). A district attorney who calls a witness for the state without previous conference with him cannot claim he was entrapped and treat the witness as hostile merely because his testimony is disappointing and not what other persons had represented that it would be.—Dunk v. State, 84 M. 452, 36 So. 609.

(1905). It was error to permit a district attorney to impeach one of his own witnesses who was in no legal sense a hostile nor adverse witness, who had testified to no fact which was favorable to the cause of the accused and whose testimony was vital to the case of the state in chief, and rendered a conviction proper, even though the defendant, who convicted himself by his own testimony, had not testified, by proof of a contradictory statement made to him the day before the trial on the plea that he was taken by surprise, when the statement which was attributed to the witness and which he denied, was about an immaterial and irrelevant matter—one shedding no light on the issue involved. This fact last indicated, while in no wise lessening the error of the court, did prevent it from being prejudicial to the rights of the defendant.—Price v. State, 38 So. 41, not officially reported.

§ 401. —— Witness cross-examined as to matter not subject of direct examination.

(1887). Where one indicted for the same offense testifies against accused, and, on cross-examination, says he did so under promise of immunity made by attorneys for the prosecution, the state cannot introduce the attorneys to disprove this; it cannot thus support the evidence given on direct examination and attack the credibility of its own witness by proof of irrelevant facts.—Madden v. State, 65 M. 176, 3 So. 328.

(1889). If the defendant cross-examines a witness in reference to matter which is collateral and immaterial, and which does not tend to show bias against the accused, he is bound by the answer of the witness, who cannot be contradicted in relation thereto.—Jones v. State, 67 M. 111, 7 So. 220.

§ 403. Testimony subject to contradiction.

(1878). Where, on a murder trial, witnesses testify that on the night after the killing they separately identified accused as the person they saw do the killing, selecting him as the guilty one from several others, this is a part of the case made by the state, and it does not belong to that class of evidence in which it is necessary to lay the foundation for impeaching the credit of witnesses. Therefore, it is competent for the defendant to prove that these witnesses did

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not, on the occasion mentioned, identify him as the slayer, and it is error to reject such proof. He has the right to prove what occurred on the occasion referred to, whether words or acts, without laying a foundation by examining the state's witnesses as to those matters.—Nixon v. State, 55 M. 525.

§ 405. —— Irrelevant, collateral, or immaterial matters.

Evidence to contradict a witness as to collateral and irrelevant matter is incompetent. —(1888) Garman v. State, 66 M. 196, 5 So. 385; (1896) Williams v. State, 73 M. 820, 19 So. 826; (1904) Davis v. State, 85 M. 416, 37 So. 1018; (1905) Bell v. State, 38 So. 795, not officially reported; (1910) Mississippi Cent. R. Co. v. Dacus, — M. —, 53 So. 398.

(1896). If the testimony of a witness on cross-examination in respect to a matter not brought out on the direct examination is such that it would not be competent if offered by the cross-examiner, the same is collateral and cannot be contradicted.—Williams v. State, 73 M. 820, 19 So. 826.

(1900). Witnesses cannot be contradicted as to their own statements touching immaterial matters, and it is inadmissible to ask a witness, on cross-examination, if he made a certain statement about such an immaterial matter.—Jeffries v. State, 77 M. 757, 28 So. 948.

(1905). Where defendant's agent on direct examination had not testified with reference to a statement, collateral and irrelevant, made to him by plaintiff at an interview after the accident, the plaintiff, on cross-examination of the witness as to such statement was bound by his answer and was not entitled to contradict him, though she laid a predicate for such contradiction on such cross-examination.—Simms v. Forbes, 86 M. 412, 38 So. 546.

(1905). A long line of cases hold that the infallible test as to whether a matter is collateral within the meaning of the rule forbidding the impeachment of a witness on matters collateral to the issue, is this: Would the cross-examining party be allowed to prove it as a part or in support of his case? If not, then it is incompetent and irrelevant, for whatever is improper to be proved directly cannot rightfully be proved indirectly.—Bell v. State, 38 So. 795, not officially reported.

§ 406. Competency of contradictory evidence.

(1905). Where, in a prosecution for homicide, a witness for the state testified that she recognized the defendant by the flash of his gun at the time of the killing, it was error to exclude testimony that such witness was very near-sighted and could not see more than ten feet away, when the evidence established that she was fifty feet distant from the defendant when the fatal shot was fired. —Mathison v. State, 87 M. 739, 40 So. 801.

(1907). Where the prosecutrix in a forgery case testified that the defendant was indebted to her on the proceeds of insurance on her husband's life, it was error to exclude evidence that the defendant was not an officer of the insurance association, that he had never collected assessments, that the policy had lapsed and that there was nothing due the prosecutrix thereon.—Sherrod v. State, 90 M. 856, 44 So. 813.

(1907). In a prosecution for forging a note, it was error to exclude statements made by the person whose name was alleged to have been forged, admitting an indebtedness to the defendant equal to the note which was offered to contradict her testimony.—Sherrod v. State, 90 M. 856, 44 So. 813.

§ 410. Right to corroborate impeached or contradicted witnesses.

(1846). A deposition of a notary was read in evidence, which proved demand and personal service of notice on the indorser. The defendant then read in evidence the notary's deposition, taken a year before this, in which he stated he had no recollection of protesting the note. The plaintiff then proved, in order to sustain the notary, that at the time the first deposition was taken, the record of the notary was lost, and that when the other was taken the record was before him. The defendant then, in rebuttal, proposed to prove that the notary was in the habit, when he made protests, of leaving his memorandum in relation to the service of notice, in blank, and filling it up afterwards. *Held*, that this was competent evidence.—Seltzer v. Fuller, 6 S. & M. 185.

(1870). Where it has been shown that a witness had on a former designated occasion stated that he knew nothing about the matter in controversy between the parties, it is not competent to re-establish his credibility by showing that he has made the same statements as those made on the trial, to other witnesses.—Head v. State, 44 M. 731, 2 Mor. St. Cas. 1700.

§ 411. Testimony subject to corroboration.

(1859). The declarations of the accused charged with murder, made just before the killing, and whilst the deceased was absent, and when the accused did not suspect that a conflict was impending, are not admissible in his favor as part of the *res gestæ*.—Newcomb v. State, 37 M. 383, 2 Mor. St. Cas. 1303.

§ 414. Competency of corroborative evidence.

(1902). It is error to permit the state to support the credibility of a witness by evidence of statements made by him to persons out of court, the defendant not being present at the time.—Johnson v. State, 80 M. 798, 32 So. 49.

(1903). Where a state's witness, who had been convicted of the crime, stated upon cross-examination on the trial of his co-defendant that no inducement had been offered him to testify as he had done, the state should not be permitted to prove the truth of the statement by the prosecuting attorney.—Owens v. State, 82 M. 18, 33 So. 718, 21 L. R. A. (N. S.) 782.

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(1903). Where a state's witness, previously convicted and sentenced, testified upon cross-examination on the trial of his co-defendant that no inducement had been made to him to obtain his testimony, the state should not be permitted to prove the truth of the statement by permitting district attorney to testify to the same effect.—Owens v. State, 82 M. 18, 33 So. 718, 21 L. R. A. 21, (N. S.) 782.

(1904). On a prosecution for murder it is error to permit a witness for the state to testify that he had testified to the same facts at the preliminary examination.—Boyd v. State, 84 M. 414, 36 So. 525.

WOMEN.

Married women, see HUSBAND AND WIFE.

WOODS AND FORESTS.

This topic INCLUDES trees not grown for their fruit or other annual products; protection and promotion of the growth of such trees and of forests; and nature and incidents of rights of property in growing trees in general.

It EXCLUDES promotion of agriculture in general (see AGRICULTURE); rights and liabilities incident to particular estates in land (see LIFE ESTATES; REMAINDERS; and other specific heads); trees on public lands (see PUBLIC LANDS); specific remedies for cutting down or injuring trees (see TRESPASS; WASTE); and cutting, floating, &c., logs (see LOGS AND LOGGING).

See cross-references for complete list of exclusions.

Analysis.

§ 1. Nature of property.
§ 2. Ownership in general.
§ 11. Penalties for violations of regulations.
§ 12. Criminal prosecutions.

Cross-References.

See LOGS AND LOGGING, § 1.
Application of statute of frauds to sale of growing trees, see FRAUDS, STATUTE OF, § 56.
Cutting and removing timber from public lands, see PUBLIC LANDS, § 9.
Cutting timber as evidence of adverse possession, see ADVERSE POSSESSION, § 23.
Cutting trees as trespass, see TRESPASS, § 9.
Cutting trees by tenant, see LANDLORD AND TENANT, §§ 13, 134.
Damages for cutting and removal of timber, see TRESPASS, § 52.
Debt and not trespass remedy for penalty for cutting trees, see DEBT, ACTION OF, § 1.
Destruction of trees by tenant of curtesy, see CURTESY, § 12.
Injunction against cutting or removal of timber, see INJUNCTION, § 52.
Liability of bridge contractor for cutting trees, see BRIDGES, § 20.
Recovery of trees wrongfully cut and corded, see TROVER AND CONVERSION, § 12.
Rights as to trees as between vendor and vendee, see VENDOR AND PURCHASER, § 193.
Right of life tenant to timber, see LIFE ESTATES, § 13.
Rights of purchaser at tax sale to timber, see TAXATION, § 737.
Waste, see WASTE, § 9.

§ 1. Nature of property.

Growing trees are part and parcel of the realty and yet are subject to separate ownership.—(1892) McKenzie v. Shows, 70 M. 388, 12 So. 336, 35 Am. St. 654; (1902) Fox v. Pearl River Lumber Co., 80 M. 1, 31 So. 583 (1902) Davis v. State, 80 M. 376, 31 So. 742.

(1902). Trees when felled, or severed from the soil, become personal property.—Learned v. Ogden, 80 M. 769, 32 So. 278.

(1902). By the common law, trees are a part and parcel of the land upon which they are growing or standing, for the term "land" embraces not only the soil, but its natural productions; and trees growing or standing upon land are not distinguishable in their character of real estate from the soil itself until they are actually severed from the soil.—Fox v. Pearl River Lumber Co., 80 M. 1, 31 So. 583.

§ 2. Ownership in general.

(1902). Title to growing trees can only be established by such evidence as will prove title to real property.—Davis v. State, 80 M. 376, 31 So. 742.

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§ 11. Penalties for violations of regulations.

(1858). Possession of land under color of title is *prima facie* sufficient evidence of title, to enable the possessor to recover the statutory penalty for cutting trees on it.—Ware v. Collins, 35 M. 223, 72 Am. Dec. 122.

(1877). In a suit for the statutory penalty for cutting trees, a bill of particulars filed in the justice court, may, on appeal by the plaintiff to the circuit court, be amended under Code 1871, § 621, by adding other trees. (Whether the sureties on the bond of a defendant who appeals could object to such an amendment not involved.)—McCleary v. Anthony, 54 M. 708.

§ 12. Criminal prosecutions.

(1902). A conviction under the statute (Code 1892, § 1317), making it a crime to box for turpentine, pine trees growing on lands known to belong to another without the consent of the owner of such realty, will not be sustained in the absence of proof showing title to the trees or possession thereof in another than defendant.—Davis v. State, 80 M. 376, 31 So. 742.

(1902). A conviction under an affidavit charging a violation of Code 1892, § 1317, not specifying the number boxed, will justify a sentence for boxing two trees only, no matter how many have been proved to have been actually boxed by the defendant.—Davis v. State, 80 M. 376, 31 So. 742.

(1902). An affidavit intended to charge an offense under the statute (Code 1892, § 1317), making it a crime to box for turpentine, pine trees growing on lands known to belong to another, without the consent of the owner of such realty, is fatally defective if it does not allege that the defendant actually knew that the land upon which the trees were growing, belonged to another.—Davis v. State, 80 M. 376, 31 So. 742.

WORDS.

Actionable words, see LIBEL AND SLANDER, § 6.
Construction in Constitution, see CONSTITUTIONAL LAW, § 14.
Imputing crime as actionable, see LIBEL AND SLANDER, § 7.
Parol evidence to explain, see EVIDENCE, §§ 454, 455.
Tending to injure business as actionable, see LIBEL AND SLANDER, § 9.

WORK AND LABOR.

This title INCLUDES obligations implied or imposed by law to pay for services rendered and materials furnished incident to the services, independent of any special relation or of any employment or promise to pay therefor; and rights, liabilities, and remedies of the parties in general.

It EXCLUDES agreements, express or implied, for hiring of services generally (see MASTER AND SERVANT), or for specific work (see CONTRACTS); recovery on *quantum meruit* for services rendered by particular classes of persons or incident to particular relations or occupations (see ATTORNEY AND CLIENT; PHYSICIANS AND SURGEONS; and other specific heads); and proceedings in actions of assumpsit (see ASSUMPSIT, ACTION OF).

See cross-references for complete list of exclusions.

Analysis.

§ 4. Rendition and acceptance of services in general.
§ 8. Effect of express contract.
§ 18. Nature and form of remedy.
§ 29. Amount of recovery.
§ 30. Trial, judgment, and review.

Cross-References.

See MASTER AND SERVANT.
Assumpsit as remedy for work and labor, see ASSUMPSIT, ACTION OF, § 1.
Contracts for services, see CONTRACTS, § 190.
Liability of estate for services rendered to decedent, see EXECUTORS AND ADMINISTRATORS, § 204.
Power of administrator to contract for services, see EXECUTORS AND ADMINISTRATORS, § 97.

§ 4. Rendition and acceptance of services in general.

(1843). Every mechanic who undertakes to make any machinery, engages to bring sufficient skill and dexterity to the performance of the contract, so as to complete it in a workmanlike manner; and if on account of his fault it be worthless, he cannot recover for the price.—Leflore v. Justice, 1 S. & M. 381.

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(1896). No one can legally claim compensation for voluntary services to another however beneficial those services may be, nor for incidental benefits and advantages of one flowing to him by reason of services rendered to another by whom the claimant may have been employed.—Rives v. Patty, 74 M. 381, 20 So. 862, 60 Am. St. 510.

(1906). A civil engineer who made a preliminary survey and estimate of cost for a waterworks system for a city without charge was entitled to compensation for his plans and specifications furnished for the system, at the request of the city although the city abandoned the enterprise.—Jenks v. Town of Terry, 88 M. 364, 40 So. 641.

§ 8. Effect of express contract.

(1902). A county health officer appointed by the supervisors under Code 1892, § 2275, is only entitled to the salary fixed in advance by the board of supervisors as compensation for services by him and he cannot maintain assumpsit against the county on a *quantum meruit* for his services, however great and meritorious they may have been.—Yandell v. Madison County, 81 M. 288, 32 So. 918.

(1894). Where a contract is an entire and indivisible one to do certain work at and for a fixed sum, the person agreeing to furnish the services cannot abandon his work, refuse to carry out his agreement, and recover for the work done by him, up to the time of the breaching of his promise. He cannot recover on the contract, because he himself has not performed it; nor can he recover on the common counts because of the existence of the unexecuted special agreement.—Butt v. Williams, 15 So. 130, not officially reported.

§ 18. Nature and form of remedy.

(1844). When a contract is made by which one party agrees to do certain work for the other, and to furnish the requisite lumber, in consideration of a fixed price, to be paid on the completion of the work, the laborer cannot abandon the work before its completion, and recover for what has been done. He cannot recover on the special contract, because he has not complied with it, nor on the common count, because there is a special contract. But, it seems, if the other party afterwards use any of the materials so furnished, he will be liable for their value. But his employment of another, at the same price, to complete the work, will not make him liable for so much of the lumber used by the second employe, without his direction.—Wooten v. Read, 2 S. & M. 585.

§ 29. Amount of recovery.

(1852). W. employed Z. to erect a milldam and mill for him, at a stipulated price, knowing at the time that objections would be raised to the erection of the work, as a common nuisance, and failing to communicate these objections to Z., who was ignorant of them. After Z. had completed a part of the work, its further progress was arrested by an injunction sued out against W. and Z., on the ground that it was a nuisance. *Held*, that under these circumstances Z. was entitled to recover upon *quantum meruit*, for the work he had done.—Whitfield v. Zellnor, 24 M. 663.

§ 30. Trial, judgment, and review.

(1873). Where a plaintiff alleges and proves that at defendant's request, he rendered certain services without any special contract as to the amount of wages, the law implies a promise to pay reasonable compensation; and upon demurrer to the evidence in such case, where there is no proof as to the value of the services, the judgment should be for plaintiff, with a writ of inquiry to ascertain the amount due.—Jordan v. Foxworth, 48 M. 607.

WORKING ROAD.

See HIGHWAYS, §§ 122–151.

WORSHIP.

See RELIGIOUS SOCIETIES.
Disturbance, see DISTURBANCE OF PUBLIC ASSEMBLAGE.

WRITINGS.

Best and secondary evidence, see EVIDENCE, §§ 160–169.
Documentary evidence, see CRIMINAL LAW, §§ 429–447; EVIDENCE, §§ 326–383.
Nature of memoranda to satisfy statute of frauds, see FRAUDS, STATUTE OF, §§ 103–113.
Necessity and sufficiency of written acknowledgment or new promise, see LIMITATION OF ACTIONS, § 146.
Necessity and sufficiency to constitute conveyance of real property, see DEEDS, §§ 33–40.
Necessity and sufficiency to constitute express trust, see TRUSTS, §§ 19–21.
Necessity and sufficiency to constitute stipulations, see STIPULATIONS, § 6.
Necessity and sufficiency under statute of frauds, see FRAUDS, STATUTE OF.
Necessity of sustaining contract of employment by corporation, see CORPORATIONS, § 456.
Necessity of written authority of broker to sell land, see BROKERS, §§ 14, 43.
Necessity of written instructions, see TRIAL, § 222.
Necessity that grant of right of way should be in writing, see EASEMENTS, § 1.
Parol evidence affecting writings, see CRIMINAL LAW, § 447.
Presumptions as to making, validity and genuineness, see EVIDENCE, § 70.
Promise to reduce agreements to writing, see FRAUDS, STATUTE OF, § 126.
Reduction of deposition to writing, see DEPOSITIONS, § 67.
Requisites and sufficiency of writings to satisfy statute of frauds, see FRAUDS, STATUTE OF, §§ 98–118.
Separate writings to satisfy statute of frauds, see FRAUDS, STATUTE OF, § 118.
Use to refresh memory of witness, see WITNESSES, §§ 253–257.

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WRIT OF ASSISTANCE.

See ASSISTANCE, WRIT OF.

WRIT OF ATTACHMENT.

Amendment, see ATTACHMENT, § 154.
Form and requisites, see ATTACHMENT, § 145.
Variance, see ATTACHMENT, § 156.

WRIT OF ERROR.

Accord and satisfaction as bar to, see APPEAL AND ERROR, § 167.
Alias citation, see APPEAL AND ERROR, § 398.
As method of review in high court, see APPEAL AND ERROR, § 30.
As *supersedeas*, see APPEAL AND ERROR, § 460.
Bar by statute of limitations, see APPEAL AND ERROR, § 338.
Dismissal for defects, see APPEAL AND ERROR, § 784.
Distinguished from appeal, see APPEAL AND ERROR, § 857.
Does not lie from interlocutory decisions, see APPEAL AND ERROR, §§ 3, 67–74.
Effect to suspend judgment, see APPEAL AND ERROR, § 437.
From judgment of circuit court on case appealed from supervisors, see APPEAL AND ERROR, § 44.
How issued and tested, see APPEAL AND ERROR, § 398.
Issuance by clerk, see CLERKS OF COURTS, § 67.
Issuance by clerks of court, see APPEAL AND ERROR, § 398.
Issuance without bond, see APPEAL AND ERROR, § 372.
Lies to revise final decree of probate court, see APPEAL AND ERROR, § 398.
Necessity of final determination, see APPEAL AND ERROR, § 66.
Not issuable after forfeiture of forthcoming bond, see APPEAL AND ERROR, § 5.
On motion for new trial, see APPEAL AND ERROR, § 110.
Parties, see APPEAL AND ERROR, § 321.
Premature, see APPEAL AND ERROR, § 14.
Prosecution immediately on rendition of final judgment, see APPEAL AND ERROR, § 337.
Remedy in criminal cases, see CRIMINAL LAW, § 1006.
Sole remedy of review from circuit court, see APPEAL AND ERROR, § 3.
Time of taking and perfecting proceedings, see APPEAL AND ERROR, § 351.
To review judgment in *habeas corpus*, see APPEAL AND ERROR, § 3.
What examinable on, see APPEAL AND ERROR, § 859.
When returnable, see APPEAL AND ERROR, § 398.

WRIT OF INQUIRY.

Assessment of damages, see DAMAGES, §§ 193–224.
In action of account, see ACCOUNT, ACTION ON, § 1.
In attachment proceedings, see ATTACHMENT, § 215.
On default, see JUDGMENT, § 128a.
To determine value of services, see WORK AND LABOR, § 30.

WRIT OF POSSESSION.

In ejectment, see EJECTMENT, § 120.

WRITS.

See ATTACHMENT, § 154; CERTIORARI; EXECUTION; GARNISHMENT, §§ 90–96; HABEAS CORPUS; INJUNCTION, § 202; MANDAMUS; PROHIBITION, §§ 6–8; QUO WARRANTO; PROCESS; REPLEVIN; SCIRE FACIAS; SEQUESTRATION, § 3; SUPERSEDEAS, § 6.
Alias executions, see EXECUTION, § 99.
Alternative writ of mandamus, see MANDAMUS, § 158.
Audita querela, see AUDITA QUERELA.
Coram nobis, see CRIMINAL LAW, § 997; JUDGMENT, § 334.
In criminal prosecutions, see CRIMINAL LAW, § 215.
Nature and scope of remedy by prohibition, see PROHIBITION, § 1.
Of error, see APPEAL AND ERROR; JUSTICES OF THE PEACE, §§ 140–190.
Peremptory writ of mandamus, see MANDAMUS, §§ 179–182.
Possession on setting aside tax deed, see TAXATION, § 689.
Procedendo, see JUSTICES OF THE PEACE, § 190.
Return of garnishment, see GARNISHMENT, § 96.
Return to mandamus, see MANDAMUS, § 164.
Testamentary, see JUDGMENT, § 17.
Violation of writ of injunction, see INJUNCTION, § 217.
Writ of error coram nobis, see JUDGMENT, § 296.

WRITTEN ACKNOWLEDGMENT.

Alteration, see ALTERATION OF INSTRUMENTS.

WRITTEN AGREEMENTS.

Necessity of writing where agreement not to be performed within one year, see FRAUDS, STATUTE OF, §§ 44–53.

WRITTEN INSTRUMENTS.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; BILLS AND NOTES, §§ 2–24; BONDS; COMPROMISE AND SETTLEMENT; DEEDS; GUARANTY, § 8; MORTGAGES; RELEASE; STIPULATIONS; SUBSCRIPTIONS; WILLS.
Acknowledgment, see ACKNOWLEDGMENT.
Affixing internal revenue stamps, see INTERNAL REVENUE, § 19.
Agreements as to repairs and alterations of leased premises, see LANDLORD AND TENANT, § 152.
Assignment, see ASSIGNMENTS, § 20.
Assignments for creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, §§ 70–84.
As hearsay evidence, see EVIDENCE, § 318.
Award of arbitrators, see ARBITRATION AND AWARD, §§ 49–82.
Best and secondary evidence, see CRIMINAL LAW, §§ 398–404; EVIDENCE, §§ 157–186.
Bills of lading, see CARRIERS.
Bills of sale, see SALES, §§ 148, 149.

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Cancellation, see CANCELLATION OF INSTRUMENTS.
Checks, see BANKS AND BANKING, §§ 137–140.
Competency as admission, see EVIDENCE, § 215.
Conditional sale contract, see SALES, §§ 460–464.
Construction as between written and printed portions, see CONTRACTS, § 163.
Construction of contracts, see CONTRACTS, § 143.
Construction of written and printed portion of insurance policies, see INSURANCE, § 149.
Contracts generally, see CONTRACTS, §§ 34, 35, 143–233.
Contracts of sale of land, see VENDOR AND PURCHASER, § 20.
Contracts of surety, see PRINCIPAL AND SURETY, § 10.
Deeds of trust, see TRUSTS, §§ 19–21.
Deeds, see DEEDS.
Delivery as escrow, see ESCROWS.
Description of parties in mortgage, see MORTGAGES, § 43.
Description of property in mortgage, see MORTGAGES, § 48.
Distinction between deed and will, see WILLS, § 88.
Documentary evidence, see CRIMINAL LAW, §§ 429–447; EVIDENCE, §§ 326–383.
Establishment and restoration, see LOST INSTRUMENTS, § 2.
Execution and delivery, see MORTGAGES, §§ 57–73.
Execution on Sunday, see SUNDAY, § 13.
Exhibits to pleading, see PLEADING, § 310.
Expert testimony as to construction, see EVIDENCE, § 518.
Filing, see RECORDS.
Forgery, see FORGERY.
Form and contents of chattel mortgages, see CHATTEL MORTGAGES, §§ 42–56.
Form and contents of instruments creating trust, see TRUSTS, § 21.
Form of will, see WILLS, § 94.
Form and contents of mortgage, see MORTGAGES, §§ 40–50.
Filing in justices' courts, see JUSTICES OF THE PEACE, § 98.
Guaranties, see GUARANTY, § 8.
Larceny of, see LARCENY, § 23.
Loss or destruction, see LOST INSTRUMENTS.
Limitations of actions on written contracts, see LIMITATION OF ACTIONS, § 23.
Mortgages, see MORTGAGES.
Nature and form of bonds, see BONDS, § 78.
Nature and requisites of escrows, see ESCROWS, § 1.
Necessity for written contract of employment of broker, see BROKERS, § 43.
Necessity of corporate seal, see CORPORATIONS, § 384.
Necessity of writing to confer authority on agent, see PRINCIPAL AND AGENT, § 117.
Necessity that new promise should be written, see LIMITATION OF ACTIONS, § 146.
Operation and effect of delivery in escrow, see ESCROWS, § 8.
Parol evidence to explain unintelligible writing, see EVIDENCE, § 453.
Parol evidence to show intent of parties, see EVIDENCE, § 461.
Parol evidence to show purpose of writing, see EVIDENCE, § 462.
Partnership articles, see PARTNERSHIP, § 22.
Pleading, see PLEADING, § 32.
Pleading legal effect, see PLEADING, § 10.
Presumptions as to making validity and genuineness of writings, see EVIDENCE, § 70.
Property conveyed under assignment, see ASSIGNMENT FOR BENEFIT OF CREDITORS, §§ 173–176.
Provisions in assignment for benefit of assignor, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 89.
Recording, see RECORDS.
Recording assignments, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 163.
Reformation, see REFORMATION OF INSTRUMENTS.
Requisites and sufficiency to satisfy statute of frauds, see FRAUDS, STATUTE OF, §§ 98–118.
Stamps, see INTERNAL REVENUE.
Stipulations, see STIPULATIONS, § 6.
Time when escrow takes effect, see ESCROWS, § 11.
Use to refresh memory of witness, see WITNESSES, §§ 253–257.
Subscriptions to corporate stock, see CORPORATIONS, § 74.
Verification of pleading based on, see PLEADING, § 291.

WRONGFUL ATTACHMENT.

See ATTACHMENT, §§ 355–382.

WRONGFUL CONVERSION.

See TROVER AND CONVERSION.

WRONGFUL DISCHARGE.

Actions for, see MASTER AND SERVANT, §§ 34–44.

WRONGFUL DISTRESS.

See LANDLORD AND TENANT, § 274.

WRONGFUL INJUNCTION.

See INJUNCTION, § 261.

WRONGFUL LEVY.

Liability of sheriff, see SHERIFFS AND CONSTABLES, § 110.

WRONGFUL SALE.

For taxes, see TAXATION, § 694.

WRONGS.

See TORTS.

YEAR.

Agreements not to be performed within one year, see FRAUDS, STATUTE OF, §§ 44–53.
Estates for years, see LANDLORD AND TENANT.

YEAR'S SUPPORT.

Of widow and children, see EXECUTORS AND ADMINISTRATORS, § 173.

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TABLE OF ABBREVIATIONS

OF TOPIC HEADS USED IN TABLE OF CASES

aband.	Abandonment.
abate. & r.	Abatement and Revival.
abduc.	Abduction.
abst. of t.	Abstracts of Title.
acc. & s.	Accord and Satisfaction.
acct.	Account.
acct. actl. on	Account, Action on.
acct. st.	Account Stated.
ack.	Acknowledgment.
action	Action.
act. on c.	Action on the Case.
adj. land	Adjoining Landowners.
adm.	Admiralty.
adop.	Adoption.
aduln.	Adulteration.
adult.	Adultery.
adv. pos.	Adverse Possession.
afft.	Affidavits.
agric.	Agriculture.
alt. of inst.	Alteration of Instruments.
am. cur.	Amicus Curiæ.
anim.	Animals.
annu.	Annuities.
app. & e.	Appeal and Error.
app.	Appearance.
appr.	Apprentices.
arb. & a.	Arbitration and Award.
army & n.	Army and Navy.
arr.	Arrest.
ars.	Arson.
assa.	Assault and Battery.
assign.	Assignments.
assign. f. b. c.	Assignments for the Benefit of Creditors.
assist.	Assistance, Writ of.
assn.	Associations.
assum.	Assumpsit, Action of.
asyl.	Asylums.
attch.	Attachment.
atty. & c.	Attorney and Client.
atty. gen.	Attorney General.
auc.	Auctions and Auctioneers.
aud.	Audita Querela.
bailm.	Bailment.
bankr.	Bankruptcy.
banks	Banks and Banking.
bast.	Bastards.
ben. assn.	Beneficial Associations.
big.	Bigamy.
bills & n.	Bills and Notes.
blasph.	Blasphemy.
bound.	Boundaries.
breach of p.	Breach of the Peace.
brok.	Brokers.
b. & l. assn.	Building and Loan Associations.
burg.	Burglary.
can. of i.	Cancellation of Instruments.
carr.	Carriers.
cem.	Cemeteries.
cert.	Certiorari.
champ.	Champerty and Maintenance.
char.	Charities.
chat. m.	Chattel Mortgages.
citiz.	Citizens.
civ. r.	Civil Rights.
clks. of c.	Clerks of Courts.
colleg.	Colleges and Universities.
com.	Commerce.
com. l.	Common Law.
comp. w. cred.	Compositions with Creditors.
comp. fel.	Compounding Felony.
comp.	Compromise and Settlement.
conf. g.	Confusion of Goods.
consp.	Conspiracy.
const. law	Constitutional Law.
cmpt.	Contempt.
contin.	Continuance.
cncts.	Contracts.
contrib.	Contribution.
conv.	Conversion.
convt.	Convicts.
coro.	Coroners.
corp.	Corporations.
court com.	Court Commissioners.
cov., actl. of.	Covenant, Action of.
cov.	Covenants.
cred. s.	Creditor's Suit.
crim. l.	Criminal Law.
curt.	Curtesy.
cust. & u.	Customs and Usages.
dam.	Damages.
debt, act.	Debt, Action of.
dedl.	Dedication.
depty.	Depositaries.
dep.	Depositions.
des. & d.	Descent and Distribution.
det.	Detinue.
discov.	Discovery.
dism.	Dismissal and Nonsuit.
dis. c.	Disorderly Conduct.
dis. h.	Disorderly House.
dist. atty.	District Attorneys.
dist. pub. a.	Disturbance of Public Assemblage.
div.	Divorce.
dom.	Domicile.
drug.	Druggists.
duel.	Dueling.
ease.	Easements.
eject.	Ejectment.
elect. rem.	Election of Remedies.
elec.	Elections.
electr.	Electricity.
embes.	Embezzlement.
em. dom.	Eminent Domain.
eq.	Equity.
est.	Estate.
est. tail.	Estates Tail.
estop.	Estoppel.
ev.	Evidence.
excep.	Exceptions, Bill of.
exch. of prop.	Exchange of Property.
ex. & ad.	Executors and Administrators.
exemp.	Exemptions.
extort.	Extortions.
extrad.	Extradition.
fact.	Factors.
false imp.	False Imprisonment.
false pret.	False Pretenses.
fixt.	Fixtures.
forc. e. & d.	Forcible Entry and Detainer.
forfeit.	Forfeitures.
forg.	Forgery.
forn.	Fornication.
fran.	Franchises.
frds. st. of.	Frauds, Statute of.
fraud. conv.	Fraudulent Conveyances.
garn.	Garnishment.
g. will	Good Will.
gr. jury	Grand Jury.
guar.	Guaranty.
guard. & w.	Guardian and Ward.
hab. corp.	Habeas Corpus.
hawk. p.	Hawkers and Peddlers.
high.	Highways.
home.	Homestead.
hom.	Homicide.
hus. & w.	Husband and Wife.
imp.	Improvements.

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indem. ..... Indemnity.
ind. ..... Indictment.
inf. ..... Infants.
inj. ..... Injunction.
inn. ..... Innkeepers.
ins. p. ..... Insane Persons.
insolv. ..... Insolvency.
ins. ..... Insurance.
int. rev. ..... Internal Revenue.
int. law. ..... International Law.
interpl. ..... Interpleader.
int. liq. ..... Intoxicating Liquors.

j. adv. ..... Joint Adventures.
j. ten. ..... Joint Tenancy.
judgm. ..... Judgment.
jud. s. ..... Judicial Sales.
j. p. ..... Justices of the Peace.

land. & t. ..... Landlord and Tenant.
larc. ..... Larceny.
lev. ..... Levees.
lewd. ..... Lewdness.
libel ..... Libel and Slander.
licens. ..... Licenses.
life est. ..... Life Estates.
lim. of act. ..... Limitation of Actions.
lis pens. ..... Lis Pendens.
liv. st. keep. ..... Livery Stable Keepers.
logs ..... Logs and Logging.
lost inst. ..... Lost Instruments.
lot. ..... Lotteries.

mal. mis. ..... Malicious Mischief.
mal. pros. ..... Malicious Prosecution.
mand. ..... Mandamus.
mar. liens. ..... Maritime Liens.
marr. ..... Marriage.
marshaling ..... Marshaling Assets and Securities.
mast. & s. ..... Master and Servant.
mech. liens. ..... Mechanics' Liens.
mines ..... Mines and Minerals.
misceg. ..... Miscegenation.
mon. lent. ..... Money Lent.
mon. paid. ..... Money Paid.
mon. recd. ..... Money Received.
monop. ..... Monopolies.
mtg. ..... Mortgages.
mun. corp. ..... Municipal Corporations.

nav. wat. ..... Navigable Waters.
neg. ..... Negligence.
new tr. ..... New Trial.
nova. ..... Novation.
nuis. ..... Nuisance.

obscen. ..... Obscenity.
obst. just. ..... Obstructing Justice.
offic. ..... Officers.

parent & c. ..... Parent and Child.
partit. ..... Partition.
partners. ..... Partnership.
party w. ..... Party Walls.
paup. ..... Paupers.
pawnb. ..... Pawnbrokers.
paymt. ..... Payment.
penal. ..... Penalties.
perj. ..... Perjury.
perp. ..... Perpetuities.
phys. ..... Physicians and Surgeons.
plead. ..... Pleading.
pigs. ..... Pledges.
princ. & a. ..... Principal and Agent.
princ. & s. ..... Principal and Surety.
priv. roads. ..... Private Roads.
prize f. ..... Prize Fighting.
proc. ..... Process.
prohib. ..... Prohibition.
propty. ..... Property.
prost. ..... Prostitution.
pub. lands. ..... Public Lands.

quiet. t. ..... Quieting Title.
quo w. ..... Quo Warranto.

r. r. ..... Railroads.
rec. ..... Receivers.
rec. s. goods. ..... Receiving Stolen Goods.
recogn. ..... Recognizances.
refer. ..... Reference.
ref. of inst. ..... Reformation of Instruments.
relig. soc. ..... Religious Societies.
remaind. ..... Remainders.
rem. of c. ..... Removal of Causes.
replev. ..... Replevin.
rob. ..... Robbery.

schools ..... Schools and School Districts.
sci. fa. ..... Scire Facias.
seduct. ..... Seduction.
sequest. ..... Sequestration.
set-off ..... Set-off and Counterclaim.
sheriffs ..... Sheriffs and Constables.
ship. ..... Shipping.
spec. perf. ..... Specific Performance.
statut. ..... Statutes.
stip. ..... Stipulations.
st. r. r. ..... Street Railroads.
subrog. ..... Subrogation.
subscrip. ..... Subscriptions.
supersed. ..... Supersedeas.

tax. ..... Taxation.
tel. & t. ..... Telegraphs and Telephones.
ten. in c. ..... Tenancy in Common.
theaters ..... Theaters and Shows.
trade-marks ..... Trade-Marks and Trade-Names.
trade u. ..... Trade Unions.
tresp. ..... Trespass.
trover ..... Trover and Conversion.
turnpikes ..... Turnpikes and Toll Roads.

u. s. ..... United States.
u. s. mar. ..... United States Marshals.
use & o. ..... Use and Occupation.

vag. ..... Vagrancy.
ven. & pur. ..... Vendor and Purchaser.

wareh. ..... Warehousemen.
waters ..... Waters and Water Courses.
weap. ..... Weapons.
weights ..... Weights and Measures.
witn. ..... Witnesses.
woods ..... Woods and Forests.
work & lab. ..... Work and Labor.

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TABLE OF CASES DIGESTED

[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

A

Aaron v. Keller, 2 Miss. Dec. 710—acct. acti. on, 6.
Aaron v. Podesta, 60 M. 82—acct. acti. on, 14.
Aaron v. Supreme Lodge of K. of H. 15 So. 115—ins. 815.
Aaron v. Warren, 62 M. 370—judgm. 784; ven. & pur. 292.
Aaron, Chaffe v.—62 M. 29.
Aaron, Hernandez v.—73 M. 434.
Aaron, Linder v.—5 H. 581.
Aaron, Lowenstein v.—69 M. 341.
Aaron, Weis v.—75 M. 138.
Abbay v. Board of Levee Commissioners, 83 M. 102—statut. 166.
Abbay v. Hill, 64 M. 340—ex. & ad. 225; lim. of act. 36, 54.
Abbay, Brewer v.—82 M. 559.
Abbay, State v.—82 M. 559.
Abbey v. Commercial Bank, 31 M. 434—eq. 2, 44; execution, 99; fraud. conv. 248.
Abbey v. Commercial Bank, 34 M. 571—app. & e. 1110; bankr. 137; courts, 354; insolv. 61.
Abbey v. Merrick, 27 M. 320—app. & e. 1001; eject. 139, 150, 152; judgm. 194.
Abbey v. Owens, 57 M. 810—acct. acti. on, 1; lim. of act. 54.
Abbey v. Van Campen, Freem. Ch. 273—princ. & s. 173, 174.
Abbott v. Agricultural Bank, 11 S. & M. 405—banks, 207.
Abbott v. Hackman, 2 S. & M. 510—app. & e. 545, 906; excep. 9; execution, 155e; judgm. 857.
Abbott v. McElroy, 10 S. & M. 100—ex. & ad. 437; lim. of act. 76, 83.
Abbott, Unger Co. v.—92 M. 563.
Abbott, Wheatley v.—32 M. 343.
Abby v. Billups, 35 M. 618—corp. 406, 452, 459; land. & t. 44, 160.
Abercrombie, Ellis v.—10 S. & M. 474.
Aberdeen v. Saunderson, 8 S. & M. 663—const. l. 136; statut. 169, 171.
Aberdeen v. Sykes, 59 M. 236—estop. 80; mun. corp. 940; trial, 156.
Aberdeen Academy v. Aberdeen, 13 S. & M. 645—see Statutes Construed, Laws 1837, p. 205; 1848, p. 447.
Aberdeen, Board of Education v.—56 M. 518.
Aberdeen, Lake v.—57 M. 260.
Aberdeen Hotel Co. Paine v.—60 M. 360.
Aberdeen, Memphis Mach. Works v.—77 M. 420.
Aberdeen, Smith v.—25 M. 458.
Aberdeen, State Board of Education v.—56 M. 518.
Abernathy v. Mobile &c. R. Co. 53 So. 539—mast. & s. 286, 289.
Abernathy, Cock v.—77 M. 872.
Abernathy, McIver v.—66 M. 79.
Abernathy, Nelson v.—74 M. 164.
Abernethy v. Green, 11 So. 186—land. & t. 248.
Abernethy v. Watkins, 2 Miss. Dec. 682—assign. f. b. c. 151.
Ables, Chicago &c. R. Co. v.—60 M. 1017.
Ables, Moring v.—62 M. 263.
Abney, Langston v.—43 M. 161.
Abraham v. McCurdy, 15 So. 137—acct. st. 11.
Abram v. State, 25 M. 589—gr. jury, 40.
Abrams, Allison v.—40 M. 747.
Abrams, Illinois Cent. R. Co. v.—84 M. 456.
Abramsohn, Lowenstein v.—76 M. 890.
A. B. Smith Co. v. Bank of Holmes County, 18 So. 847—judgm. 422.
A. B. Smith Co. v. Jones, 75 M. 325—frds. st. of, 44.
Acker v. Trueland, 56 M. 30—ex. & ad. 182; home. 6, 18, 61, 134, 153, 167; statut. 264.
Acker, Gattman v.—1 Miss Dec. 264.
Ackerman v. Cook, 34 M. 262—action, 13; parties, 4.
Acker, Peebles v.—70 M. 356.
Acker, Pennington v.—30 M. 161.
Acker, Turner v.—2 Miss. Dec. 736.
Acme Lumber Co. v. Hoyt, 71 M. 106—fraud. conv. 110; mtg. 152.
Acme Lumber Co. v. Vandergrift, 70 M. 91—garn. 96.
Acme Lumber Co. McPherson v.—70 M. 649.
Acre v. Bufford, 80 M. 565—replev. 71, 81, 84.
Adair, Campbell v.—45 M. 170.
Adair, Coleman v.—75 M. 660.
Adam, Arthur v.—49 M. 404.
Adams v. Adams, 57 M. 267—marr. 38.
Adams v. Arnold, 76 M. 655—counties, 95, 101.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Adams v. Ball, 5 So. 109—inj. 136, 241.
Adams v. Bank of Oxford, 78 M. 532—tax. 39.
Adams v. Berg, 65 M. 3—replev. 91.
Adams v. Berg, 67 M. 234—princ. & a. 145.
Adams v. Bolivar County, 75 M. 154—states, 61.
Adams v. Bullock, 94 M. 27—app. & e. 843; propty. 2; tax. 159, 377; waters, 188.
Adams v. Capital State Bank, 74 M. 307—const. l. 46; mun. corp. 956, 969; tax. 300.
Adams v. Carter, 92 M. 578—app. & e. 530, 779.
Adams v. Carter, 92 M. 579—app. & e. 162, 1172.
Adams v. Carter, 25 So. 669—evid. 383; tax. 593.
Adams v. Clarke, 80 M. 134—tax. 74, 76, 328, 362, 490.
Adams v. Clarksdale, 95 M. 88—app. & e. 169; mand. 10, 66, 119; tax. 362, 363, 491.
Adams v. Coker, 85 M. 222—counties, 68, 94.
Adams v. Colonial & United States Mortg. Co., 82 M. 263—tax. 75, 95.
Adams v. Conner, 73 M. 425—counties, 101; eq. 3; tax. 568b, 570, 570b.
Adams v. Cox, 80 M. 561—int. liq. 88.
Adams v. Dees, 62 M. 354—home. 75.
Adams v. Delta & Pine Land Co. 89 M. 817—tax. 123.
Adams v. Dendy, 82 M. 135—const. law, 24; counties, 46.
Adams v. Ducate, 86 M. 276—mun. corp. 956, 966.
Adams v. Evans, 74 M. 886—costs, 58, 78; tax. 598.
Adams v. Evans, 19 So. 834—app. & e. 1178; attach. 128, 275.
Adams v. Farley, 18 So. 390—wills, 436, 592.
Adams v. Fidelity Mut. Life Ins. Co. 94 M. 433—bonds, 131; j. p. 141.
Adams v. Greenville, 77 M. 881—mand. 66; mun. corp. 968.
Adams v. Griffin, 3 S. & M. 556—execution, 238, 239.
Adams v. Griffin, 85 M. 1—eq. 143.
Adams v. Guice, 30 M. 397—adv. pos. 68; plead. 129.
Adams v. Harris, 47 M. 144—acct. acti. on, 1; execution, 41, 268; ex. & ad. 135, 388a; inj. 27; judgm. 780; lim. of act. 175; quiet. t. 9; ven. & pur. 266, 272, 279.
Adams v. Harvey, 2 Miss. Dec. 319—counties, 155.
Adams v. Helms, 95 M. 211—counties, 160.
Adams v. Illinois Cent. R. Co. 38 M. 977—app. & e. 1238.
Adams v. Illinois Cent. R. Co. 92 M. 566—tax. 389.
Adams v. Jackson Electric &c. Co. 78 M. 887—mun. corp. 872.
Adams v. Johnson, 41 M. 258—mtg. 48, 73, 116, 485.
Adams v. Kansas City &c. R. Co., 74 M. 331—tax. 389.
Adams v. Kuhn, 72 M. 277—tax. 362¼.
Adams v. Kuykendall, 83 M. 571—mand. 66; mun. corp. 64, 73, 958; tax. 41, 42, 47, 109.
Adams v. Kyzer, 61 M. 407—judges, 30; inj. 164.
Adams v. Louisville &c. R. Co. 13 So. 932—tax. 155.
Adams v. Luce, 87 M. 220—tax. 109.
Adams v. Lumberman's Indemnity Exch. 55 So. 882—ins. 7.
Adams v. Massey, 1 S. & M. 660—plead. 164.
Adams v. Miller, 81 M. 613—int. liq. 88.
Adams v. Mills, 71 M. 150—tax. 711.
Adams v. Mississippi Lumber Co. 84 M. 23—com. 63; licens. 7.
Adams v. Mississippi State Bank, 75 M. 701—judges, 26; offic. 39; mun. corp. 957; tax. 41, 44.
Adams v. Munson, 3 H. 77—app. & e. 723, 744, 786.
Adams v. Natchez &c. R. Co. 76 M. 714—counties, 154.
Adams v. Power, 48 M. 450—bills & n. 329, 364, 452, 578; nova. 1, 7, 10; trial, 252.
Adams v. Power, 52 M. 828—frds. st. of, 74; nova. 1; princ. & a. 164.
Adams v. Rigby, 16 So. 599—tax. 362¼.
Adams v. Rowan, 8 S. & M. 624—bills & n. 106, 352; concts, 140.
Adams v. Saunders, 89 M. 784—tax. 568a.
Adams v. Saunders, 93 M. 520—statut. 241; tax. 545, 565.
Adams v. Schwartz, 80 M. 660—tax. 109.
Adams v. Sigman, 89 M. 844—judgm. 751.
Adams v. Standard Oil Co. 53 So. 692—const. law, 209, 210, 230; ev. 23; statut. 64.
Adams v. State, 24 So. 386—hom. 286a, 340b.
Adams v. State, 47 So. 787—rape, 50.
Adams v. Stonewall Cotton Mills, 89 M. 865—tax. 451, 593.
Adams v. Stonewall Mfg. Co. 80 M. 94—tax. 251, 545, 564, 584.
Adams v. Tombigbee Mills, 78 M. 676—tax. 192, 235.
Adams v. Torry, 26 M. 499—lim. of act. 72a, 148, 150.
Adams v. Vicksburg Bank, 10 So. 102—tax. 551, 568.

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Adams v. Vicksburg Waterworks Co. 94 M. 601—tax. 365, 377.
Adams v. Watts, 76 M. 667—counties, 70½.
Adams v. Westbrook, 41 M. 385—ev. 463; ex. & ad. 458, 513, 533; guard. & w. 137, 151, 163, 179.
Adams v. Williams, 52 So. 865—lev. 4; offic. 126.
Adams v. Williams, 57 M. 38—ex. & ad. 437.
Adams v. Winona Cotton Mills, 92 M. 743—tax. 192, 196.
Adams v. Yazoo &c. R. Co. 75 M. 275—mun. corp. 967; statut. 183, 206, 217; tax. 205.
Adams v. Yazoo &c. R. Co. 77 M. 194—app. & e. 1186; const. law, 316; corp. 31, 581, 586; courts, 88, 92, 103; judgm. 564, 584, 600, 713, 714, 948; r. r. 140; tax. 45, 192, 196, 203, 204, 205, 210, 248; trial, 343.
Adams, Bramlett v.—96 M. 61.
Adams County v. Aikman, 52 So. 513—health, 7.
Adams Lumber Co. v. Stevenson, 89 M. 678—app. & e. 351, 787.
Adams Mach. Co. v. Thomas, 87 M. 391—app. & e. 1040; sales, 428.
Adams, Chenault v.—52 So. 189.
Adams, Clark v.—80 M. 219.
Adams, Davis v.—50 So. 568.
Adams, Delta &c. Land Co. v.—93 M. 340.
Adams, Doolittle v.—43 So. 951.
Adams, *Ex parte*, 25 M. 883—cmpt. 8, 66; hab. corp. 22, 29, 94, 98.
Adams, Falkner v.—33 So. 411.
Adams, Grenada v.—87 M. 669.
Adams, Gulf &c. R. Co. v.—83 M. 306.
Adams, Gulf &c. R. Co. v.—85 M. 772.
Adams, Gulf &c. R. Co. v.—90 M. 559.
Adams, Harland v.—76 M. 308.
Adams, Hugonin v.—33 So. 497.
Adams, Illinois Cent. R. Co. v.—78 M. 895.
Adams, Illinois Cent. R Co. v.—78 M. 977.
Adams, Jackson Electric R. &c. Co. v.—79 M. 408.
Adams Mach. Co. Chenault v.—53 So. 629.
Adams Mach. Co. French &c. Co. v.—93 M. 537.
Adams Mach. Co. Western Union Tel. Co. v.—92 M. 849.
Adams, McKinney v.—50 So. 474.
Adams, Morris Ice Co. v.—75 M. 410.
Adams, Pullman Palace Car Co. v.—78 M. 814.
Adams, Rowan v.—Sm. & M. Ch. 45.
Adams, Speight v.—Freem. Ch. 318.
Adams, Stein v.—23 So. 269.
Adams, Terrall v.—23 M. 570.
Adams, Thompson v.—Freem. Ch. 225.
Adams, Thurman v.—82 M. 204.
Adams, Uhler v.—73 M. 332.
Adams, Vicksburg Bank v.—74 M. 179.
Adams, Watkins v.—32 M. 333.
Adams, Yazoo &c. R. Co. v.—73 M. 648.
Adams, Yazoo &c. R. Co. v.—76 M. 545.
Adams, Yazoo &c. R. Co. v.—77 M. 194, 382, 764, 780.
Adams, Yazoo &c. R. Co. v.—78 M. 977.
Adams, Yazoo &c. R. Co. v.—81 M. 90.
Adams, Yazoo &c. R. Co. v.—90 M. 559.
Adams, Yazoo &c. R. Co. v.—81 So. 427.
Adams, Yazoo &c. R. Co. v.—52 So. 794.
Adcock, Bolton v.—27 M. 758.
Addison v. Eldridge, 1 S. & M. 510—judgm. 342.
Addison, Izod v.—5 H. 432.
Adler v. Meyer, 73 M. 863—jud. s. 3.
Adler v. Searles, 86 M. 406—gaming, 31.
Adler, Floyd v.—51 So. 897.
Adler, O'Leary v.—51 M. 28.
Adler, State v.—68 M. 487.
Advance Gin &c. Co. v. Thomas, 81 M. 486—app. & e. 1025; neg. 1.
Advance Lumber Co. v. Laurel Nat. Bank, 86 M. 419—attach. 12, 71.
Ætna Ins. Co. v. Mount, 90 M. 642—ins. 125, 198, 335, 388, 640.
Ætna Ins. Co. v. Renno, 93 M. 594—ins. 124.
Ætna Ins. Co. v. Renno, 96 M. 172—ins. 136.
Ætna Ins. Co. Alabama &c. R. Co. v.—82 M. 770.
Agnew v. Jones, 74 M. 347—dedi. 56; fixt. 35; licens. 50; tresp. 1, 12, 25.
Agnew v. McElroy, 10 S. & M. 552—app. & e. 1106; judgm. 585.
Agnew v. Natchez, 9 S. & M. 104—j. p. 142, 165.
Agnew, Thomasson v.—24 M. 93.
Agricultural Bank v. Commercial Bank, 7 S. & M. 592—banks, 156, 172; bills & n. 400.
Agricultural Bank v. Dorsey, Freem. Ch. 338—fraud. conv. 22, 115, 194, 201.
Agricultural Bank v. Harris, 2 S. & M. 463—abat. & r. 27; bills & n. 301.
Agricultural Bank v. Pallen, 8 S. & M. 357—execution, 126; judgm. 793; marshaling, 8.
Agricultural Bank, Abbott v.—11 S. & M. 405.
Agricultural Bank, Allein v.—3 S. & M. 48.
Agricultural Bank, Harrisson v.—2 S. & M. 307.
Agricultural Bank, McIntyre v.—Freem. Ch. 105.

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Agricultural Bank, Montgomery v.—10 S. & M. 566.

Agricultural Bank, Moss v.—4 S. & M. 726.

Agricultural Bank, Pallen v.—Freem. Ch. 419.

Agricultural Bank, Routh v.—12 S. & M. 161.

Agricultural, Robertson v.—28 M. 237.

A. G. Russell Co. Columbia Star Milling Co. v.—89 M. 437.

A. H. George Co. v. Pigford, 52 So. 796—rec. 156.

Aikman, Adams County v.—52 So. 513.

Ailles, Tillman v.—5 S. & M. 373.

Ainsworth v. Ainsworth, 24 M. 145—bills & n. 427; paymt. 5; set-off, 20.

Ainsworth v. State, 5 H. 242—hom. 141.

Ainsworth, Underwood v.—72 M. 328.

Ainsworth, Watts v.—89 M. 40.

Aird v. Alexander, 72 M. 358—deeds, 94; frds. st. of, 56, 62.

Airey v. Buchanan, 64 M. 181—home. 112.

Alabama &c. Life Ins. Co. v. Herron, 56 M. 643—ins. 130, 136; trial 197.

Alabama &c. R. Co. v. Ætna Ins. Co. 82 M. 770—r. r. 361, 481.

Alabama &c. R. Co. v. Baldwin, 52 So. 358—dam. 136; r. r. 482; trial, 252.

Alabama &c. R. Co. v. Barrett, 78 M. 432—r. r. 465, 481, 482.

Alabama &c. R. Co. v. Beard, 93 M. 294—waters, 171, 175.

Alabama &c. R. Co. v. Beardsley, 79 M. 417—carr. 237, 300; marr. 40.

Alabama &c. R. Co. v. Bell, 29 So. 818—carr. 381, 382.

Alabama &c. R. Co. v. Bloom, 71 M. 247—em. dom. 69, 117; r. r. 114, 222.

Alabama &c. R. Co. v. Bolding, 69 M. 264—app. & e. 492, 1007, 1011; judgm. 147, 339, 377, 568.

Alabama &c. R. Co. v. Bolding, 69 M. 255—proc. 16; r. r. 20; sheriffs, 79.

Alabama &c. R. Co. v. Boyles, 37 So. 498—r. r. 446.

Alabama &c. R. Co. v. Brennan, 69 M. 103—tax. 479.

Alabama &c. R. Co. v. Brichetto, 72 M. 891—carr. 116.

Alabama &c. R. Co. v. Brooks, 69 M. 168—app. & e. 1028, 1040; corp. 492; mast. & s. 302.

Alabama &c. R. Co. v. Carter, 77 M. 511—r. r. 234, 371.

Alabama &c. R. Co. v. Coleman, 78 M. 182—carr. 229; witn. 253, 258.

Alabama &c. R. Co. v. Cumberland &c. Tel. Co. 88 M. 438—em. dom. 36, 171.

Alabama &c. R. Co. v. Dalton, 86 M. 299—j. p. 54, 71.

Alabama &c. R. Co. v. Davis, 69 M. 444—app. & e. 154; judgm. 314; neg. 93; new tr. 162; r. r. 324, 348.

Alabama &c. R. Co. v. Dear, 87 M. 339—app. & e. 1002; carr. 321.

Alabama &c. R. Co. v. Drummond, 73 M. 813—carr. 277b, 356, 382.

Alabama &c. R. Co. v. Fried, 81 M. 314—app. & e. 1025; r. r. 458, 471; witn. 253.

Alabama &c. R. Co. v. Gibbs, 12 So. 545—carr. 382; dam. 88.

Alabama &c. R. Co. v. Goforth, 14 So. 457—carr. 126.

Alabama &c. R. Co. v. Groome, 52 So. 703—ev. 90; mast. &. s. 103, 207, 265; neg. 120, 136, 137; trial, 296.

Alabama &c. R. Co. v. Hanes, 69 M. 160—dam. 141; neg. 119; torts, 23.

Alabama &c. R. Co. v. Harris, 71 M. 74—carr. 247, 280; mast. & s. 302c; r. r. 276, 277.

Alabama &c. R. Co. v. Harz, 88 M. 681—app. & e. 1058; assa. 25; mast. & s. 302 a.

Alabama &c. R. Co. v. Hayne, 76 M. 538—carr. 98, 99, 106; trial, 252.

Alabama &c. R. Co. v. Holmes, 75 M. 371—carr. 356, 371.

Alabama &c. R. Co. v. Hunnicutt, 53 So. 617—mast. & s. 281; r. r. 393.

Alabama &c. R. Co. v. Inge, 22 So. 294—em. dom. 117.

Alabama &c. R. Co. v. Jones, 73 M. 110—cncts. 93; r. r. 231; release, 59.

Alabama &c. R. Co. v. Jones, 86 M. 263—carr. 303, 333.

Alabama &c. R. Co. v. King, 93 M. 379—const. law, 154, 302; em. dom. 104.

Alabama &c. R. Co. v. Kline, 69 M. 168—libel, 44, 49, 50, 50½, 101, 123.

Alabama &c. R. Co. v. Kuhn, 78 M. 114—false imp. 7, 9, 32, 36.

Alabama &c. R. Co. v. Ligon, 74 M. 176—r. r. 102.

Alabama &c. R. Co. v. Livingston, 84 M. 1—carr. 243; r. r. 276, 281, 282.

Alabama &c. R. Co. v. Lowe, 73 M. 203—app. & e. 1056; neg. 61, 94, 136; new tr. 35; r. r. 282a, 315, 350, 393.

Alabama &c. R. Co. v. McAfee, 71 M. 70—carr. 247; mast. & s. 302a, 306; r. r. 276, 277, 281.

Alabama &c. R. Co. v. McCerrin, 75 M. 687—judgm. 572, 656.

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Alabama &c. R. Co. v. Moore, 81 M. 14—r. r. 446.
Alabama &c. R. Co. v. Odeneal, 73 M. 34—r. r. 100, 102, 104, 193.
Alabama &c. R. Co. v. Odeneal, 74 M. 827—penal. 21; r. r. 102.
Alabama &c. R. Co. v. Organ Power Co. 92 M. 781—carr. 93; ev. 16.
Alabama &c. R. Co. v. Overstreet, 85 M. 78—app. & e. 840; mast. & s. 270; trial, 252.
Alabama &c. R. Co. v. Phillips, 70 M. 14—r. r. 234, 351; trial, 192.
Alabama &c. R. Co. v. Pounder, 82 M. 568—app. & e. 197; carr. 95, 98.
Alabama &c. R. Co. v. Purnell, 69 M. 652—carr. 277, 277b, 278, 302.
Alabama &c. R. Co. v. Railroad Commission of Mississippi, 86 M. 667—carr. 13.
Alabama &c. R. Co. v. Rooks, 78 M. 91—neg. 56.
Alabama &c. R. Co. v. Searles, 71 M. 744—carr. 131, 133, 179; ev. 113, 543; trial, 194, 231.
Alabama &c. R. Co. v. Sparks, 71 M. 757—app. & e. 208; carr. 210.
Alabama &c. R. Co. v. Stacey, 68 M. 463—carr. 286, 294, 303.
Alabama &c. R. Co. v. Stacy, 35 So. 137—r. r. 419, 446, 447.
Alabama &c. R. Co. v. Summers, 68 M. 566—neg. 136; r. r. 310, 400, 401.
Alabama &c. R. Co. v. Thomas, 86 M. 27—lis pens. 3; judgm. 500, 502; mtg. 427, 529.
Alabama &c. R. Co. v. Tirelli, 93 M. 797—carr. 91.
Alabama &c. R. Co. v. Turnbull, 71 M. 1029—comp. 23; release, 17, 54.
Alabama &c. R. Co. v. Turner, 52 So. 261—mun. corp. 390, 587.
Alabama &c. R. Co. v. Williams, 78 M. 209—death 31.
Alabama &c. R. Co. Anderson v.—81 M. 587.
Alabama &c. R. Co. Baldwin v.—96 M. 52.
Alabama &c. R. Co. Burnham v.—81 M. 46.
Alabama &c. R. Co. Burns v.—93 M. 816.
Alabama &c. R. Co. Conklin v.—81 M. 152.
Alabama &c. R. Co. Easley v.—50 So. 491.
Alabama &c. R. Co. Ewing v.—68 M. 551.
Alabama &c. R. Co. Faison v.—69 M. 569.
Alabama &c. R. Co. Farquhar v.—78 M. 193.
Alabama &c. R. Co. Fore v.—87 M. 211.
Alabama &c. R. Co. Forsee v.—63 M. 66.
Alabama &c. R. Co. Groton Bridge &c. Co. v.—80 M. 162.
Alabama &c. R. Co. Hardy v.—73 M. 719.
Alabama &c. R. Co. Hasie v.—78 M. 413.
Alabama &c. R. Co. Hasie v.—79 M. 581.
Alabama &c. R. Co. Hill v.—79 M. 587.
Alabama &c. R. Co. Hooks v.—73 M. 145.
Alabama &c. R. Co. Hunnicutt v.—50 So. 697.
Alabama &c. R. Co. Jackson v.—58 M. 648.
Alabama &c. R. Co. Jackson v.—76 M. 703.
Alabama &c. R. Co. Johnson v.—69 M. 191.
Alabama &c. R. Co. Jones v.—72 M. 22.
Alabama &c. R. Co. Lowe v.—81 M. 9.
Alabama &c. R. Co. McGerrin v.—72 M. 1013.
Alabama &c. R. Co. McKenna v.—87 M. 652.
Alabama &c. R. Co. People's Bank v.—65 M. 365.
Alabama &c. R. Co. Postal Tel. Co. v.—68 M. 314.
Alabama &c. R. Co. Ragsdale v.—67 M. 106.
Alabama &c. R. Co. Rooks v.—28 So. 821.
Alabama &c. R. Co. Searles v.—69 M. 186.
Alabama &c. R. Co. Southern Tel. Co. v.—1 Miss. Dec. 489.
Alabama &c. R. Co. Sproule v.—78 M. 88.
Alabama &c. R. Co. State v.—67 M. 647.
Alabama &c. R. Co. Wells v.—67 M. 24.
Alabama &c. R. Co. Welsh v.—70 M. 20.
Alabama &c. R. Co. Wilson v.—63 M. 352.
Alabama &c. R. Co. Wilson v.—77 M. 714.
Albert Mackie Grocer Co. v. Byrd, 25 So. 156—paymt. 35.
Albin v. Howard, 74 M. 370—execution, 50; princ. & a. 145.
Albrecht v. State, 62 M. 516—costs, 109; excep. 38; int. liq. 88, 188.
Albright v. Flowers, 52 M. 246—app. & e. 880; eq. 119; partit. 99.
Alcorn v. Alcorn, 76 M. 907—inj. 163, 171.
Alcorn v. Hamer, 38 M. 652—const. law, 59; lev. 2; states, 120; statut. 35½, 259; tax, 3.
Alcorn v. Hill, see Alcorn v. Hamer.
Alcorn v. Sadler, 66 M. 221—inj. 163; waters, 117.
Alcorn v. Sadler, 71 M. 634—ease. 7; waters, 159.
Alcorn v. State, 57 M. 273—clks. of c. 70, 73; ex. & ad. 352; jud. s. 4.
Alcorn v. State, 71 M. 464—licens. 15.
Alcorn, Chism v.—71 M. 506.
Alcorn Cotton Oil Co. v. State, 54 So. 881—aduln. 2.
Alcorn County, Jones v.—56 M. 766.
Alcorn County, Reynolds v.—59 M. 132.
Alcorn, Eckerly v.—62 M. 228.
Alcorn Electric Light Co. Williams v.—53 So. 958.
Alcorn, Kimball v.—45 M. 145.
Alcorn, Kimball v.—45 M. 151.
Alcorn, Ladd v.—71 M. 395.

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Alcorn, Rector v.—88 M. 788.
Alcorn, Shelby v.—36 M. 273.
Alcorn, Slaton v.—51 M. 72.
Alcorn, Swain v.—50 M. 320.
Alcus, Butler v.—51 M. 47.
Alderson, Otts v.—10 S. & M. 476.
Alderson, Yost v.—58 M. 40.
Aldrich v. Lewis, 60 M. 229—partners. 318.
Aldrich, Dunbar v.—79 M. 698.
Aldrich, Reddy v.—11 So. 828.
Aldridge v. Grider, 13 S. & M. 281—plead. 232.
Aldridge v. State, 59 M. 250—hom. 112, 119, 300c; trial, 228.
Aldridge, Robinson v.—34 M. 352.
Ales v. Plant, 61 M. 259—ex. & ad. 328.
Alexander v. Beresford, 27 M. 747—ven. & pur. 36.
Alexander v. Berry, 54 M. 422—liens, 2; trusts, 30½.
Alexander v. Dulaney, 16 So. 355—app. & e. 1180; attach. 311; trial, 194, 260.
Alexander v. Eastland, 37 M. 554—app. & e. 247; plead. 136; tresp. 25, 41.
Alexander v. Equitable Fire Ins. Co. 12 So. 706—garn. 2, 95, 179.
Alexander v. Flood, 77 M. 925—app. & e. 214, 302.
Alexander v. Greenville, 54 M. 659—crim. l. 246; ind. 18; mun. corp. 603, 632, 639; penal. 22.
Alexander v. Herring, 55 So. 360—ex. & ad. 1, 76, 93.
Alexander v. Houston, 31 So. 211—chat. m. 249.
Alexander v. Kimbro, 49 M. 529—partners. 68; ten. in c. 11.
Alexander v. Lloyd, 70 M. 662—garn. 95; judgm. 119.
Alexander v. Manning, 58 M. 634—judges, 30; rec. 29.
Alexander v. Moye, 38 M. 640—eq. 247, 289; ven. & pur. 123b.
Alexander v. Polk, 39 M. 737—ack. 14; alt. inst. 1, 26; adv. pos. 112; champ. 7; deeds, 46; execution, 19; sheriffs, 3.
Alexander v. Porter, 88 M. 585—app. & e. 223.
Alexander v. Pringle, 27 M. 558—assign. 20; plead. 187.
Alexander v. Smith, 4 S. & M. 258—app. & e. 376, 803; courts, 200¼ 202c.
Alexander v. State, 60 M. 953—larc. 75, 77.
Alexander v. State, 21 So. 923—crim. l. 747, 1159; rape, 50, 62.
Alexander v. State, 22 So. 871—crim. l. 855, 1035.
Alexander v. Thomas, 70 M. 517—tax, 386, 465.
Alexander v. Western Union Tel. Co. 66 M. 161—cncts. 332; plead. 204; tel. & t. 36, 39, 61, 65, 67.
Alexander v. Western Union Tel. Co. 67 M. 386—brok. 8; tel. & t. 38.
Alexander v. Vicksburg, 68 M. 564—mast. & s. 304; mun. corp. 747.
Alexander v. Zeigler, 84 M. 560—conf. g. 11; land. & t. 323, 331; trial, 158.
Alexander, Aird v.—72 M. 358.
Alexander, Bedon v.—47 M. 254.
Alexander, Carson v.—34 M. 528.
Alexander, Catlett v.—4 H. 404.
Alexander, Jones v.—10 S. & M. 627.
Alexander, McCarroll v.—48 M. 128.
Alexander, Madison County Court v.—W. 423.
Alexander, Madison County Court v.—W. 523.
Alexander, O'Hara v.—56 M. 316.
Alexander, Probate Judge v.—31 M. 297.
Alexander, Shaw v.—32 M. 229.
Alexander, Vicksburg &c. R. Co. v.—62 M. 496.
Alexander, Wright v.—11 S. & M. 411.
Alford v. Laurel Imp. Co. 86 M. 375—corp. 88, 98.
Alford v. Pegues, 92 M. 558—mast. & s. 339.
Alford, Ellis v.—64 M. 8.
Alford, Gullich v.—61 M. 224.
Alford, Lauderdale County v.—65 M. 63.
Alford, Magee v.—48 So. 234.
Alford, Robertson v.—13 S. & M. 509.
Alfred v. Batson, 91 M. 749—j. p. 129.
Alfred v. State, 37 M. 296—courts, 45; jury, 58, 84, 103, 104, 110; slaves, 18c.
Alfred v. State, 32 So. 54—rape, 35.
Algheri v. State, 25 M. 584—crim. l. 552; hom. 234.
Alkinson, McCarlie v.—77 M. 594.
Allbritain, Kent v.—4 H. 317.
Allbritton, New Orleans &c. R. Co. v.—38 M. 242.
Allein v. Agricultural Bank, 3 S. & M. 48—bills & n. 313, 427, 440.
Allen v. Alliance Trust Co. 84 M. 319—mtg. 342c.
Allen v. Bennett, 8 S. & M. 672—frds. st. of. 105; ven. & pur. 246, 268.
Allen v. Board of Levee Commissioners, 57 M. 163—em. dom. 167, 264.
Allen v. Bobo, 81 M. 443—mon. paid, 1.
Allen v. Bratton, 47 M. 119—bills & n. 117, 328, 347, 455; ven. & pur. 108.
Allen v. Caffee, 85 M. 766—cov. 3.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Allen v. Dicken, 63 M. 91—chat. m. 46; judgm. 490.
Allen v. Edwards, 93 M. 719—corp. 215, 217, 262.
Allen v. Hillman, 69 M. 225—ex. & ad. 241, 328; lim. of act. 83, 105, 148.
Allen v. Hopsom, Freem. Ch. 276—eq. 23; fraud, 31; judgm. 428; ven. & pur. 228.
Allen v. Johnson, 48 M. 413—hus. & w. 58, 97.
Allen v. Kansas City &c. R. Co., 32 So. 3—r. r. 350.
Allen v. Keith, 26 M. 232—ex. & ad. 415b.
Allen v. Leflore County, 78 M. 671—deeds, 71; lim. of act. 97.
Allen v. Leflore County, 80 M. 298—eq. 39; estop. 39; inj. 188.
Allen v. Lenoir, 53 M. 321—ack. 23, 35, 55, 62; app. & e. 321; dism. 63; hus. & w. 175, 221, 235.
Allen v. Levee Commissioners, 57 M. 163—lev. 19.
Allen v. Levy, 59 M. 613—app. & e. 938; excep. 35, 40; judgm. 800a.
Allen v. Luckett, 94 M. 868—deeds, 70; eq. 8.
Allen v. Lyles, 35 M. 513—cust. & u. 9, 51.
Allen v. Mandeville, 26 M. 397—abate. & r. 51; lim. of act. 117; lis pens. 6.
Allen v. Martin, 61 M. 78—jud. s. 30, 31, 39, 41, 56; partit. 105, 106, 113.
Allen v. Miles, 36 M. 640—ex. & ad. 419; hus. & w. 49¾.
Allen v. Miller, 54 So. 731—cov. 108, 118, 130.
Allen v. Montgomery, 48 M. 101—agric. 11; attch. 66; bankr. 20, 142, 174; execution, 18; fact. 47; fraud. conv. 212, 241.
Allen v. Peete, 25 M. 29—guard. & w. 10.
Allen v. Poole, 54 M. 323—ex. & ad. 218; inf. 30, 31; lis pens. 6, 23; mtg. 526, 536; princ. & a. 177; tax. 693; ten. in c. 20, 36, 230, 266; ven. & pur. 315.
Allen v. Smith, 72 M. 689—app. & e. 1009; assign. f. b. c. 104, 161, 173; ex. & ad. 418; fraud. conv. 327; land. & t. 203.
Allen v. Standifer, 57 M. 612—agric. 12.
Allen v. State, 61 M. 627—crim. l. 665, 666½; gr. jury 33.
Allen v. State, 66 M. 385—crim. l. 673, 814, 1172; hom. 340d; trial, 252; witn. 362.
Allen v. State, 88 M. 159—hom. 234.
Allen v. State, 1 Miss. Dec. 126—new tr. 67.
Allen v. State, 45 So. 833—rape 54.
Allen v. State, 53 So. 498—crim. l. 1105, 1106.
Allen v. Tate, 58 M. 585—bills & n. 443, 457; hus. & w. 208.
Allen v. Union &c. Bank, 72 M. 549—assign. f. b. c. 160; comp. w. cred. 25; ev. 392.
Allen v. Yazoo &c. R. Co. 88 M. 25—mast. & s. 261.
Allen, Beck v.—58 M. 143.
Allen, Board of Levee Commissioners v.—60 M. 93.
Allen, Clay v.—64 M. 426.
Allen, Cooper v.—57 M. 694.
Allen, Cumberland Tel. Co. v.—89 M. 832.
Allen, Davidson v.—36 M. 419.
Allen, Farmer v.—85 M. 672.
Allen, Fisher v.—2 H. 611.
Allen, Hall v.—75 M. 175.
Allen, Harrington v.—48 M. 492.
Allen, Hester v.—52 M. 162.
Allen, Huntington v.—44 M. 654.
Allen, Imperial Cotton Oil Co. v.—83 M. 27.
Allen, Land v.—65 M. 455.
Allen, Leflore v.—80 M. 298.
Allen, Ligon v.—56 M. 632.
Allen, McDaniel v.—64 M. 417.
Allen, Mask v.—17 So. 82.
Allen, Moore v.—25 M. 363.
Allen, Moore v.—72 M. 273.
Allen, Smith v.—39 M. 469.
Allen, Smythe v.—67 M. 146.
Allen, State v.—69 M. 508.
Allen, Tishomingo Sav. Inst. v.—76 M. 114.
Allen, Tobin v.—53 M. 563.
Allen, Union &c. Bank v.—77 M. 442.
Allen, Van Range v.—7 So. 499.
Allen, Ware v.—64 M. 545.
Allen West Commission Co. v. Millstead, 92 M. 837—judgm. 302, 682.
Allen-West Com. Co. Dollar v.—78 M. 274.
Allen, Western Union Tel. Co. v.—66 M. 549.
Alley, Jane v.—64 M. 446.
Alley, State v.—96 M. 720.
Allgood v. Hill, 54 M. 666—counties 47.
Allgood, Watt v.—62 M. 38.
Alliance, Owen v.—77 M. 500.
Alliance Trust Co. v. Nettleton Hardware Co., 74 M. 584—lis pens. 23; plead. 115; tresp. 20, 43; trover, 13, 33; ven. & pur. 229.
Alliance Trust Co. Allen v.—84 M. 319.
Alliance Trust Co. Taylor v.—71 M. 694.
Allison v. Abrams, 40 M. 747—des. & d. 86; ex. & ad. 459, 512.
Allison, Neal v.—50 M. 175.
Alliston v. Lindsley, 12 S. & M. 656—plead. 91, 139, 384.
Allis̱ton, Thornton v.—12 S. & M. 124.
Allnutt, Amos v.—2 S. & M. 215.
Alred, Kelly v.—65 M. 495.
Alsobrook v. Eggleston, 69 M. 833—adv. pos.

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60; judgm. 747; jud. s. 31, 49, 53; partit. 95.
Alsop v. Cowan, 66 M. 451—execution 71; judgm. 867.
Alsop, Berry v.—45 M. 1.
Alsop, Cowen v.—51 M. 158.
Alsop, McIlvoy v.—45 M. 365.
Alston v. Foster, Freem Ch. 732—guard. & w. 166.
Alston v. Newcomer, 42 M. 186—attach. 25.
Alston v. Robinson, 49 M. 348—spec. perf. 3; ven. & pur. 178.
Alston, Foster v.—6 H. 406.
Alston, Healy v.—25 M. 190.
Alston, Kennard v.—62 M. 763.
Alsup v. Banks, 68 M. 664—land. & t. 93, 193, 200.
Alsworth v. Cordtz, 31 M. 32—inf. 30, 55, 72; trusts 81.
Altneave, McCormick v.—73 M. 86.
Alvis, Nations v.—5 S. & M. 338.
Amari, Saucier v.—63 M. 276.
American B. & L. Assn. Hart v.—29 So. 999.
American Build. &c. Assn. McMahan v.—75 M. 965.
American Burial Case Co. v. Shaughnessy, 59 M. 398—courts, 22; dism. 80; judgm. 564, 570; plead. 431.
American Cent. Ins. Co. v. Antram, 86 M. 224—cncts. 98; ins. 255, 256, 371, 372, 378, 392, 500, 665.
American Cent. Ins. Co. v. Antrim, 88 M. 518—trial, 252, 296.
American Colonization Society v. Wade, 8 S. & M. 610—inj. 110.
American Col. Soc. Wade v.—4 S. & M. 670.
American Col. Soc. Wade v.—7 S. & M. 663.
American Cooperage Co. Pecan Lake Mill Co. v.—15 So. 580.
American Cotton Co. v. Herring, 84 M. 693—sales, 77, 93, 339, 340; wareh. 27.
American Express Co. v. Bradford, 82 M. 130—dep. 31; ev. 543.
American Express Co. v. Crawley, 88 M. 525—carr. 18, 19.
American Express Co. v. Jennings, 86 M. 329—carr. 105, 124, 135; dam. 21, 92, 163, 218; trial, 190.
American Express Co. Flora v.—92 M. 66.
American Express Co. Richberger v.—73 M. 161.
American Fire Ins. Co. v. First Nat. Bank, 73 M. 469—ins. 144, 376, 388; licens. 32, 39.
American Fire Ins. Co. v. State, 75 M. 24—monop. 10, 18, 31.
American Fire Ins. Co. Freed v.—90 M. 72.
American Freehold Mortgage Co. v. Brower, 32 So. 906—corp. 262.
American Freehold Land &c. Co. v. Jefferson, 69 M. 770—bills & n. 444; cncts. 144; eq. 66; mtg. 605; usury 2, 74, 94, 95, 99, 111.
American Freehold &c. Co. Cox v.—88 M. 88.
American Life Ins. Co. v. Mahone, 56 M. 180—ins. 257, 291, 379, 560, 664; jury 42.
American Life Ins. Co. Wood v.—7 H. 609.
American Life Ins. &c. Co. v. Emerson, 4 S. & M. 177—bills & n. 411, 416, 489, 498.
American Nat. Bank, Miller v.—76 M. 84.
American Snuff Co. Morrison v.—79 M. 330.
American Soda Fountain Co. Murphy v.—86 M. 791.
American Steel Hoop Co. v. Searles, 93 M. 1—estop. 63; sales, 179, 410.
American Surety Co. v. Holly Springs, 77 M. 428—corp. 663, 666; princ. & s. 148, 153.
American Surety Co. v. United States, 76 M. 289—bonds 131; u. s. 111.
American Surety Co. Cole v.—90 M. 782.
American Surety Co. Fewell v.—80 M. 782.
American &c. Mortgage Co. v. Jefferson, 69 M. 770—acct. 17; cncts. 7.
American &c. Mortg. Co. Lucas v.—72 M. 366.
Ames v. Dorrah, 76 M. 187—fraud. conv. 85, 95, 182, 207, 218, 270, 272.
Ames v. Williams, 72 M. 760—eq. 2; guard. & w. 8; judgm. 474, 488.
Ames v. Williams, 73 M. 772—app. & e. 790, 1034.
Ames v. Williams, 74 M. 404—guard. & w. 147a, 175.
Ames, Hoskins v.—78 M. 986.
Ames, Saxon v.—47 M. 565.
Amite County v. Steen, 72 M. 567—adv. pos. 114.
Amite County, Robinson v.—2 Miss. Dec. 75.
Ammons v. State, 80 M. 592—crim. l. 522.
Ammons v. State, 89 M. 369—crim. l. 768.
Ammons v. Whitehead, 31 M. 99—execution, 159; judgm. 857; j. p. 141, 159, 167.
Ammons, Freemans v.—91 M. 672.
Ammons, Sullivan v.—95 M. 196.
Amos v. Allnutt, 2 S. & M. 215—attch. 110, 132.
Amos v. Mobile &c. R. Co. 63 M. 509—death, 31.
Anderson v. Alabama &c. R. Co. 81 M. 587—r. r. 246.
Anderson v. Beck, 64 M. 113—false imp. 20.
Anderson v. Burke, 6 S. & M. 475—plead. 139, 218, 409, 431; set-off, 12.
Anderson v. Burnett, 5 H. 165—fraud, 64; sales, 252, 268, 443; trial, 135.

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Anderson v. Cameron, 63 M. 114—ex. & ad. 510a.
Anderson v. Carlisle, 7 H. 408—execution, 333, 348, 353, 357; jury, 16; sheriffs, 101.
Anderson v. Cumberland Tel. &c. Co., 86 M. 341—ev. 77; mast. & s. 286; trial, 158; witn. 311.
Anderson v. Duke, 28 M. 87—eq. 22; ex. & ad. 115.
Anderson v. Falconer, 34 M. 257—inj. 250.
Anderson v. Faulconer, 30 M. 145—cncts. 117; inj. 59.
Anderson v. Gregg, 44 M. 170—ex. & ad. 86, 88, 104, 294, 296, 302, 314g, 519; forc. e. & d. 522; hus. & w. 138; witn. 115.
Anderson v. Hawks, 70 M. 639—tax. 549.
Anderson v. Hill, 12 S. & M. 679—excep. 26; ven. & pur. 37, 304, 308a, 309.
Anderson v. Ingersoll, 62 M. 73—counties, 47; tax. 449, 465, 494.
Anderson v. Issaquena County, 75 M. 873—lev. 30.
Anderson v. Lachs, 59 M. 111—assign. f. b. c. 32, 99, 154, 158.
Anderson v. Leland, 46 M. 290—acct. acti. on 1; assum. 23; witn. 139.
Anderson v. Leland, 48 M. 253—app. & e. 169.
Anderson v. Lewis, Freem. Ch. 178—deeds, 67; est. 7; Indians, 3, 14, 15, 24; ven. & pur. 8.
Anderson v. Lincoln, 5 H. 279—eq. 10; ven. & pur. 112, 115.
Anderson v. Locke, 64 M. 283—anim. 47, 95; j. p. 57.
Anderson v. McInnis, 56 So. 170—eq. 429.
Anderson v. McNeal, 82 M. 542—fraud. conv. 241; lim. of act. 171, 181.
Anderson v. Maxwell, 94 M. 138—app. & e. 171.
Anderson v. Miller, 7 S. & M. 586—assign. 47; atty. & c. 110; bankr. 137, 155, 256.
Anderson v. Mobile &c. R. Co., 38 So. 661—carr. 41, 147.
Anderson v. Moore, 84 M. 400—eject. 10.
Anderson v. Newman, 60 M. 532—cred. s. 22; eq. 237; ex. & ad. 325, 437; lis pens. 22.
Anderson v. Patrick, 7 H. 347—bills & n. 452, 474, 480, 486.
Anderson v. Pryor, 10 S. & M. 620—wills 94, 96.
Anderson v. Robertson, 24 M. 389—lim. of act. 148, 152; plead. 218.
Anderson v. Robertson, 32 M. 241—partners. 102, 112; plead. 252.
Anderson v. Root, 8 S. & M. 362—evid. 368.
Anderson v. Spencer, 51 M. 869—ven. & pur. 254, 261, 275.
Anderson v. State, 3 S. & M. 751—crim. l. 1024.
Anderson v. State, 23 M. 459—counties, 208; liens, 1; tax. 501.
Anderson v. State, 82 M. 784—rape, 14, 48.
Anderson v. State, 91 M. 407—crim. l. 1169; hom. 338c.
Anderson v. State, 92 M. 656—crim. l. 126.
Anderson v. State, 50 So. 554—crim. l. 596.
Anderson v. State, 53 So. 393—crim. l. 765.
Anderson v. Tarpley, 6 S. & M. 507—app. & e. 1140; atty. & c. 163; bills & n. 474; partners. 214.
Anderson v. Tindall, 26 M. 332—ex. & ad. 418.
Anderson v. Tyson, 6 S. & M. 244—replev. 107.
Anderson v. Walker, 31 M. 642—app. & e. 1030.
Anderson v. Walton, Freem. Ch. 347—eq. 37.
Anderson v. Wanzer, 5 H. 587—garn. 140, 188; partners. 208, 217.
Anderson v. Warrick, 2 Miss. Dec. 313—app. & e. 1140.
Anderson v. Western Union Tel. Co. 77 M. 851—princ. & s. 172.
Anderson v. Wilder, 33 M. 606—estop. 27, 46; pub. lands, 139.
Anderson v. Wilkinson, 10 S. & M. 601—interpl. 1, 23, 32.
Anderson v. Williams, 24 M. 684—action, 13, 20; app. & e. 689; judgm. 863.
Anderson, Andrews v.—16 So. 346.
Anderson, Berry v.—2 H. 649.
Anderson, Burrell v.—1 Miss. Dec. 357.
Anderson, Byrne v.—10 S. & M. 81.
Anderson, Carr v.—24 M. 188.
Anderson, Caruth v.—24 M. 60.
Anderson, Clark v.—2 H. 852.
Anderson, Clements v.—46 M. 581.
Anderson, Cumberland &c. Co. v.—89 M. 732.
Anderson, Delafield v.—7 S. & M. 630.
Anderson, Gerault v.—W. 30.
Anderson, Goodwin v.—5 S. & M. 730.
Anderson, Gordon v.—90 M. 677.
Anderson, Green v.—39 M. 359.
Anderson, Hill v.—5 S. & M. 216.
Anderson, Hunt v.—33 M. 559.
Anderson, Issaquena County v.—38 So. 47.
Anderson, Jackson v.—51 So. 896.
Anderson, McLemore v.—92 M. 42.

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Anderson, Memphis Grocery Co. v.—76 M. 322.
Anderson, Memphis &c. R. Co. v.—51 M. 829.
Anderson, Moseley v.—40 M. 49.
Anderson, Niles v.—5 H. 365.
Anderson, Presley v.—42 M. 274.
Anderson, Price v.—65 M. 410.
Anderson, Roach v.—28 M. 234.
Anderson, Scales v.—26 M. 94.
Anderson, Selma &c. R. Co. v.—51 M. 829.
Anderson, Still v.—63 M. 545.
Anderson, Stingler v.—12 So. 831.
Anderson, Welborn v.—37 M. 155.
Anderson, Yazoo &c. R. Co. v.—76 M. 582.
Anderson, Yazoo &c. R. Co. v.—77 M. 28.
Anding v. Davis, 38 M. 574—adv. pos. 42, 76; chat. m. 34, 35, 300; deeds, 17; eq. 87, 232; ev. 462; frds. st. of, 56; lim. of act. 70a, 72; mtg. 34, 37; trusts, 17, 40; wills, 66, 88.
Anding v. Levy, 57 M. 51—acct. st. 4, 19; app. & e. 1055, 1133; costs, 179; licens. 8, 39; statut. 275, 276.
Anding v. Levy, 60 M. 487—refer. 94, 99.
Andre v. Morrow, 65 M. 315—sales, 346; set-off, 25.
Andre, Osburn v.—58 M. 609.
Andrews v. Anderson, 16 So. 346—eject. 113; estop. 35; inf. 31.
Andrews v. Andrews, 48 M. 220—wills, 140.
Andrews v. Brumfield, 32 M. 107—ex. & ad. 39, 129, 153, 307; life est. 3, 23; powers, 33; wills, 591, 616.
Andrews v. Carr, 26 M. 577—assign. 133; ex. & ad. 519.
Andrews v. Covington, 69 M. 740—clks. of c. 7; quo. w. 24, 55; offic. 37, 49.
Andrews v. Jones, 32 M. 274—hus. & w. 31e, 110½, 179.
Andrews v. Kramer, 77 M. 151—ev. 130, 333; guar. 3.
Andrews v. McLeod, 66 M. 348—execution, 188.
Andrews v. Mann, 31 M. 322—partners. 183, 241.
Andrews v. New Orleans Brewing Assn. 74 M. 362—cncts. 135.
Andrews v. Partee, 79 M. 80—app. & e. 49; chat. m. 188.
Andrews v. Planters' Bank, 7 S. & M. 192—partners. 147, 217.
Andrews v. Powell, 41 M. 729—bills & n. 540; courts, 10; judgm. 17.
Andrews v. Simmons, 68 M. 732—des. & d. 25; marr. 38.
Andrews v. Wallace, 72 M. 291—app. & e. 782, 1163.
Andrews v. Washburn, 3 S. & M. 109—mech. liens, 2, 258.
Andrews v. Wilkes, 6 H. 554—judgm. 755, 766, 775, 784, 789, 791.
Andrews v. Yazoo &c. R. Co. 86 M. 129—carr. 247, 283.
Andrews, Bernheim v.—65 M. 28.
Andrews, Bookout v.—25 So. 865.
Andrews, Bowers v.—52 M. 696.
Andrews, Chisholm v.—57 M. 636.
Andrews, Handy v.—52 M. 626.
Andrews, Illinois Cent. R. Co. v.—61 M. 474.
Andrews, Keirn v.—59 M. 39.
Andrews, Norwood v.—71 M. 641.
Andrews, Pope v.—Sm. & M. Ch. 135.
Andrews, Snodgrass v.—30 M. 472.
Andrews, Wells v.—60 M. 373.
Angevine, Wolfe v.—57 M. 767.
Anglin v. Broadnax, 52 So. 865—dower, 114; lim. of act. 72.
Anglin v. State, 96 M. 215—crim. l. 829; int. liq. 147.
Anketel v. Torry, 7 S. & M. 467—execution, 348.
Anketell, Briscoe v.—28 M. 361.
Anketell, Briscoe v.—31 M. 361.
Anonymous Case, 37 M. 54—bast. 53, 59, 62; ev. 471; witn. 330.
Anonymous Case, 58 M. 15—witn. 60.
Ansley, Gulfport Land &c. Co. v.—87 M. 648.
Anspach v. Relfe, 2 Miss. Dec. 243—attach. 266, 304; parties, 59.
Anstill, Dozier v.—8 S. & M. 528.
Anthony v. Capel, 53 M. 350—ex. & ad. 416; judgm. 886; princ. & s. 110.
Anthony v. State, 13 S. & M. 263—crim. l. 19, 1187; ind. 107, 110; slaves, 18b.
Anthony, McCleary v.—54 M. 708.
Antignance v. Central Bank, 26 M. 110—assign. f. b. c. 267.
Antram, American Cent. Ins. Co. v.—86 M. 224.
Antrim, American Cent. Ins. Co. v.—88 M. 518.
Apgar v. Howard, 11 So. 110—ev. 114.
Apperson v. Fant, 42 M. 252—app. & e. 398.
Apperson v. Wilbourn, 58 M. 439—princ. & s. 194.
Apple v. Ganong, 47 M. 189—app. & e. 1009; hus. & w. 5.
Applegate v. Taylor, 56 M. 685—hus. & w. 157.
Applewhite v. Foxworthy, 79 M. 773—eq. 324; tax. 715, 809.

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Applewhite v. Nelms, 71 M. 482—marshaling, 4, 5, 8.
Applewhite, Ferguson v.—10 S. & M. 301.
Applewhite, Hitt v.—20 So. 161.
Arbour v. Yazoo &c. R. Co. 96 M. 340—courts, 69.
Arbuckle v. Nelms, 50 M. 556—land. & t. 239, 241, 248.
Arbuckle v. State, 80 M. 15—crim. l. 261, 301, 1031, 1033, 1128, 1172.
Archer v. Helm, 70 M. 874—bound. 33, 46, 48; eject. 13, 86, 87, 89, 110; estop. 103; ev. 90, 122; frds. st. of, 62; trial, 56; witn. 367.
Archer v. Jones, 26 M. 583—eq. 141; ex. & ad. 300, 314b, 420; lim. of act. 180; mtg. 427.
Archer v. Putnam, 12 S. & M. 286—usury 19, 29, 32.
Archer v. Sinclair, 49 M. 343—bailm. 14; trial, 267; wareh. 24.
Archer v. Stamps, 4 S. & M. 352—parties 65; plead. 236.
Archer v. Yazoo &c. R. Co., 82 M. 110—deeds 8.
Archer, Grand Gulf Bank v.—8 S. & M. 151.
Archer, Harper v.—4 S. & M. 99.
Archer, Harper v.—8 S. & M. 229.
Archer, Harper v.—9 S. & M. 71.
Archer, Harper v.—28 M. 212.
Archer, Paxton v.—2 Miss. Dec. 611.
Archer, Sutton v.—93 M. 603.
Archibald v. Bank, 64 M. 523—mar. liens 17, 30, 74.
Archibald v. Mississippi &c. R. Co., 66 M. 424—r. r. 114; tresp. 9; venue, 4; waters, 59.
Archibald, Miss. &c. R. Co. v.—67 M. 38.
Arighi, Surget v.—11 S. & M. 87.
Arky v. Cameron, 92 M. 632—app. & e. 1027; garn. 143; j. p. 209.
Arky, Floyd v.—89 M. 162.
Armat, Pitcher v.—5 H. 288.
Armfield v. Armfield, Freem. Ch. 311—hus. & w. 28.
Armfield v. Nash, 31 M. 361—judgm. 572, 713; mast. & s. 42; plead. 131; schools, 143.
Armistead v. Bernard, 62 M. 180—attach. 300.
Armistead v. Blythe, 20 So. 298—usury, 2.
Armistead v. Chatters, 71 M. 509—mast. & s. 339.
Armistead v. Cocke, 62 M. 198—attach. 20.
Armistead, Barker v.—82 M. 788.
Armistead Lumber Co. v. Louisville &c. R. Co., 11 So. 472—carr. 94.
Armistead, Reedy v.—31 M. 353.
Armitage v. Rector, 62 M. 600—j. p. 86, 164, 182.
Armor v. Bank of Loudon, 86 M. 658—b. & l. assn. 33, 34; can. of i. 6; usury 66, 72, 146.
Armor, Bank of Loudon v.—90 M. 709.
Armor-Cudahy Packing Co. v. First Nat. Bank, 69 M. 700—banks 119, 128, 130, 137.
Armour v. Meridian, 24 So. 533—int. liq. 133, 223, 234.
Armour Packing Co., Vicksburg v.—24 So. 224.
Armstrong v. Armstrong, 32 M. 279—div. 8, 26, 47, 89, 95, 123, 233, 240, 248; hus. & w. 5.
Armstrong v. Barton, 42 M. 506—app. & e. 496; judgm. 18, 251.
Armstrong v. Canady, 35 So. 138—ten. in c. 55.
Armstrong v. Fusz, 16 So. 532—inj. 188.
Armstrong v. Guenther, 67 M. 698—assign. f. b. c. 84.
Armstrong v. Minkus, 93 M. 621—judgm. 926, 930.
Armstrong v. Owens, 83 M. 10—chat. m. 38.
Armstrong v. Stovall, 26 M. 275—deeds, 54, 99; eq. 327; fraud. conv. 172, 185; frds. st. of, 45; hus. & w. 168, 193; sales, 468.
Armstrong v. Whitehead, 81 M. 35—app. & e. 784.
Amstrong, Cook v.—25 M. 63.
Armstrong, Doss v.—6 H. 258.
Armstrong, Holloway v.—30 M. 504.
Armstrong, Illinois Cent. R. Co. v.—93 M. 583.
Armstrong, Jarvis v.—94 M. 145.
Armstrong, Mims v.—42 M. 429.
Armstrong, Minkus v.—90 M. 751.
Armstrong, Pope v.—3 S. & M. 214.
Armstrong, State v.—91 M. 513.
Arnett v. Bitsel, W. 496—slaves, 9.
Arnett v. Evans, W. 471—assum. 5.
Arnola, Illinois Cent. R. Co. v.—78 M. 787.
Arnold v. Elkins, 67 M. 675—fixt. 10; hus. & w. 45, 129.
Arnold v. Hamer, Freem. Ch. 509—ex. & ad. 242; marshaling, 8; partners. 177, 243, 245.
Arnold v. Leonard, 12 S. & M. 258—bankr. 256; bills & n. 208.
Arnold v. Miller, 26 M. 152—eq. 426.
Arnold v. State, 77 M. 463—counties, 94.
Arnold v. Wynn, 26 M. 338—j. p. 78; sheriffs, 25.
Arnold, Adams v.—76 M. 655.
Aron v. Chaffe, 72 M. 159—inj. 167; judgm. 951; marshaling, 8.
Aron, Noel v.—8 So. 647.
Arrghi, Jefferson County v.—51 M. 667.
Arrighi, Jefferson County v.—54 M. 668.

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Arrington v. Mobile &c. R. Co., 30 M. 470—judgm. 107.
Arrington, Conington v.—32 M. 144.
Arthur v. Adam, 49 M. 404—counties, 53, 56; judgm. 386.
Arthur v. Commercial &c. Bank, 9 S. & M. 394—assign. f. b. c. 89, 151; banks, 39, 78; corp. 550; execution, 28; r. r. 18, 32, 135.
Arthur v. Mitchell, 10 S. & M. 326—new tr. 89; witn. 100, 105.
Arthur v. Pearson, 32 M. 131—cov. 107; ven. & pur. 96.
Arthur, Bowling v.—34 M. 41.
Arthur, Paxton v.—60 M. 832.
Arthur, Taylor v.—9 S. & M. 183.
Ash v. Lee, 51 M. 101—j. p. 44.
Ashby v. Carr, 40 M. 64—assign. 35; set-off, 51.
Ashcraft, Wofford v.—47 M. 641.
Asher, Fitch v.—56 M. 571.
Asher, Vaccaro v.—11 So. 531.
Ashford v. State, 81 M. 414—crim. l. 761; rape, 48.
Ashford v. State, 35 So. 569—rape, 53.
Ashford, Brown v.—56 M. 677.
Ashley v. State, 37 So. 960—hom. 216.
Ashley v. Young, 79 M. 129—ex. & ad. 150; land. & t. 256.
Ashley, Smith County v.—56 So. 165.
Askew v. Askew, 49 M. 301—j. p. 44, 141, 166.
Askew, Dickerson v.—82 M. 436.
Assurance Co. Sneed v.—72 M. 51.
Assurance Society, Mayo v.—71 M. 590.
Aston v. Robinson, 49 M. 348—spec. perf. 3; ven. & pur. 178.
Atherton, Commercial Bank v.—1 S. & M. 641.
Atchinson, Botanico Med. Col. v.—41 M. 188.
Atchison v. Potter, 6 S. & M. 120—j. p. 147; slaves, 18.
Atkins v. State, 32 So. 921—anim. 37.
Atkinson v. Felder, 78 M. 83—eq. 39, 385; mtg. 386; trial, 71.
Atkinson v. Foxworth, 53 M. 733—attach. 337, 345, 353, 354; dam. 204; parties, 21; replev. 92, 96, 127.
Atkinson v. Foxworth, 53 M. 741—attach. 301, 304, 335, 342, 353.
Atkinson v. Greaves, 70 M. 42—bankr. 256; comp. 14; fraud. conv. 270; ven. & pur. 241.
Atkinson v. Pike County, 73 M. 348—app. & e. 36; tax. 495.
Atkinson v. Sinnott, 67 M. 502—cncts. 147, 151; deeds, 95, 114; ev. 449; ven. & pur. 90.
Atkinson v. Whitney, 67 M. 655—arb. & a. 5; frds. st. of, 114, 118; mtg. 407; spec. perf. 32, 48.
Atkinson &c. Co. v. Varando, 91 M. 825—home. 115.
Atkinson, ex parte, 40 M. 17—guard. & w. 144.
Atkinson, Greaves v.—68 M. 598.
Atkinson, Grenada Cotton Compress Co. v.—94 M. 93.
Atkinson, Hammel v.—82 M. 465.
Atkinson, Packwood v.—79 M. 646.
Atkinson, Simmons v.—69 M. 862.
Atkinson, Sylverstein v.—45 M. 81.
Atlanta Stove Works v. Hamilton, 83 M. 704—mast. & s. 21, 30.
Attala County v. Grant, 9 S. & M. 77—counties, 163; mand. 1, 51, 114, 157, 164, 179.
Attala County v. Kelly, 68 M. 40—tax. 192, 196, 205.
Attala County v. Niles, 58 M. 48—eq. 116; high. 64.
Attala County, Strahan v.—91 M. 529.
Attala County, Teague v.—56 M. 29.
Attlesy v. State, 12 So. 210—crim. l. 770; int. liq. 239.
Attorney General, Lindsey v.—33 M. 508.
Atwood v. Meredith, 37 M. 635—app. & e. 1057; ev. 472; execution, 194; hus. & w. 129, 138; new tr. 41; partners. 18, 45, 220.
Atwood v. Thomas, 60 M. 162—bankr. 389½.
Augur, Gulfport Land &c. Co. v.—48 So. 722.
Aust v. Rosenbaum, 74 M. 893—eq. 299; mtg. 605.
Austin v. Barber, 88 M. 553—eq. 418.
Austin v. Dean, see Austin v. Lamar.
Austin v. Feamster, 1 S. & M. 166—princ. & a. 121; witn. 100, 105, 120.
Austin v. Lamar, 23 M. 189—courts, 198, 200¼; ex. & ad. 510a, 512; guard. & w. 58, 175; statut. 267.
Austin v. Millspaugh, 90 M. 354—dam. 105.
Austin v. State, 48 So. 817—rape, 16.
Austin v. Vicksburg Traction Co., 95 M. 867—st. r. r. 80, 85, 117.
Austin, Fowler v.—1 H. 156.
Austin, Hooker v.—41 M. 717.
Austin, Lochte v.—69 M. 271.
Austin, State v.—23 So. 34.
Austin, Watson v.—63 M. 469.
Auter v. The Jacobs, 34 M. 269—attach. 2, 73, 104.
Auze, Commercial Bank v.—74 M. 609.
Avant v. State, 71 M. 78—ars. 22, 25.
Avant v. State, 88 M. 226—crim. l. 888, 992.
Aven, Bates v.—60 M. 955.
Avent v. McCorkle, 45 M. 221—lim. of act. 164, 167, 194; mtg. 16, 171; plead. 266; ven. & pur. 260, 266.

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Avent v. Maroney, 12 So. 209—bills & n. 393; trial, 143.
Avera v. Williams, 81 M. 714—adv. pos. 81; parties, 77; tresp. 56.
Avora, Farmers Loan &c. Co. v.—7 So. 358.
Avery v. McClure, 94 M. 172—action 27, 28; corp. 236.
Avery v. Myers, 60 M. 367—ex. & ad. 94.
Avery, Crawford v.—35 M. 205.
A. W. Stevens Lumber Co. v. Hughes, 38 So. 769—mtg. 315; quiet t. 43, 44; subrog. 13.
Aydelott, Hedges v.—46 M. 99.
Ayer v. Bailey, 5 H. 688—judgm. 17a, 236.
Ayers v. Mitchell, 3 S. & M. 683—bills & n. 313; can. of i. 47; cncts. 350; estop. 86; ven. & pur. 37, 104, 119, 123b, 123c, 339.
Ayers v. State, 60 M. 709—crim. l. 717, 808½; hom. 124, 125.
Ayers v. Taylor, 25 M. 200—clks. of c. 64.
Ayers, Moore v.—5 S. & M. 310.
Ayers, Vick v.—56 M. 670.
Azlin v. Lake, 57 M. 693—attch. 349.

B

Babcock v. Scott, 1 H. 100—app. & e. 963; plead. 25, 76, 85, 106.
Babers, Desearn v.—62 M. 421.
Backrack, Cassell v.—42 M. 56.
Bacon v. Bacon, 76 M. 458—app. & e. 1049, 1055, 1067; false imp. 15, 21, 37; ins. p. 49; trial, 255, 260, 269.
Bacon v. Bevan, 44 M. 293—hus. & w. 18, 164, 171; judgm. 17a; proc. 67, 132.
Bacon v. Cohea, 12 S. & M. 516—banks, 77, 216; bills & n. 194, 286, 448; eq. 23.
Bacon v. Conn, Sm. & M. Ch. 348—tax. 710, 801; tender, 14.
Bacon v. Gardner, 23 M. 60—lis pens. 6; lim. of act. 117.
Bacon v. Gray, 23 M. 140—lim. of act. 72a.
Bacon v. Howell, 60 M. 362—chat. m. 138; land. & t. 248; ven. & pur. 27, 157.
Bacon v. Mississippi Ins. Co. 31 M. 116—corp. 300, 382, 460.
Bacon v. Reed, 27 M. 469—execution, 75.
Bacon v. Ventress, 32 M. 158—cncts. 265; eq. 227; nova. 3; princ. & s. 157.
Bacon, Berry v.—28 M. 318.
Bacon, Brown v.—27 M. 589.
Bacon, Catlett v.—33 M. 269.
Bacon, Coats v.—77 M. 320.
Bacon, Foute v.—24 M. 156.
Bacon, Holmes v.—28 M. 607.
Bacon, Holt v.—25 M. 567.
Bacon, Johnson v.—92 M. 156.
Bacon, Nevitt v.—32 M. 212.
Bacon, Parker v.—26 M. 425.
Bacon, Railey v.—26 M. 455.
Bacon, Sessions v.—23 M. 272.
Bacon, Simonton v.—49 M. 582.
Bacon, State v.—77 M. 366.
Bacot v. Hazelhurst Lumber Co. 23 So. 481—partners. 15; sales, 364; witn. 323, 379.
Bacot v. Phoenix Ins. Co. 96 M. 223—dism. 56; ins. 282, 624.
Bacot v. State, 94 M. 225—int. liq. 133, 176.
Bacot v. State, 96 M. 125—crim. l. 456, 782.
Badley v. Ladd, 70 M. 688—execution, 123; sheriffs, 16.
Badley, Illinois Cent. R. Co. v.—94 M. 437.
Baggett v. Beard, 43 M. 120—inj. 188.
Baggett v. McCormick, 73 M. 552—bailm. 21, 35.
Baggett v. State, 69 M. 625—rec. s. goods, 7, 8.
Baggett v. Watson, 70 M. 64—costs, 120.
Baggett, Brookhaven v.—61 M. 383.
Bahenhauser, Easly v.—59 M. 580.
Bailet, Groves v.—24 M. 588.
Bailey v. Delta Electric Light &c. Co. 86 M. 634—release, 29; torts, 22.
Bailey v. Dilworth, 10 S. & M. 404—ex. & ad. 83, 86, 87, 508, 508a.
Bailey v. Fitz-Gerald, 56 M. 578—courts, 97; em. dom. 179; guard. & w. 8, 53, 76, 159, states, 18, 18c.
Bailey v. Fuqua, 24 M. 497—tax. 346, 501.
Bailey v. Gaskins, 6 H. 519—app. & e. 1175; judgm. 195.
Bailey v. Henry, 1 M. Dec. 565—acct. acti. on, 7; sales, 82.
Bailey v. Osborne, 33 M. 128—wills, 241, 249.
Bailey v. State, 56 M. 637—judges, 7; offic. 51.
Bailey v. State, 67 M. 333—crim. l. 369, 678; int. liq. 241; witn. 277.
Bailey v. State, 93 M. 79—hom. 348.
Bailey v. State, 94 M. 863—crim. l. 413, 942.
Bailey, Ayer v.—5 H. 688.
Bailey, Binkins v.—23 M. 284.
Bailey, Buckingham v.—4 S. & M. 538.
Bailey, Cocke v.—42 M. 81.
Bailey, Fitz-Gerald v.—58 M. 658.
Bailey, Fleming v.—44 M. 132.
Bailey, Gibson v.—24 M. 237.
Bailey, Glazier v.—47 M. 395.
Bailey, Hoopes v.—28 M. 328.
Bailey, Jones v.—5 H. 564.
Bailey, Knotts v.—54 M. 235.
Bailey, Matthews v.—25 M. 33.
Bailey, Morin v.—55 M. 570.
Bailey, Nevin v.—62 M. 433.

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Bailey, New Orleans &c. R. Co. v.—40 M. 395.
Bailey, O'Donnel v.—24 M. 386.
Bailey, Strauss v.—58 M. 131.
Bailey, Wofford v.—57 M. 239.
Baily, Wood v.—77 M. 815.
Bain v. Brooks, 46 M. 537—agric. 13.
Bain v. State, 67 M. 557—perj. 15.
Bainbridge v. Woodburn, 52 M. 95—mtg. 427, 532, 536.
Baine v. Williams, 10 S. & M. 113—app. & e. 443; execution, 154a, 155, 155b, 172; judgm. 405, 786, 793; princ. & s. 168; marshaling, 8.
Baine, Hines v.—Sm. & M. Ch. 530.
Baines v. McGee, 1 S. & M. 208—eq. 17, 148, 237; ex. & ad. 141, 158, 293, 365, 368.
Baines, Hibbette v.—78 M. 695.
Baird v. Bardwell, 60 M, 164—judgm. 570, 650.
Baird v. Boucher, 60 M. 326—life est. 23; wills, 461, 690.
Baird v. Georgia Pac. R. Co. 12 So. 547—appr. 9; attach. 74; 128; parties, 6; r. r. 34.
Baird v. NcNamara, 78 M. 455—lev. 28h; tax. 709.
Baird, Boone v.—91 M. 420.
Baird, Georgia Pac. R. Co. v.—76 M. 521.
Baird, Heard v.—40 M. 793.
Baird, McNamara v.—72 M. 89.
Baird, Oliver v.—90 M. 718.
Baird, Raines v.—84 M. 807.
Bais, State v.—65 M. 510.
Baker v. Brown, 83 M. 793—wills, 132.
Baker v. Burkett, 75 M. 89—plgs. 21, 30.
Baker v. Byrne, 2 S. & M. 193—princ. & a. 166, 173, 174, 175.
Baker v. Cochran, 2 Miss. Dec. 96—app. & e. 1009.
Baker v. Cox, 79 M. 306—tax. 691.
Baker v. Griffin, 50 M. 158—ven. & pur. 231.
Baker v. Justice, 41 M. 240—trial, 190.
Baker v. Kelly, 41 M. 696—attach. 47; bills, 393; dep. 72, 76; guar. 4, 33, 83; trial, 194a, 208.
Baker v. Richardson, 96 M. 394—ten. in c. 34; life est. 4.
Baker v. State, 23 M. 243—gr. jury. 10, 19.
Baker v. State, 82 M. 84—crim. l. 351; rape, 40, 44, 46.
Baker, Cochran v.—60 M. 282.
Baker, Cooper v.—54 M. 637.
Baker, Cumberland Tel. &c. Co. v.—85 M. 486.
Baker, Dyson v.—54 M. 24.
Baker, Peets v.—95 M. 576.
Baker, State v.—47 M. 88.
Baker, Tagert v.—57 M. 303.
Baldwin v. Alabama &c. R. Co. 96 M. 52—ev. 20.
Baldwin v. Conger, 9 S. & M. 516—attach. 20, 132.
Baldwin v. Dreyfus, 92 M. 94—app. & e. 1115; execution, 94, 99, 218, 334.
Baldwin v. Flash, 58 M. 593—attach. 321; fraud. conv. 289, 309; j. p. 86; paymt. 38.
Baldwin v. Flash, 59 M. 61—chat. m. 151, 188, 193; fact. 31.
Baldwin v. Jenkins, 23 M. 206—deeds, 90, 99; execution, 36, 268, 272; judgm. 780; mtg. 33, 42, 99.
Baldwin v. Little, 64 M. 126—fraud. conv. 142, 197.
Baldwin v. McGee, 14 So. 451—execution, 250.
Baldwin v. McKay, 41 M. 358—dism. 8; ev. 157; trover, 15, 65; sales, 1; trial, 135, 214.
Baldwin v. Morgan, 73 M. 276—agric. 12; mast. & s. 82.
Baldwin v. Tillery, 62 M. 378—home. 73.
Baldwin, Alabama &c. R. Co. v.—52 So. 358.
Baldwin, Buckley v.—69 M. 804.
Baldwin, Coopwood v.—25 M. 129.
Baldwin, Illinois Cent. R. Co. v.—77 M. 788.
Baldwin, Meyer v.—52 M. 263.
Baldwin, Payne v.—3 S. & M. 661.
Baldwin, Ross v.—65 M. 570.
Baldwin, Shelton v.—26 M. 439.
Baldwin, Spratt v.—33 M. 581.
Baldwin, Sprott v.—34 M. 327.
Baldwin, Yazoo &c. R. Co. v.—78 M. 57.
Bales v. Hyman, 57 M. 330—estop. 92; ex. & ad. 157, 368, 434.
Balfour v. Louisville &c. R. Co. 62 M. 508—em. dom. 139.
Balfour v. Mitchell, 12 S. & M. 629—app. & e. 691, 723, 934; dism. 80.
Balfour, Harrison v.—5 S. & M. 301.
Ball v. Meridian, 67 M. 91—tax. 606, 608.
Ball v. Phelan, 94 M. 293—wills, 436, 442, 452, 470, 478, 595, 599.
Ball v. Sledge, 82 M. 747—app. & e. 20; j. p. 44, 164; land. & t. 246, 256; paymt. 30.
Ball v. State, 67 M. 358—crim. l. 200, 290; dist. pub. a. 8; ind. 124.
Ball, Adams v.—5 So. 109.
Ballard v. Davis, 31 M. 525—counties, 47.
Ballard v. Mississippi Cotton Oil Co. 81 M. 507—const. l. 238, 245; statut. 64.
Ballard, Bank of Louisiana v.—7 H. 371.
Ballard, Bridges v.—62 M. 237.
Ballard, Miss. &c. R. Co. v.—5 S. & M. 606.

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Ball, Jordan v.—44 M. 194.
Ball, Mangum v.—43 M. 288.
Ball, Meridian Land Co. v.—68 M. 135.
Ball, Nagle v.—71 M. 330.
Ball, Williams v.—2 Miss. Dec. 536.
Baltimore Express Co. v. Cooper, 66 M. 558—carr. 149.
Bamberger v. Gordin, 2 Miss. Dec. 111—app. & e. 1064; chat. m. 218.
Bamberger v. Merchants' &c. Bank, 73 M. 572—attach. 34.
Bamberger, Park v.—52 M. 565.
Bandeau, Meyer-Bridges Co. v.—90 M. 27.
Bang v. State, 60 M. 571—hom. 115, 116.
Bangle v. Holden, 52 M. 804—tax. 78.
Bangs v. State, 61 M. 363—crim. l. 717.
Bank of Augusta v. Courey, 28 M. 667—attach. 2, 232, 249; ex. & ad. 351.
Bank of Duncan v. Brittain, 92 M. 545—bills & n. 126.
Bank of England v. Tarleton, 23 M. 173—bills & n. 268; eq. 60; mtg. 151, 244, 264; partners. 241; sales, 234; subrog. 5; trusts, 203.
Bank of Forest v. Orgill, 82 M. 81—corp. 30.
Bank of Gloster v. Hindman, 95 M. 742—banks, 104.
Bank of Gulfport v. O'Neal, 86 M. 45—exemp. 4, 93, 126; sheriffs, 91.
Bank of Hazlehurst v. Goodbar, 73 M. 566—chat. m. 188.
Bank of Holly Springs v. Pinson, 58 M. 421—corp. 53, 95, 111, 161, 162, 399.
Bank of Indianola v. Dodds, 90 M. 767—tax. 568.
Bank of Lexington v. Taylor, 2 S. & M. 27—app. & e. 66, 110.
Bank of Louden v. Armor, 90 M. 709—b. & l. assn. 33.
Bank of Louisiana v. Ballard, 7 H. 371—app. & e. 191; mon. recd. 1.
Bank of Louisiana v. Williams, 46 M. 618—cncts. 11, 144; hus. & w. 56, 239.
Bank of Manchester v. Nolan, 7 H. 508—usury, 16, 36.
Bank of Meadville v. Hardy, 94 M. 587—rec. 29, 54.
Bank of Mississippi v. Catlett, 5 H. 175—execution, 99.
Bank of Mississippi v. Duncan, 52 M. 740—eq. 13, 37; ev. 2; ex. & ad. 435, 537a; fraud. conv. 314; rec. 58, 218; statut. 85, 199, 242.
Bank of Mississippi v. Duncan, 56 M. 166—banks, 72; corp. 618; courts, 88, 93.
Bank of Mississippi v. Rush, W. 265—bills & n. 441.
Bank of Mississippi v. Wren, 3 S. & M. 791—corp. 594.
Bank of Mobile v. Tishomingo Savings Institution, 62 M. 250—fraud. conv. 13, 154; mtg. 171.
Bank of Newberry v. Stegall, 41 M. 142—banks, 1; cncts. 108, 137.
Bank of Newton v. Simmons, 49 So. 616—bills & n. 373; trial, 252.
Bank of Oxford v. Lafayette County, 79 M. 152—app. & e. 382, 390; banks, 12; tax. 406, 495.
Bank of Oxford v. Oxford, 70 M. 504—licens. 19; tax. 47, 196, 386.
Bank of Port Gibson v. Baugh, 9 S. & M. 290—ex. & ad. 124; partners. 245, 255.
Bank of Port Gibson v. Dickson, 4 S. & M. 689—app. & e. 19.
Bank of Port Gibson v. Moore, 13 S. & M. 157—corp. 617.
Bank of Tupelo v. Kansas City &c. R. Co. 16 So. 572—carr. 46.
Bank of United States v. Patton, 5 H. 200—app. & e. 5; execution, 153b, 154b, 155.
Bank of United States v. State, 12 S. & M. 456—banks, 12; corp. 1; stat. 194; tax. 3, 95.
Bank of Vicksburg v. Jennings, 5 H. 425—dism. & n. 42; proc. 7; venue, 28.
Bank of Water Valley v. Southern Express Co. 71 M. 741—carr. 96.
Bank of Winona v. Wofford, 71 M. 711—bills & n. 330.
Bank of Aberdeen, Clifton v.—75 M. 929.
Bank of Alabama, Hemphill v.—6 S. & M. 44.
Bank of Alabama, Wright v.—6 S. & M. 251.
Bank of Carrolton, Jones v.—71 M. 1023.
Bank of Commerce, Comenitz v.—85 M. 662.
Bank of Commerce, Williams v.—71 M. 858.
Bank of Friar's Point, Chism v.—27 So. 610.
Bank of Friar's Point, Fogg v.—80 M. 750.
Bank of Greenville, Citizens' Bank v.—71 M. 271.
Bank of Greenville, Newman v.—66 M. 323.
Bank of Greenville, Newman v.—67 M. 770.
Bank of Grenada, Trible v.—2 S. & M. 523.
Bank of Holmes County, A. B. Smith Co. v.—18 So. 847.
Bank of Indianola, Mitchell v.—54 So. 87.
Bank of Kentucky, Coffman v.—40 M. 29.
Bank of Kentucky, Coffman v.—41 M. 212.
Bank of Lexington, Cook v.—8 S. & M. 543.
Bank of Loudon, Armor v.—86 M. 658.
Bank of Mississippi, Brown v.—31 M. 454.
Bank of Oxford, Adams v.—78 M. 532.

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Bank of Pennsylvania, Carmichael v.—4 H. 567.
Bank of Port Gibson, Nevitt v.—Freem. Ch. 438.
Bank of Port Gibson, Nevitt v.—6 S. & M. 513.
Bank of Port Gibson, Officers of Court v.—4 S. & M. 431.
Bank of United States, Knox v.—26 M. 655.
Bank of Winona, Huntley v.—69 M. 663.
Bank of Winona, Winona v.—69 M. 663.
Banks v. Cage, 1 H. 293—atty. & c. 126; statut. 244.
Banks v. Evans, 10 S. & M. 35—atty. & c. 94; eq. 388; execution, 14, 19, 129, 145, 246, 256, 309, 345, 348, 351; judgm. 800, 853; quiet. t. 3.
Banks v. Machen, 40 M. 256—ex. & ad. 104, 480.
Banks v. State, 93 M. 700—ars. 1; crim. l. 517.
Banks, Alsup v.—68 M. 664.
Banks, Fullilove, v.—62 M. 11.
Banks, Mayson v.—59 M. 447.
Banks, Payne v.—32 M. 292.
Banks, Pickett v.—11 S. & M. 445.
Banks, Preston v.—71 M. 601.
Banks, Redmond v.—60 M. 293.
Banks, Robertson v.—1 S. & M. 666.
Bank, Sherman v.—66 M. 648.
Banks, State v.—66 M. 431.
Bankston v. Bankston, 27 M. 692—div. 230, 234.
Bankston v. Catchings, 1 Miss. Dec. 198—app. & e. 190; attach. 217.
Bankston v. Coopwood, 55 So. 48—ex. & ad. 227.
Bankston, Goff v.—35 M. 518.
Bannon, Roach v.—57 M. 490.
Baptist Church, Priebatsch v.—66 M. 345.
Barataria Canning Co. v. Joulian, 80 M. 555—monop. 8, 17.
Barataria Canning Co. v. Ott, 84 M. 737—deeds, 141; ev. 461; fish, 7.
Barataria Canning Co. v. Ott, 88 M. 771—app. & e. 1201; ref. inst. 10.
Barbaro, Ramsey v.—12 S. & M. 293.
Barbee v. Reese, 60 M. 906—assa. 35; new tr. 67.
Barbee, Reese v.—61 M. 181.
Barber v. Armistead, 82 M. 788—eq. 457, 462; partit. 113.
Barber v. Biloxi, 76 M. 578—judgm. 310.
Barber v. Ellis, 68 M. 172—ex. & ad. 173.
Barber v. Levy, 73 M. 484—inj. 242, 250; statut. 279.
Barber v. Kinard, 4 So. 120—attach. 308.
Barber v. Manier, 71 M. 725—rec. 3.
Barber v. Sintes, 28 So. 722—app. & e. 909.
Barber, Austin v.—88 M. 553.
Barber, Jenkins v.—85 M. 666.
Barber, Netterville v.—52 M. 168.
Barber, Sintes v.—78 M. 585.
Barbour, Taylor v.—90 M. 888.
Barclay v. Smith, 36 So. 449—ev. 323; trover, 34, 36, 40.
Barcus v. State, 49 M. 17—crim. l. 24; hom. 142, 144, 146.
Bardwell v. Railroad Co. 63 M. 574—carr. 333.
Bardwell, Baird v.—60 M. 164.
Bardwell, State v.—72 M. 535.
Barfield v. Impson, 1 S. & M. 326—app. & e. 544; judgm. 134; plead. 433.
Barfield v. Kearney, W. 504—bonds, 125.
Barker v. Jackson, 90 M. 621—tax. 674b, 688.
Barker v. Justice, 41 M. 240—cncts. 108, 279; ev. 176; judgm. 120, 128a, 137; plead. 92, 258; sales, 352; slaves, 10; trial, 189.
Barker v. Planters' Bank, 5 H. 566—execution, 81, 102, 154b.
Barker v. Shepard, 42 M. 277—app. & e. 914; appr. 5; plead. 339.
Barker v. Stacy, 25 M. 471—chat. m. 89, 151; judgm. 788; sales, 148.
Barker v. Wanzer, 5 H. 290—app. & e. 375.
Barker, Stacy v.—Sm. & M. Ch. 112.
Barker, Wanzer v.—4 H. 363.
Barkley v. Hanlan, 55 M. 606—cncts. 54; new tr. 85.
Barkley v. State, 23 So. 185—crim. l. 1191; mal. mis. 1.
Barkley, Brooks v.—72 M. 320.
Barksdale v. Barksdale, 92 M. 166—deeds, 111, 114.
Barksdale v. Capital City Realty Co. 88 M. 623—wills, 676.
Barksdale v. Elam, 30 M. 694—cncts. 122.
Barksdale v. Elam, 35 M. 172—wills, 857.
Barksdale, Hagan v.—44 M. 186.
Barksdale, Tennent v.—3 So. 80.
Barkwell v. Swan, 69 M. 907—cred. s. 50; eq. 427; fraud. conv. 85, 311; paymt. 24; princ. & s. 114, 131.
Barland, Ross v.—W. 489.
Barlow v. Brittain, 70 M. 427—chat. m. 177; marshaling, 8.
Barlow v. Esterling, W. 302—cert. 35.
Barlow v. Planters' Bank, 7 H. 129—bills & n. 129, 130, 404.
Barlow, Brown v.—51 M. 7.
Barlowe, Person v.—35 M. 174.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Barlow, Hays v.—54 So. 2.
Barlow, McGrath v.—21 So. 237.
Barlow, Nangold v.—61 M. 593.
Barlow, Wade v.—54 So. 662.
Barmore v. Vicksburg &c. R. Co. 85 M. 426—mast. & s. 302; r. r. 302, 302c, 305, 332, 391.
Barmore, Vicksburg &c. R. Co. v.—87 M. 273.
Barnard v. Planters' Bank, 4 H. 98—bills & n. 510; notaries, 9.
Barnard v. Sykes, 72 M. 297—acct. 512; eq. 21; princ. & a. 64.
Barnard, Mayfield v.—43 M. 270.
Barnes v. Holcomb, 12 S. & M. 306—chat. m. 6, 104; mtg. 6; slaves, 7b.
Barnes v. Lloyd, 1 H. 584—accd. 15; eq. 43; ev. 390; lim. of act. 27, 41; paymt. 60; set-off, 12.
Barnes v. Jarnagin, 12 S. & M. 108—ex. & ad. 441.
Barnes v. McGee, 1 S. & M. 208—ex. & ad. 314b.
Barnes v. McLemore, 12 S. & M. 316—judgm. 870c.
Barnes v. Moody, 5 H. 636—app. & e. 166.
Barnes v. Pike County, 51 M. 305—counties, 29; elec. 99, 295; statut. 94.
Barnes v. Reynolds, 4 H. 114—bills & n. 188, 467; plead. 434.
Barnes v. State, 60 M. 355—jury, 78.
Barnes v. State, 53 So. 956—larc. 54.
Barnes, Boon v.—23 M. 136.
Barnes, Dogan v.—76 M. 566.
Barnes, Dogan v.—23 So. 259.
Barnes, Eastman v.—95 M. 715.
Barnes, Grand Gulf Bank v.—2 S. & M. 165.
Barnes, Gulf &c. R. Co. v.—94 M. 484.
Barnes, Leinkauf v.—66 M. 207.
Barnes, Lyles v.—40 M. 608.
Barnes, Saffold v.—39 M. 399.
Barnes, Sprawles v.—1 S. & M. 629.
Barnett v. Dalton, 69 M. 611—app. & e. 1025.
Barnett v. Eaton, 62 M. 768—new tr. 48; trial, 305.
Barnett v. Jayne, 1 Miss. Dec. 65—app. & e. 214; new tr. 67.
Barnett v. Nichols, 56 M. 622—eject. 27; eq. 10; estop. 82; fraud. conv. 314; inj. 207; ven. & pur. 20.
Barnett v. Ring, 55 M. 97—app. & e. 1043; attch. 69, 74; execution, 99; garn. 57; j. p. 141; See statutes Construed, Code 1871, § 855 (Wolfe v. Crawford, 54 M. 514).
Barnett v. Stewart, 1 Miss Dec. 342—ex. & ad. 308, 528; wills, 757.
Barnett v. Wedgeworth, 1 Miss. Dec. 334—app. & e. 1149; land. & t. 67; tax. 722.
Barnett, Coppage v.—34 M. 621.
Barnett, Downey v.—27 M. 409.
Barnett, Hall v.—71 M. 37.
Barnett, Lester v.—33 M. 584.
Barnett, Lowe v.—38 M. 329.
Barnett, State v.—54 So. 313.
Barnett, Winn v.—31 M. 653.
Barney v. Moore-Haggerty Lumber Co., 95 M. 118—partners. 208.
Barney v. Scherling, 40 M. 320—app. & e. 263, 301, 860; attach. 256, 257; new tr. 126; trial, 275.
Barney v. State, 12 S. & M. 68—gr. jury 5, 19.
Barnhill, Eaton v.—68 M. 305.
Barr v. Heard, 33 M. 131—ex. & ad. 416.
Barr v. Lewis, 71 M. 727—atty. & c. 110; ex. & ad. 86; lim. of act. 72a.
Barr v. State, 21 So. 131—assa. 93, 96; crim. l. 823.
Barr v. State, 23 So. 628—crim. l. 919; witn. 227.
Barr v. Sullivan, 75 M. 536—ex. & ad. 428, 431, 442, 450a; plead. 379.
Barrentine v. State, 51 So. 275—crim. l. 939.
Barrett v. Carter, 69 M. 593—app. & e. 20, 325, 880, 1167; eq. 2; fraud. conv. 327; judgm. 473.
Barrett, Alabama &c. R. Co. v.—78 M. 432.
Barrett, Harper v.—16 So. 533.
Barrett, Jelks v.—52 M. 315.
Barrett, Vicksburg &c. R. Co. v.—67 M. 579.
Barrier v. Kelly, 82 M. 233—app. & e. 92; can. of i. 36; estop. 29, 52, 92.
Barrier v. Young, 96 M. 160—dower, 34.
Barrier, Collins v.—64 M. 21.
Barringer v. Boyd. 27 M. 473—judgm. 306, 577, 934, 937; lim. of act. 76.
Barringer v. Fisher, 45 M. 200—paymt. 10.
Barringer v. Nesbit, 1 S. & M. 22—app. & e. 1025, 1028, 1050, 1051; bills & n. 97, 314, 518, 523; ev. 601; fraud. conv. 201; new tr. 160.
Barringer, Boyd v.—23 M. 269.
Barringer, Wilkinson v.—23 M. 319.
Barrington v. Mississippi Cent. R. Co., 32 M. 370—app. & e. 502, 529; corp. 88; excep. 1, 6.
Barron v. Wade, 7 S. & M. 49—app. & e. 1175.
Barron, Miss. Home Ins. Co. v.—91 M. 722.
Barrow v. Barrow, Sm. & M. Ch. 101—ex. & ad. 120.
Barrow v. Burdridge, 41 M. 622—app. & e. 214; attach. 25, 217.
Barrow v. Wade, 7 S. & M. 49—plead. 436.

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Barrow, McClanahan v.—27 M. 664.
Barrow, Yazoo &c. R. Co. v.—89 M. 808.
Barr, Tush-Ho-Yo-Tubby v.—41 M. 52.
Barr, Tush-Ho-Yo-Tubby v.—45 M. 189.
Barry v. Barry, 64 M. 709—eq. 93, 232; spec. perf. 106.
Barry v. Sturdivant, 53 M. 490—witn. 147; wills, 474.
Barry, Cannon v.—59 M. 289.
Barry, Odineal v.—24 M. 9.
Barry, Roberts v.—42 M. 260.
Barr, Young v.—69 M. 879.
Barstow, Harmon v.—23 M. 276.
Bartee, Brown v.—10 S. & M. 268.
Bartee, Humphries v.—10 S. & M. 282.
Bartlett v. Sutherland, 24 M. 395—ex. & ad. 123, 124.
Bartlett, Dye v.—7 H. 224.
Bartlett, State v.—30 M. 624.
Bartley, Gross v.—66 M. 116.
Barton v. King, 41 M. 288—wills, 12, 586.
Barton v. Magruder, 69 M. 462—frds. st. of, 56; trusts, 63½.
Barton v. New Eng. Mortg. Sec. Co., 25 So. 362—princ. & a. 103; spec. perf. 105.
Barton v. Parker, 57 M. 144—app. & e. 984.
Barton v. State, 94 M. 375—crim. l. 1, 992; rape, 34.
Barton, Armstrong v.—42 M. 506.
Barton, Black v.—6 S. & M. 239.
Barton, Dreyfus v.—54 So. 254.
Barton, Gladney v.—51 M. 216.
Barton, Holt v.—42 M. 711.
Barton, Ligon v.—88 M. 135.
Barwick v. Moyse, 74 M. 415—estop. 59; fraud, 33; fraud. conv. 172; mtg. 415.
Basham, State v.—77 M. 688.
Baskerville v. Harris, 41 M. 535—bills & n. 267, 404, 423.
Baskett, Portwood v.—64 M. 213.
Baskett, Ricks v.—68 M. 250.
Basket, Weis v.—71 M. 771.
Basket, Wilson v.—47 M. 637.
Baskin, Hargrove v.—50 M. 194.
Baskin, May v.—12 S. & M. 428.
Baskins v. May, 9 S. & M. 373—app. & e. 460 462.
Baskins v. Winston, 24 M. 431—app. & e. 1028; tax. 619, 671.
Bass v. Estill, 50 M. 300—deeds, 82; judgm. 30; partners. 180; ven. & pur. 231.
Bass v. Heard, 33 M. 131—execution, 129, 322; ex. & ad. 411.
Bass v. Maxwell see Harkleroad v. Maxwell.
Bass v. Nelms, 56 M. 502—bankr. 394; comp. 16; estop. 90; home. 106; inj. 8, 175; judgm. 404, 460, 715.
Bass v. Patterson, 68 M. 310—usury, 32.
Bass v. Taylor, 34 M. 342—eq. 327; partners. 287.
Bass, Harkleroad v.—84 M. 483.
Bate v. Incisa, 59 M. 513—dom. 1; wills, 242, 249.
Bateman v. State, 64 M. 233—crim. l. 261, 262, 390; hom. 166.
Bates v. Aven, 60 M. 955—adv. pos. 7; Indians, 12; pub. lands, 142.
Bates v. Bates, W. 356—eq. 17, 324, 327; tender, 7, 10.
Bates v. Cotton, 32 M. 266—des. & d. 10; hus. & w. 111.
Bates v. Crow, 57 M. 676—attach. 1; j. p. 86.
Bates v. Hyman, 28 So. 567—ins. p. 66, 73, 99.
Bates v. McCully, 27 M. 584—ev. 348.
Bates v. McDowell, 58 M. 815—dower, 2, 11.
Bates v. Nuckols, 11 So. 109—princ. & a. 145.
Bates v. Snider, 59 M. 497—action, 32; chat-m. 158, 172; replev. 8, 99.
Bates v. State, 32 So. 915—crim. l. 945.
Bates v. Stokes, 40 M. 56—marr. 25.
Bates, Commercial State Bank &c. Co. v.—51 So. 599.
Bates, Gayden v.—W. 209.
Bates, Lindsey v.—42 M. 397.
Batesville Gin Co. v. Whitten, 96 M. 210—bailm. 14, 31.
Batiste, Raby v.—27 M. 731.
Batson v. Thompson Land &c. Co. 92 M. 199—partners. 269, 288.
Batson, Alfred v.—91 M. 749.
Batson, Brantley v.—84 M. 411.
Battaile v. Fisher, 36 M. 321—ex. & ad. 251; rec. 192.
Battaile v. Hall, 24 M. 246—eject. 44.
Battaile, Fisher v.—31 M. 471.
Battle v. Woolf, 23 M. 318—j. p. 159.
Battle, Fort v.—13 S. & M. 133.
Bauer, Galbart v.—38 So. 548.
Baugh v. Lamb, 40 M. 493—offic. 134; pub. lands, 58.
Baughan v. Graham, 1 H. 220—bills & n. 393; cncts. 327; ev. 327; partners. 217; trial, 59.
Baugh, Bank of Port Gibson v.—9 S. & M. 290.
Baughn v. Shackleford, 48 M. 255—bills & n. 428; ex. & ad. 187; guard. & w. 33, 62, 70, 177; paymt. 12a.
Baum v. Buntyn, 62 M. 110—accd. 15.
Baum v. Burns, 66 M. 124—attach. 71, 74, 75.

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Baum v. Covert, 62 M. 113—concts. 197; fact. 144; mech. liens 31, 186.
Baum v. Greenwald, 95 M. 765—ins. p. 8, 10, 33, 49.
Baum v. Lynn, 72 M. 932—ev. 384, 401, 408, 409; guard. & w. 15, 117, 182e.
Baum v. McDonald, 11 So. 680—app. & e. 1001.
Baum v. Pearce, 67 M. 700—assign. f. b. c. 94.
Baum, McLaurin v.—12 So. 594.
Baum, Meggett v.—57 M. 22.
Baum, Paxton v.—59 M. 531.
Baum, Yale v.—70 M. 225.
Baxter, Betts v.—58 M. 329.
Bay v. Shrader, 50 M. 326—alt. of inst. 1; can. of i. 54.
Bay, Cook v.—4 H. 485.
Baygents v. Beard, 41 M. 531—eq. 427; hus. & w. 37; statut. 272.
Bayless v. Orne, Freem. Ch. 161—corp. 202, 294, 502, 611.
Bayless, Sagory v.—13 S. & M. 153.
Bay Mfg. Co. Orrell v.—83 M. 800.
Baynton v. Finnall, 4 S. & M. 193—app. & e. 1028; hus. & w. 10, 15, 149, 154.
Bay St. Louis v. Hancock County, 80 M. 364—adv. pos. 8; counties, 113; land. & t. 118, 279; lim. of act. 11.
Bay St. Louis, Chandler v.—57 M. 326.
Bay St. Louis, Quintine v.—64 M. 483.
Bay St. Louis, Rosette v.—52 So. 785.
Bay St. Louis, Telheard v.—87 M. 580.
Bay St. Louis, Tyler v.—34 So. 215.
Beal v. Sharp, 1 Miss. Dec. 325—judgm. 195; tax. 549.
Beal, Cohn v.—61 M. 398.
Beale, Ratliff v.—74 M. 247.
Beal, Fitzpatrick v.—62 M. 244.
Beall v. Bullock, 11 So. 720—trial, 190.
Beall v. Campbell, 1 H. 24—app. & e. 516; plead. 164, 434.
Beall v. Shattuck, 53 M. 358—execution, 347.
Beall v. State, 39 M. 715—bail, 41.
Beall, Lexington Lodge No. 24 F. & A. M. v.—94 M. 521.
Beall, McGee v.—63 M. 455.
Beall, Norfleet v.—82 M. 538.
Beall, Reed v.—42 M. 472.
Beaman v. Beaman, 90 M. 762—ten. in c. 19.
Beaman v. Buck, 9 S. & M. 207—frds. st. of, 74, 129.
Beaman v. Leake County, 42 M. 237—counties, 47, 54, 57, 165, 208; mand. 3, 179.
Bean, George v.—30 M. 147.
Bean, Roberts v.—5 S. & M. 590.
Beard v. Green, 51 M. 856—eq. 375, 388; estop. 68; tax. 622.
Beard v. Griffin, 10 S. & M. 586—action, 13; assign. 118; estop. 101.
Beard v. Holland, 59 M. 164—clks. of c. 6; marr. 25.
Beard v. Lee County, 51 M. 542—counties, 191; mand. 164; schools, 48, 98; statut. 159, 160; tax. 297.
Beard, Alabama &c. R. Co. v.—93 M. 294.
Beard, Baggett v.—43 M. 120.
Beard, Baygents v.—41 M. 531.
Beard, Holland v.—59 M. 161.
Beard, Johnston v.—7 S. & M. 214.
Beardsley, Alabama &c. R. Co. v.—79 M. 417.
Beardsley, Yellowly v.—76 M. 613.
Beard, Tupelo v.—56 M. 532.
Beasley v. Cottrell, 94 M. 253—app. & e. 356.
Beasley v. Evans, 35 M. 192—lim. of act. 148, 149, 150; trial, 135.
Beasley v. New Orleans &c. R. Co.—91 M. 268—j. p. 202; r. r. 406, 446.
Beasley v. State, 64 M. 518—hom. 308.
Beasley, Crisman v.—Sm. & M. Ch. 561.
Beasly, Patrick v.—6 H. 609.
Beason v. Coleman, 92 M. 622—app. & e. 174; can. of i. 35.
Beason v. State, 34 M. 602—crim. l. 283; jury, 93.
Beason v. State, 96 M. 105—inf. 66.
Beattie, Yazoo &c. R. Co. v.—49 So. 609.
Beatty v. Martin, 42 So. 130—sales, 66.
Beatty v. Smith, 2 S. & M 567—execution, 171; hus. & w. 111; inj. 175.
Beatty v. State, 61 M. 18—larc. 10, 15, 44.
Beatty, Brown v.—34 M. 227.
Beatty, Franklin v.—27 M. 347.
Beatty, Horn v.—85 M. 504.
Beatty, Mississippi Cent. R. Co. v.—35 M. 668.
Beatty, Servis v.—32 M. 52.
Beaty v. Harkey, 2 S. & M. 563—judgm. 195; ven. & pur. 88, 106.
Beaty, Head v.—5 H. 480.
Beaty, Wyatt v.—10 S. & M. 463.
Beauchamp v. Comfort, 42 M. 94—cncts. 108; sales, 193.
Beauchamp, Hayne v.—5 S. & M. 515.
Beauchamp, McDuff v.—50 M. 531.
Beauchamp, Wilson v.—44 M. 556.
Beauchamp, Wilson v.—50 M. 24.
Beaumont, Garrett v.—24 M. 377.
Beaumont, Nevitt v.—6 H. 237.
Beaumont, Richter v.—67 M. 285.
Beaver v. Crump, 76 M. 34—adop. 21; spec. perf. 29.
Beavers v. Spinks, 77 M. 346—courts, 489.

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Beazley v. Prentiss, 13 S. & M. 97—app. & e. 330; execution, 352.
Beazley, Mayson v.—27 M. 106.
Beck v. Allen, 58 M. 143—counties, 53, 124, 133, 168, 189, 191, 192; mand. 15; statut. 61; tax. 301, 608.
Beck v. Beck, 36 M. 72—convt. 1; eq. 166, 216; lim. of act. 75.
Beck v. Louisville &c. R. Co., 65 M. 172—tresp. 25.
Beck v. Montgomery, 7 H. 39—remaind. 12; wills, 821.
Beck v. Railroad Co., 65 M. 172—eject. 5, 10; em. dom. 268.
Beck v. Rainey, 28 M. 111—ex. & ad. 544.
Beck v. Rosser, 68 M. 72—assign. 117; parties, 4; plead. 433.
Beck v. State, 69 M. 217—crim. l. 59; int. liq. 166.
Beck, Anderson v.—64 M. 113.
Beck, Brothers v.—75 M. 482.
Becket v. Dean, 57 M. 232—execution, 36, 37, 38; mtg. 6.
Beckman v. Georgia Pac. R. Co., 12 So. 956—death, 16, 45; plead. 34.
Beckwith, Brewer v.— 35 M. 457.
Beck, Wright v.—10 S. & M. 277.
Bedell v. State, 50 M. 492—crim. l. 886, 1188; hom. 315; ind. 189.
Bedford v. Blythe, 74 M. 720—indem. 5.
Bedford v. Gartrell, 88 M. 429—chat. m. 138.
Bedford v. Louisville &c. R. Co., 65 M. 385—r. r. 251, 446.
Bedford, French &c. Co. v. Adams Mach. Co., 93 M. 537—execution, 192.
Bedford, Partee v.—51 M. 84.
Bedon v. Alexander, 47 M. 254—attach. 312, 353; dam. 204; replev. 96.
Bedwell, Crane v.—25 M. 507.
Bedwell, Sublett v.—47 M. 266.
Beeks v. Fooshee, 25 M. 55—schools, 134.
Beeks v. Rye, 77 M. 358—app. & e. 69; perp. 4.
Been v. Lindsey, 2 S. & M. 581—execution, 198, 201.
Beer v. Hooper, 32 M. 246—assign. f. b. c. 18, 199; attach. 77, 129, 145; garn. 158; insolv. 6.
Beer, Bernheim v.—56 M. 149.
Beers, Rowe v.—59 M. 371.
Behaly v. Hatch, W. 369—tender, 10.
Beirne v. Burdett, 52 M. 795—tax. 790, 802.
Beirne v. Mower, 13 S. & M. 427—judgm. 800a.
Belcher v. Mhoon, 47 M. 613—champ. 7; ev. 85; lev. 2, 28; tax. 615, 787, 790, 791, 809.
Belcher v. Wilkerson, 54 M. 677—eject. 108; tax. 790.
Belcher, Houston v.—12 S. & M. 514.
Belden, Nethery v.—66 M. 490.
Belew v. Jones, 56 M. 342—app. & e. 862, 1169; eq. 419, 422; partit. 12, 99.
Belew v. Jones, 56 M. 592—app. & e. 801, 937; courts, 204.
Belknap v. Lyell, 89 M. 197—chat. m. 163.
Belknap, Hunt v.—78 M. 76.
Bell v. Blair, 65 M. 191—mtg. 132; vend. & pur. 60.
Bell v. Clark, 71 M. 603—can. of i. 2; eq. 427; lim. of act. 19, 171.
Bell v. Coats, 56 M. 776—adv. pos. 45; eject. 90; tax. 794.
Bell v. Cooper, 26 M. 650—lis pens. 23; mech. liens 165, 268, 291; vend. & pur. 231.
Bell v. Faison, 53 M. 354—ex. & ad. 246, 421.
Bell v. Flaherty, 45 M. 694—eject. 90; execution, 40, 41, 263, 268, 272; trusts, 83; ven. & pur. 232.
Bell v. Gordon, 55 M. 45—app. & e. 521, 548; tax. 754, 787, 816.
Bell v. Gulf &c. R. Co., 76 M. 71—carr. 277.
Bell v. Henderson, 6 H. 311—eq. 10, 179; ven. & pur. 37.
Bell v. Kansas City &c. R. Co., 68 M. 19—lim. of act. 31; r. r. 282.
Bell v. Kerr, 80 M. 177—const. 1, 46; licens. 8, 16, 39.
Bell v. McKinney, 63 M. 187—execution, 124; judges, 36; j. p. 7, 23.
Bell v. Medford, 57 M. 31—app. & e. 1028; costs, 179; eject. 117; judgm. 716; new tr. 41.
Bell v. Morrisson, 27 M. 68—assa. 13, 33; dam. 87, 95, 181; ev. 122, 123; witn. 114.
Bell v. Oates, 53 So. 491—cncts. 75; ex. & ad. 221.
Bell v. Refuge Oil-Mill Co., 77 M. 387—mast. & s. 128.
Bell v. Rudolph, 70 M. 234—guard. & w. 177, 182b.
Bell v. Southern R. Co., 87 M. 234—neg. 136; r. r. 282a; trial, 143.
Bell v. Southern R. Co., 94 M. 440—carr. 286.
Bell v. State, 39 M. 715—bail, 41.
Bell v. State, 66 M. 192—crim. l. 636, 680; hom. 190.
Bell v. State, 72 M. 507—hom. 188, 203, 216.
Bell v. State, 89 M. 810—crim. l. 561, 1172, 1173.
Bell v. State, 90 M. 104—crim. l. 547; hom. 292; witn. 317.

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Bell v. State, 38 So. 795—crim. l. 338a; hom. 539; offic. 92; witn. 405.
Bell v. Suddeth, 2 S. & M. 532—ex. & ad. 469; guard. & w. 172.
Bell v. Tombigbee R. Co., 4 S. & M. 549—app. & e. 840; courts, 37, 103; execution, 153d, 154b, 155e.
Bell v. West Point, 51 M. 262—j. p. 54; mun. corp. 757, 787, 789.
Bell, Alabama &c. R. Co. v.—29 So. 818.
Bellamy v. Shelton, 26 M. 250—spec. perf. 65; ven. & pur. 296.
Bell, Davis v.—57 M. 320.
Bell, ex parte, 56 M. 282—bail, 54; crim. l. 1076, 1216.
Bell, Merrill v.—6 S. & M. 730.
Bell, Monroe County v.—18 So. 121.
Bellows, Davis v.—56 So. 174.
Bell, Smith v.—2 Miss. Dec. 684.
Bell, State v.—58 M. 345, 823.
Bell, Tombigbee R. Co. v.—4 S. & M. 685.
Bell, Tombigby R. Co. v.—7 H. 216.
Belt, Stewart v.—19 So. 957.
Belote v. State, 36 M. 96—crim. l. 537, 820; larc. 41, 69.
Belzoni Drainage Commission v. Winn, 53 So. 778—waters, 38.
Belzoni Oil Co. v. Yazoo &c. R. Co., 94 M. 58—corp. 426; inj. 121; licens. 44, 57; plead. 248.
Benbrook v. Yancy, 96 M. 536—trusts, 97.
Benbrook, Fletcher v.—5 S. & M. 619.
Benedict, English v.—25 M. 167.
Benjamin v. Reach, 65 M. 347—forc. e. & d. 8, 15, 29.
Benjamin v. Staples, 93 M. 507—banks, 77; rec. 47, 77.
Benjamin, Brandon v.—39 M. 505.
Bennett v. Bennett, 84 M. 493—partit. 45, 85, 86, 87; ten. in c. 28, 29.
Bennett v. Byram, 38 M. 17—ship. 114, 118.
Bennett v. Chaffe, 69 M. 279—eq. 325; tax. 727, 791.
Bennett v. Dempsey, 94 M. 406—home. 65, 162, 171; judgm. 482.
Bennett v. Holloway, 55 M. 211—new tr. 156; replev. 63.
Bennett v. McGaughy, 3 H. 192—bills & n. 271, 443.
Bennett v. Maxwell, 82 M. 70—tax. 435.
Bennett v. Rowland, 1 Miss. Dec. 569—eq. 196; home. 118c.
Bennett v. State, 58 M. 556—offic. 55, 130; sheriffs, 5.
Bennett v. State, 87 M. 803—int. liq. 131, 146.
Bennett v. State, 55 So. 482—crim. l. 632, 1082.
Bennett, Allen v.—8 S. & M. 672.
Bennett, Dillon v.—14 S. & M. 171.
Bennett, Douglas v.—51 M. 680.
Bennett, Hodge v.—78 M. 868.
Bennett, Holman v.—44 M. 322.
Bennett, Jiggitts v.—31 M. 610.
Bennett Land Co. Kolb v.—74 M. 567.
Bennett, Lee v.—31 M. 119.
Bennett, Marsh v.—6 H. 215.
Bennett, Prewett v.—7 S. & M. 101.
Bennett, Roach v.—24 M. 98.
Bennett, Saffaracus v.—6 H. 277.
Bennett, Seavy v.—64 M. 735.
Benny, Switzer v.—94 M. 209.
Benoit v. Brill, 7 S. & M. 32—ex. & ad. 296, 299, 504, 507.
Benoit, Chaffe v.—60 M. 34.
Benson v. Benson, 24 M. 625—attch. 217; trial, 135, 217.
Benson v. Holloway, 59 M. 358—garn. 96, 124.
Benson v. State, 79 M. 538—witn. 356.
Benson v. Stewart, 30 M. 49—adv. pos. 43, 69; land. & t. 66; lim. of act. 5, 1210; mtg. 424; statut. 267.
Benson, Cannon v.—26 M. 395.
Benson, Cooper v.—28 M. 766.
Bentley v. Callaghan, 79 M. 302—adv. pos. 115; mtg. 143; ten. in c. 15.
Benton v. Crowder, 7 S. & M. 185—execution, 153e; new tr. 10.
Benton, Butler v.—46 M. 118.
Benton County v. Patrick, 54 M. 240—app. & e. 3, 31, 44; counties, 115, 124.
Benton, Robson v.—7 S. & M. 724.
Benton &c. Co. Reed v.—4 H. 257.
Bent, Yazoo &c. R. Co. v.—94 M. 681.
Benwood Iron Works Co. v. Tappan, 56 M. 659—app. & e. 925, 934; dism. 43; plead. 286; trial, 305.
Bercier v. McInnis, 57 M. 279—ev. 408.
Beresford v. Marble, 50 So. 68—lim. of act. 74.
Beresford, Alexander v.—27 M. 747.
Berg, Adams v.—65 M. 3.
Berg, Adams v.—67 M. 234.
Bergen v. State, 58 M. 623—judgm. 778.
Berg, Hall's Gin Co. v.—65 M. 184.
Bergman v. Hutcheson, 60 M. 872—judgm. 409.
Berkson v. Coen, 71 M. 650—lim. of act. 29.
Berkson v. Cox, 73 M. 339—judgm. 853; lim. of act. 139.
Berkson v. Kahn, 1 Miss. Dec. 179; attch. 258.

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Bernard v. Elder, 50 M. 336—ack. 23, 28; eject. 68.
Bernard, Armistead v.—62 M. 180.
Bernard, Caillaret v.—7 S. & M. 316.
Bernard, Caillaret v.—7 S. & M. 319.
Bernheim v. Andrews, 65 M. 28—execution, 112; exemp. 31.
Bernheim v. Beer, 56 M. 149—fraud. conv. 235; ins. 580.
Bernheim v. Brogan, 66 M. 184—app. & e. 934; garn. 136, 191.
Bernheim v. Dibrel, 66 M. 199—fraud. conv. 285, 288, 308; trial, 41, 167.
Berheim v. Dibrell, 11 So. 795—app. & e. 999; attach. 308.
Bernheim v. Hahn, 65 M. 459—attch. 308; ev. 240.
Bernheim v. State, 28 So. 28—app. & e. 498, 984.
Bernheim, Debrill v.—12 So. 336.
Bernheimer v. Martin, 66 M. 486—attch. 302; execution, 188, 189; j. p. 41.
Bernheimer, Conn v.—67 M. 498.
Bernheim, Ohleyer v.—67 M. 75.
Bernstein, Mayer v.—69 M. 17.
Berry v. Alsop, 45 M. 1—ex. & ad. 512; slaves, 22.
Berry v. Anderson, 2 H. 649—attch. 128, 130, 217, 301; garn. 124.
Berry v. Bacon, 28 M. 318—lim. of act. 167; mtg. 432.
Berry v. Bland, 7 S. & M. 77—hus. & w. 87, 111, 164.
Berry v. Broach, 65 M. 450—corp. 182.
Berry v. Bullock, 81 M. 463—hus. & w. 46; subrog. 23.
Berry v. Cumberland Telephone &c. Co. 96 M. 729—mast. & s. 258.
Berry v. Dobson, 68 M. 483—home. 81.
Berry v. Folkes, 60 M. 576—elect. rem. 3; ex. & ad. 94; inf. 21; interest, 4; partners. 75, 125, 138, 245, 249, 255, 258, 259½, 333, 344, 346, 347; usury, 87.
Berry v. Hale, 1 H. 315—det. 3; excep. 20.
Berry v. McComb City, 69 M. 882—ded. 19.
Berry v. Parks, 3 S. & M. 625—ex. & ad. 83, 87, 299, 475.
Berry v. State, 22 So. 826—crim. l. 715, 718.
Berry v. Waterman, 71 M. 497—frds. st. of 129; replev. 8; sales, 197, 209, 228.
Berry, Alexander v.—54 M. 422.
Berry, Brinson v.—7 So. 322.
Berry, Cedar Rapids Nat. Bank v.—53 So. 393.
Berry, Chapman v.—73 M. 437.
Berry, Gibson v.—66 M. 515.
Berry, Gulledge v.—31 M. 346.
Berryman v. Sullivan, 13 S. & M. 65—frds. st. of. 24; garn. 86.
Berry, Smith v.—1 S. & M. 321.
Berthe v. Briggs, 1 H. 195—bills & n. 464.
Bertrand v. State, 73 M. 51—int. liq. 131, 186.
Bertrand, State v.—72 M. 516.
Besancon v. Shirly, 9 S. & M. 457—bills & n. 39, 484; costs, 105, 117; judgm. 195, 526.
Bescher, Bustamente v.—43 M. 172.
Bessemer Sav. Bank v. Learned, 47 So. 119—banks, 43.
Bessinger, Brewer v.—25 M. 86.
Betancourt v. Maduel, 69 M. 839—attch. 215.
Betancourt, Tebo v.—73 M. 868.
Betbeze, Queen Ins. Co. v.—53 So. 592.
Bethany, Brittain v.—31 M. 331.
Bethea, Illinois Cent. R. Co. v.—88 M. 119.
Bethley v. State, 13 So. 886—crim. l. 1159; hom. 250.
Betsey v. Torrance, 34 M. 132—champ. 7.
Betsy, Torrance v.—30 M. 129.
Betts v. Baxter, 58 M. 329—judgm. 17a, 17d, 119; j. p. 78, 122; proc. 85.
Betts v. Ratliff, 50 M. 561—agric. 10, 11; chat. m. 3, 138; land. & t. 326.
Bevan, Bacon v.—44 M. 293.
Beverly v. Hattiesburg, 83 M. 342—mun. corp. 184, 185, 186.
Beverly v. Hattiesburg, 83 M. 621—quo w. 30, 48.
Beverly, Westbrook v.—11 S. & M. 419.
Beville v. McIntosh, 41 M. 516—ven. & pur. 285.
Bew v. State, 71 M. 1—elec. 95, 98; int. liq. 28, 34.
Bew, Lowenstein v.—68 M. 256.
B. F. Johnson Pub. Co. v. Mills, 79 M. 543—monop. 3; states, 104.
B. F. Sturtevant Co., Fidelity &c. Co. v.—86 M. 509.
Bias v. Cockrum, 37 M. 509—princ. & a. 123.
Bias v. Frederick, 65 M. 410—courts, 45; judges, 2, 29.
Bias v. Vance, 32 M. 198—app. & e. 793; attch. 167, 217.
Bibb v. Jones, 7 H. 397—execution, 112, 351; judgm. 784.
Bibb v. Martin, 14 S. & M. 87—mtg. 420; princ. & s. 147.
Bibb v. Peyton, 11 S. & M. 275—bills & n. 442, 445; execution, 348; lim. of act. 151.
Bibb v. Wilson, 31 M. 624—eq. 117; ven. & pur. 96.
Bibb, Harper v.—34 M. 472.
Bickell v. Colton, 41 M. 368—sales, 418.

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Bickerstaff v. Marlin, 60 M. 509—guard. & ward, 21, 148, 149, 161.
Biddle v. Paine, 74 M. 494—app. & e. 49; land. & t. 229h.
Bien v. Weatherspoon, 1 H. 28—evid. 271.
Bierce v. Grant, 91 M. 791—app. & e. 73, 92.
Bierce &c. Co. v. Biloxi Canning Co. 29 So. 513—sales, 178, 288, 414, 418.
Bierne, Buckner v.—9 S. & M. 304.
Bierne, House v.—5 S. & M. 622.
Biggam v. Merritt, W. 430—execution, 326; judgm. 784.
Bigger, Louisville &c. R. Co. v.—66 M. 319.
Biggs, Wheeler v.—12 So. 596.
Biggs, Wheeler v.—15 So. 118.
Bigham v. State, 59 M. 529—crim. l. 170, 187.
Biglane v. Hicks, 33 So. 413—frds. st. of, 17.
Biglane, Richardson v.—81 M. 676.
Bigner v. Hodges, 82 M. 215—libel, 98, 100.
Biles v. Dean, 14 So. 536—wills, 262.
Biles v. Wolf, 49 So. 267—app. & e. 908, 933.
Biles, Hardaway v.—1 S. & M. 657.
Billgerry, Scott v.—40 M. 119.
Billingslea v. Young, 33 M. 95—des. & d. 79; elec. rem. 7; ex. & ad. 175, 314g, 477; hus. & w. 88, 119.
Billingsley v. Niblett, 56 M. 537—home. 12, 118a; ven. & pur. 304, 308.
Billingsley v. Pollock, 69 M. 759—banks, 80, 166.
Billingsley, Hill v.—53 M. 111.
Billingsly, Choat v.—W. 420.
Billups v. Brander, 56 M. 495—ex. & ad. 337.
Billups, Abby v.—35 M. 618.
Billups, Yongue v.—23 M. 407.
Biloxi v. Biloxi Real Estate Co. 94 M. 653—tax. 449.
Biloxi v. Borries, 78 M. 657—licens. 29.
Biloxi, Barber v.—76 M. 578.
Biloxi Canning Co. v. Stillwell-Bierce &c. Co. 25 So. 366—sales, 361; trial, 143.
Biloxi Canning Co. Bierce &c. Co. v.—29 So. 513.
Biloxi Canning Co. Drysdale v.—67 M. 409.
Biloxi Canning Co. Drysdale v.—67 M. 534.
Biloxi Canning Co. Stillwell v.—78 M. 779.
Biloxi City R. Co. v. Maloney, 74 M. 738—dam. 91; em. dom. 301.
Biloxi City R. Co. v. Maloney, 19 So. 832—eq. 419; nuis. 25.
Biloxi, Graves v.—29 So. 768.
Biloxi Lumber &c. Co. v. New Orleans &c. R. Co., 28 So. 21—judgm. 107.
Biloxi, Maybin v.—77 M. 673.
Biloxi, Nixon v.—76 M. 810.
Biloxi, Nixon v.—5 So. 621.
Biloxi Real Estate Co., Biloxi v.—94 M. 653.
Binder v. Weinberg, 94 M. 817—ease. 12; licens. 57; party w. 8; ven. & pur. 230.
Binford, Govan v.—25 M. 151.
Bingaman v. Hyatt, Sm. & M. Ch. 437—deeds, 38; eq. 114; execution, 146, 153e, 275, 351; judgm. 786.
Bingaman v. Phillips, 1 H. 285—states, 176.
Bingaman v. Robertson, 25 M. 390—banks, 77.
Bingaman v. Robertson, 25 M. 501—ex. & ad. 453b, 454; lim. of act. 143.
Bingaman, Hoggatt v.—7 H. 565.
Bingaman, McAnulty v.—6 H. 382.
Bingham v. Sessions, 6 S. & M. 13—bills & n. 104, 477, 480; plead. 35, 87.
Bingham, Oglesby v.—69 M. 795.
Binns v. Brittain, 30 M. 693—costs, 289.
Binns v. Stokes, 27 M. 239—app. & e. 181, 194; libel, 58, 101.
Binns, Bohannon v.—31 M. 355.
Binns, Holton v.—40 M. 491.
Binns, Jones v.—27 M. 373.
Birchett, Yazoo City v.—89 M. 700.
Bird v. Furniss, 33 M. 44—ex. & ad. 408.
Bird v. McLaurin, 4 S. & M. 50—spec. perf. 97; ven. & pur. 5, 112.
Bird v. State, 11 So. 187—crim. l. 404.
Birdsong v. Dodds, 2 Miss. Dec. 423—judgm. 314.
Birdsong v. Ellis, 62 M. 418—dam. 62; mast. & s. 41, 42.
Birdsong v. Mendenhall, 52 So. 795—mun. corp. 821.
Bird, Turner v.—44 M. 449.
Birmingham v. Birmingham, 53 M. 610—home. 141.
Bishop v. Curphey, 60 M. 22—ins. 772, 797.
Bishop v. Fennerty, 46 M. 570—attach. 115, 157, 253.
Bishop v. McDonald, 27 M. 371—schools, 15.
Bishop v. Miller, 48 M. 364—eq. 115, 367.
Bishop v. Rosenbaum, 58 M. 84—attach. 301; eq. 150; inj. 26.
Bishop v. State, 1 Miss. Dec. 292—crim. l. 596, 598.
Bishop v. State, 62 M. 289—crim. l. 561, 1150; hom. 286b, 340b.
Bishop v. State, 96 M. 846—crim. l. 47, 354, 456, 531, 682.
Bishop v. State, 52 So. 690—high. 151.
Bishop, Illinois Cent. R. Co. v.—76 M. 810.
Bishop, Ligon v.—43 M. 527.
Bishop, King v.—62 M. 553.
Bishop, Mitchell v.—1 Miss. Dec. 58.
Bishop, Wilborn v.—62 M. 341.

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Bisland v. Hewett, 11 S. & M. 164—dower, 46, 69.
Bisland, Foster v.—23 M. 296.
Bissinger v. Lawson, 57 M. 36—cncts. 54; lim. of act. 83.
Bitsel, Arnett v.—W. 496.
Bixler, Harrell v.—W. 176.
Bixler, Wright v.—W. 256.
Black v. Barton, 6 S. & M. 239—ex. & ad. 416, 421, 453.
Black v. McMurty, W. 389—assign. 98; judgm. 780.
Black v. Pattison, 61 M. 599—judgm. 13, 481; usury, 133.
Black v. Robinson, 61 M. 54—chat. m. 223, 224; ev. 248, 317; marshaling, 8; tresp. 22; trover, 60.
Black v. Robinson, 62 M. 68—hus. & w. 45, 126; trover, 60.
Black v. Washington, 65 M. 60—app. & e. 193; partit. 13.
Blackbourn, Cocke v.—57 M. 689.
Blackbourn, Cocke v.—58 M. 537.
Black, Brooks v.—68 M. 161.
Blackburn v. Senatobia Educational Assn. 74 M. 852—ex. & ad. 173; judgm. 567.
Blackburn v. Tucker, 72 M. 735—mills, 12.
Blackburn, Tate v.—48 M. 1.
Black, Capital Oil Works v.—70 M. 8.
Black, Claughton v.—24 M. 185.
Black, Combs v.—62 M. 831.
Black Creek Drainage Dist., Holmes County v.—55 So. 963.
Black, Davis v.—5 S. & M. 226.
Black, Houston v.—14 So. 529.
Black, Lewis v.—27 M. 425.
Blackman, Taylor v.—12 So. 458.
Black, Newman v.—73 M. 239.
Black, Planters' Bank v.—11 S. & M. 43.
Blackston Mercantile Co. v. McPherson, 77 M. 403—partners. 217, 218.
Blackwell v. Davis, 2 H. 812—ev. 249.
Blackwell v. Graham, 74 M. 595—app. & e. 1049.
Blackwell v. Reid, 41 M. 102—partners. 197; plead. 32, 205.
Blackwell v. State, 94 M. 240—rob. 16.
Blackwell, Sullivan v.—28 M. 737.
Blackwood, Watson v.—50 M. 15.
Blair v. Kansas City &c. R. Co., 76 M. 478—garn. 39.
Blair, Bell v.—65 M. 191.
Blair, Curtis v.—26 M. 309.
Blair, Hawkins v.—36 So. 246.
Blair, Scruggs v.—44 M. 406.
Blake v. Blake, 53 M. 182—ex. & ad. 75, 425; fraud. conv. 107, 225; quiet. t. 16.
Blake v. McCarthy, 56 M. 654—counties, 47; const. l. 20; em. dom. 22; ferries, 9.
Blake v. McCray, 65 M. 443—forc. e. & d. 9, 15.
Blake v. Morrisson, 33 M. 123—ev. 462; paymt. 30.
Blake, Ex parte, 47 So. 783—crim. l. 1181.
Blake, Gaskins v.—27 M. 675.
Blakely v. State, 57 M. 680—int. liq. 217.
Blakeman, Hicks v.—74 M. 459.
Blake, Miss. Cotton Oil Co. v.—20 So. 156.
Blakemore, Bonelli v.—66 M. 136.
Blakemore, Myer v.—54 M. 570.
Blakeney, Memphis &c. R. Co. v.—43 M. 218.
Blalack v. Stevens, 81 M. 711—execution, 194.
Blalack, Queen City Mfg. Co. v.—18 So. 800.
Blalock v. Gaddis, 33 M. 452—tax. 657.
Blalock v. Hardy, 37 M. 615—quiet. t. 43.
Blalock v. State, 79 M. 517—crim. l. 519, 778; hom. 108, 116, 340.
Blalock v. State, 27 So. 642—hom. 308.
Blanchard v. Buckholtz, W. 64—courts, 482.
Bland v. Commercial &c. Bank, 3 S. & M. 250—bills & n. 510, 526.
Bland v. Muncaster, 24 M. 62—ex. & ad. 319, 362, 365, 383.
Bland, Berry v.—7 S. & M. 77.
Bland, Gowing v.—2 H. 813.
Blanks v. Southern R. Co., 82 M. 703—marr. 22.
Blann, McPhail v.—47 So. 666.
Blanton v. King, 2 H. 856—app. & e. 28; courts, 198.
Blanton, Carter v.—33 M. 291.
Blanton, Davis v.—71 M. 821.
Blanton, McCutcheon v.—59 M. 116.
Blasdale, Johnson v.—1 S. & M. 17.
Blau v. State, 82 M. 514—gr. jury, 23.
Blaun, McPhail v.—95 M. 53.
Bledsoe v. Little, 4 H. 13—adv. pos. 69, 99; bound. 36; champ. 7; deeds, 28, 64; eject. 87, 113; lim. of act. 11; new tr. 102; pub. lands, 115.
Blennerhassett v. State, W. 7—crim. l. 622, 913, 1157, 1166½.
Blennerhassett, State v.—W. 7.
Blewett v. Blewett, 12 So. 249—eq. 365.
Blewett v. Evans, 42 M. 804—sales, 1, 281; slaves, 7.
Blewett v. State, 34 M. 606—gaming, 62.
Blewett, Morgan v.—71 M. 409.
Blewett, Robertson v.—14 So. 33.
Blewett, Townsend v.—5 H. 503.

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Blewett, Witherspoon v.—47 M. 570.
Blewitt v. Vaughan, 5 H. 418—inj. 45.
Blewitt, Morgan v.—72 M. 903.
Bloch, First Nat. Bank v.—82 M. 197.
Block v. Cross, 36 M. 549—hus. & w. 110½, 164, 179.
Block v. McMurry, 56 M. 217—eq. 13; Sunday, 10, 13, 19.
Blocker v. State, 72 M. 720—mun. corp. 691, 809.
Blockman, Gulf &c. R. Co. v.—87 M. 192.
Block, Weztbrook v.—2 Miss. Dec. 720.
Block, Yazoo &c. R. Co. v.—86 M. 426.
Blodgett v. Seals, 78 M. 522—assign. 75; conf. of g. 12; schools, 77.
Blomquest v. Gardner, 95 M. 307—can. of i. 47.
Bloodworth v. Stevens, 51 M. 475—land. & t. 181, 203, 210, 274; wills, 475.
Bloodworth, Dogan v.—56 M. 419.
Bloom v. Helm, 53 M. 21—bills & n. 73, 338; excep. 8; partners. 128, 146, 160; trial, 395, 403.
Bloom v. McGrath, 53 M. 249—acct. acti. on 6, 15; ev. 205, 471; frds. st. of, 14, 26; judgm. 182; plead. 325.
Bloom v. Price, 44 M. 73—app. & e. 959; j. p. 140; plead. 229, 236.
Bloom v. State, 57 M. 752—pilots, 18.
Bloom, Alabama &c. R. Co. v.—71 M. 247.
Bloom, Craft v.—59 M. 69.
Bloomfield, Hart v.—66 M. 100.
Bloom, Maclin v.—54 M. 365.
Bloom, Price v.—44 M. 73.
Bloom &c. Co., Hill &c. Co. v.—1 Miss. Dec. 385.
Blow, Leach v.—8 S. & M. 221.
Bloxum, Holden v.—35 M. 381.
Bluff City R. Co. v. Clarke, 95 M. 689—licens. 8, 10.
Blum Co. Yazoo &c. R. Co. v.—88 M. 180.
Blumenberg v. State, 55 M. 528—ind. 160.
Blumenfeld v. Seward, 71 M. 342—execution, 31.
Blumenfeld v. Seward, 71 M. 342—licens. 11; partners, 220; plgs. 5.
Blumer v. Jones, 2 Miss. Dec. 518—app. & e. 868.
Blumer v. Ulmer, 44 So. 161—banks, 82; eq. 51.
Blum, McCormick v.—75 M. 81.
Blum, May v.—21 So. 528.
Blum, Shannon v.—60 M. 828.
Blum, Yazoo &c. R. Co. v.—89 M. 242.
Blundell v. Vaughan, 12 S. & M. 625—bills & n. 426, 428; witn. 84, 107, 120.
Blundell, Washburn v.—75 M. 266.
Blythe v. Hernando Bank, 17 So. 4—bills & n. 97; chat. m. 32; partit. 104.
Blythe v. Pratt. 62 M. 707—em. dom. 155.
Blythe, Armistead v.—20 So. 298.
Blythe, Bedford v.—74 M. 720.
Blythe, Louisville &c. R. Co. v.—69 M. 939.
Board of Com'rs v. Hemingway, 66 M. 289—states, 142.
Board of Commissioners v. Johnson, 66 M. 248—em. dom. 155, 157, 179, 245.
Board of Education v. Aberdeen, 56 M. 518—const. l. 121; int. liq. 95.
Board of Education v. Mobile &c. R. Co. 71 M. 500—penal. 6, r. r. 242.
Board of Education v. Mobile &c. R. Co. 72 M. 236—judgm. 106; statut. 183.
Board of Education v. West Point, 50 M. 638—int. liq. 95; mand. 3, 28, 112.
Board of Levee Commissioners v. Allen, 60 M. 93—em. dom. 167, 223, 238.
Board of Levee Com'rs v. Brooks, 76 M. 635—em. dom. 172.
Board of Levee Commissioners v. Dancy, 65 M. 335—em. dom. 70, 238.
Board of Levee Commissioners v. Dillard, 76 M. 641—em. dom. 189, 199, 215; ev. 543, 558; witn. 268.
Board of Levee Commissioners v. Houston, 81 M. 619—lev. 24.
Board of Levee Commissioners v. Lee, 85 M. 508—em. dom. 199, 262.
Board of Levee Commissioners v. Harkleroads, 62 M. 807—em. dom. 124.
Board of Levee Commissioners v. Hendricks, 77 M. 483—em. dom. 199.
Board of Levee Commissioners v. Johnson, 66 M. 248—em. dom. 167, 187.
Board of Levee Commissioners v. Nelms, 82 M. 416—em. dom. 126, 239; ev. 113, 353, 485, 547.
Board of Levee Commissioners of Yazoo & Mississippi Valley Delta v. Nelms, 84 M. 642—remaind. 13.
Board of Levee Commissioners v. Royal Ins. Co. 96 M. 832—statut. 109.
Board of Levee Commissioners v. Wiborn, 74 M. 396—em. dom. 154, 159.
Board of Levee Commissioners v. Yazoo &c. R. Co. 25 So. 664—tax. 591.
Board of Levee Commissioners, Abbay v.—83 M. 102.
Board of Levee Commissioners, Allen v.—57 M. 163.
Board of Levee Commissioners, Duncan v.—74 M. 125.

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Board of Levee Commissioners, Fosdick v.—76 M. 859.
Board of Levee Commissioners, Hurley v.—76 M. 141.
Board of Levee Commissioners, Miller v.—78 M. 201.
Board of Levee Commissioners of Yazoo-Mississippi Delta, Corley v.—95 M. 617.
Board of Levee Commissioners, Richardson v.—77 M. 518.
Board of Levee Commissioners, Royal Ins. Co. v.—95 M. 168.
Board of Levee Commissioners, Tate v.—84 M. 388.
Board of Police, Drane v.—42 M. 264.
Board of Supervisors of, see title of particular county.
Board of Supervisors v. Johnston, 7 So. 390—app. & e. 1073; tax. 583.
Boarman v. Catlett, 13 S. & M. 149—execution, 36; mtg. 594; statut. 1.
Boarman v. Groves, 23 M. 280—hus. & w. 164.
Boarman, Mellen v.—13 S. & M. 100.
Boarman, Towns v.—23 M. 186.
Boaz, Sims v.—11 S. & M. 318.
Bobbitt, Huntington v.—46 M. 528.
Bobbitt, Johnson v.—81 M. 339.
Bobbitt, Jordan v.—91 M. 1.
Bobbitt, Wallace v.—79 M. 402.
Bobb, Smith v.—12 S. & M. 322.
Bobo v. State, 16 So. 755—crim. l. 763, 784, 830, 1085, 1172.
Bobo v. Yazoo-Mississippi Delta, 92 M. 792—const. l. 70, 89, 318; lev. 34; statut. 15, 110, 200, 241.
Bobo, Allen v.—81 M. 443.
Bobo, Ferguson v.—54 M. 121.
Boddie v. Pardee, 74 M. 13—ev. 158; lim. of act. 72; tax. 696.
Bodenheimer, Oliver Finnie Grocery Co. v.—77 M. 415.
Bodgett v. Ebbing, 24 M. 245—hus. & w. 130, 221.
Bodley v. McKinney, 9 S. & M. 339—ex. & ad. 90, 101, 118, 124; wills, 809.
Bodley, Jenkins v.—Sm. & M. Ch. 338.
Bodly v. Scarboro, 5 H. 729—bills & n. 510; notaries, 9.
Bogan v. Holder, 76 M. 597—mand. 3; tax. 316.
Bogard v. Gardley, 4 S. & M. 302—chat. m. 168, 184; fraud. conv. 54, 63, 308.
Bogard, Illinois Cent. R. Co. v.—78 M. 11.
Boggan v. Walter, 12 S. & M. 666—ex. & ad. 475.
Boggan, Robinson v.—52 So. 705.
Boggett v. Beard, 43 M. 120—bonds, 125.
Bogle, Patty v.—49 M. 491.
Boguechitts v. Lewis, 75 M. 741—mun. corp. 956.
Boguechitts, Lewis v.—76 M. 356.
Bohannon v. Binns, 31 M. 355—corp. 596.
Bohannon v. Fulton, 31 M. 348—ex. & ad. 389.
Bohannon v. Hough, W. 461—deeds, 46; seals, 3.
Bohannon v. Walcot, 1 H. 336—wills, 172, 197.
Bohn v. Lowery, 77 M. 424—phys. 20.
Bohn Mfg. Co. Robinson v.—71 M. 95.
Bohr v. Steamboat Baton Rouge, 7 S. & M. 715—app. & e. 963; dep. 56; new tr. 160.
Boisgerard v. Wall, Sm. & M. Ch. 404—eq. 106; execution, 36; mtg. 114; partners, 20, 27, 180, 183.
Boisgerard, Wall v.—11 S. & M. 574.
Boisseau v. Kahn, 62 M. 757—acct. acti. on, 15; attach. 122; j. p. 174.
Boland, Wimberly v.—72 M. 241.
Bolden v. State, 54 So. 241—crim. l. 535, 563.
Bolding, Alabama &c. R. Co. v.—69 M. 255.
Bolding, Alabama &c. R. Co. v.—69 M. 264.
Bolding, Britney v.—28 M. 53.
Bole v. State, 24 M. 445—witn. 279.
Bolen v. Lilly, 85 M. 344—home. 118a, 122.
Boles v. State, 9 S. & M. 284—crim. l. 834; hom. 308.
Boles v. State, 13 S. & M. 398—crim. l. 927, 928, 929, 1166½; jury, 75.
Boles v. State, 24 M. 445—crim. l. 364; jury, 11, 73, 75, 80.
Bolivar County v. Coleman, 71 M. 832—counties, 53; courts, 33; eq. 241; judgm. 577; pub. lands, 55, 124.
Bolivar County, Adams v.—75 M. 154.
Bolling v. Red Snapper &c. Co. 53 So. 394—trial, 139.
Bolling, Red Snapper &c. Co. v.—95 M. 752.
Bollis v. State, 7 So. 390—int. liq. 239.
Bollis, State v.—73 M. 57.
Bolls v. Duncan, W. 161—escheat, 8.
Bolls, Natchez &c. R. Co. v.—62 M. 50.
Bolton v. Adcock, 27 M. 758—app. & e. 1001.
Bolton v. Roebuck, 77 M. 713—eject. 26; propty. 10.
Bolton, Clopton v.—23 M. 78.
Bolton, Coopwood v.—26 M. 212.
Bolton, Harris v.—7 H. 167.
Bolton, O'Leary v.—50 M. 172.
Bolton, Peale v.—24 M. 630.
Bomer v. Canady, 79 M. 222—spec. perf. 11, 29, 67, 74.

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Bond v. Griffin, 74 M. 599—replev. 91, 107, tresp. 52.
Bond v. Jones, 8 S. & M. 368—eq. 150, 237; interest, 56; usury, 100, 102.
Bond v. State, 13 S. & M. 265—slaves, 19.
Bond v. State, 68 M. 648—abat. & r. 45; app. & e. 1069; crim. l. 1175; r. r. 254.
Bond, Gulfport Sash &c. Co. v.—95 M. 723.
Bond, Holden v.—29 So. 769.
Bond, Millsaps v.—64 M. 453.
Bond, Mitchell v.—84 M. 72.
Bonds v. Garvey, 87 M. 335—attach. 279.
Bonds v. Greer, 56 M. 710—statut. 180; tax. 699.
Bonds v. Lipton Co., 85 M. 209—app. & e. 1051; sales, 51, 108, 153.
Bonds, Howie v.—87 M. 698.
Bonds, Tapp v.—57 M. 281.
Bondurant v. Bank, 8 S. & M. 533—banks, 181; usury, 19.
Bondurant, Harper v.—7 S. & M. 397.
Bondurant, Herron v.—45 M. 683.
Bone v. McGinley, 7 H. 671—app. & e. 516, 548; plead. 164, 193, 433.
Bonelli v. Blakemore, 66 M. 136—ease. 1, 7, 15, 18, 24; frds. st. of, 60.
Bonelli v. Bowen, 70 M. 142—dam. 47, 149½, 163; ev. 60; tresp. 40; witn. 388.
Bone, McGill v.—13 S. & M. 592.
Bone, McGill v.—26 M. 446.
Bonnafee v. Fenner, 6 S. & M. 212—partners, 53, 102.
Bonnafee v. Fisk, 13 S. & M. 682—execution, 326.
Bonnell v. Covington, 7 H. 322—bills & n. 39, 131, 428.
Bonner v. Bynum, 72 M. 442—ven. & pur. 119.
Bonner v. Lessley, 61 M. 392—eject. 22; mtg. 342b, 342d; subrog. 16.
Bonner v. Marsh, 10 S. & M. 376—attach. 63; fact. 47; ship. 106.
Bonner v. Marx, 51 M. 141—ev. 314; mon. recd. 1, 17.
Bonner v. Mutual Life Ins. Co., 36 So. 538—ins. 144.
Bonner v. State, 65 M. 293—rape, 35.
Bonner v. White, 78 M. 653—acct. acti. on, 9.
Bonner, Bowen v.—45 M. 10.
Bonner, Commercial Bank v.—13 S. & M. 649.
Bonner Co. v. New Orleans &c. R. Co., 40 So. 65—trial, 143.
Bonner, Herndon v.—52 M. 513.
Bonner, Holman v.—63 M. 131.
Bonner, Lawson v.—88 M. 235.
Bonner, McDowell v.—62 M. 278.
Bonner, Scott v.—11 So. 791.
Bonner, Tatum v.—27 M. 760.
Bonner, Tittle v.—53 M. 578.
Bonner, Watts v.—66 M. 629.
Bonner, Williams v.—79 M. 664.
Bonney v. Bowman, 63 M. 166—judgm. 428, 739.
Bonney v. McLeod, 38 M. 393—bound. 54.
Bonney, Wildy v.—26 M. 35.
Bonney, Wildy v.—28 M. 710.
Bonney, Wildey v.—31 M. 644.
Bonny, Wildy v.—35 M. 77.
Booker v. State, 9 So. 355—crim. l. 560; larc. 54.
Booker v. State, 81 M. 391—crim. l. 636.
Booker, Carpenter v.—33 M. 45.
Booker, State v.—61 M. 16.
Booker, State v.—84 M. 187.
Bookout v. Andrews, 25 So. 865—statut. 185; tax. 688.
Bookout v. Shannon, 59 M. 378—ev. 354, 369, 376, 454; trial, 139; witn. 165.
Boon v. Barnes, 23 M. 136—execution, 290; ex. & ad. 135, 349; fraud. conv. 201; mtg. 152; vend. & pur. 220, 239, 266.
Boon v. Boon, 8 S. & M. 318—judgm. 299, 306, 321.
Boon v. Bowers, 30 M. 246—courts, 46; guard. & w. 168; judges, 1; statut. 82.
Boone v. Baird, 91 M. 420—deeds, 131.
Boone v. Boone, 58 M. 820—bills & n. 94, 476; cncts. 341.
Boone v. Davis, 64 M. 133—trusts, 64.
Boone v. Dulion, 80 M. 584—tax. 419, 734, 769.
Boone v. McIntosh, 62 M. 744—attch. 178; garn. 1, 107.
Boone v. McJunkin, 63 M. 559—app. & e. 708, 1108.
Boone v. Mendenhall Lumber Co. 52 So. 584—fixt. 21.
Boone v. Poindexter, 12 S. & M. 640—app. & e. 124; execution, 172; judgm. 411.
Boone v. State, 33 So. 172—ars. 38.
Boone v. Wells, 91 M. 799—tax. 764.
Boone, Sledge v.—57 M. 222.
Boon, Green v.—57 M. 617.
Boonville, Crittenden v.—92 M. 277.
Boories, Perret v.—78 M. 934.
Booth v. Stebbins, 47 M. 161—wills, 778, 782, 798.
Booth v. Watson, 5 S. & M. 295—bills & n. 510.
Booth, Green v.—91 M. 618.
Booth, Hamilton v.—55 M. 60.

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Booth, Hunt v.—Freem. Ch. 215.
Booth, Lanier v.—50 M. 410.
Booth, Warren County v.—81 M. 267.
Booyer v. Hodges, 45 M. 78—bills & n. 342; ex. & ad. 170.
Booze v. Yazoo City, 94 M. 428—costs, 296.
Bordeaux, Schulherr v.—64 M. 59.
Borden, Richardson v.—42 M. 71.
Borders, Gilmore v.—2 H. 824.
Borodofski v. Feld, 88 M. 31—ex. & ad. 224; exemps. 26.
Borodofski, Feld v.—87 M. 727.
Borries, Biloxi v.—78 M. 657.
Borroum v. State, 23 M. 477—ind. 61.
Borroum v. State, 94 M. 88—crim. l. 1064; int. liq. 173.
Borroum v. State, 22 So. 62—crim. l. 115.
Borroum, State v.—25 M. 203.
Bosarge, Scranton v.—19 So. 194.
Bosbyshell v. Emanuel, 12 S. & M. 63—attach. 92, 115; judgm. 386.
Bosley v. Breiner, 24 M. 457—app. & e. 462, 484.
Bossel, Waters v.—2 Miss. Dec. 414.
Bossel, Waters v.—58 M. 602.
Bostic, Harvie v.—1 H. 106.
Bostick, Hays v.—96 M. 794.
Bostick Lumber &c. Co. Dewees v.—96 M. 253.
Bostwick, McQueen v.—12 S. & M. 604.
Boswell v. State, 70 M. 395—int. liq. 40.
Boswell v. Thigpen, 75 M. 308—acct. 12; ex. & ad. 442; lim. of act. 82; plgs. 39.
Boswell v. Wheat, 37 M. 610—judgm. 148; inj. 148.
Boswell, Gulf &c. R. Co. v.—85 M. 313.
Bosworth, Crowley v.—23 So. 585.
Botanico Med. Col. v. Atchison, 41 M. 188—cncts. 54; seals, 1; statut. 226.
Botsai, Carroll v.—65 M. 350.
Bott v. Wood, 56 M. 136—alt. inst. 26; ev. 269; wills, 328.
Botters v. Edrington, 30 M. 580—execution, 113, 116.
Botto v. State, 26 M. 108—int. liq. 223.
Bottom, Coopwood v.—26 M. 212.
Bott, Wood v.—56 M. 128.
Boucher, Baird v.—60 M. 326.
Bouggeois, New Orleans &c. R. Co. v.—66 M. 3.
Boughton, State v.—71 M. 90.
Boule v. Wood, 43 So. 480—ex. & ad. 428.
Bouldin, Zemurray v.—87 M. 583.
Bounds, Collins v.—82 M. 447.
Bounds, Collins v.—36 So. 689.
Bourdeaux v. Meridian Land Co., 67 M. 304—schools, 22; tax. 297, 300.
Bourdeaux v. Warren County, 66 M. 231—bail, 48; sheriffs, 35, 40.
Bourgeois v. Fairchild, 81 M. 708—mand. 74.
Bourgeois v. Laizer, 77 M. 146—elec. 273, 283.
Bourgeois, Clark v.—86 M. 1.
Bourgeois, Ex parte, 60 M. 663—crim. l. 201; mun. corp. 589, 592.
Bourland v. Itawamba County, 60 M. 996—app. & e. 273.
Bourland, Tate County v.—42 So. 379.
Bourn v. State, 5 So. 626—hom. 236.
Boush v. Smith, 2 S. & M. 512—bills & n. 460; dism. 23.
Bousquet v. State, 78 M. 478—mun. corp. 81, 98.
Boutte, Fenner v.—72 M. 271.
Bovard v. State, 30 M. 600—crim. l. 49.
Bowden v. Gray, 49 M. 547—hus. & w. 5.
Bowden, Shrock v.—4 H. 426.
Bowden, Simpson v.—23 M. 524.
Bowdre v. Carter, 64 M. 221—eq. 47, 66; licens. 39; mtg. 485.
Bowdre v. Sloan, 69 M. 369—land. & t. 203.
Bowdre, Phœnix Fire Ins. Co. v.—67 M. 620.
Bowdre, Smith v.—69 M. 692.
Bowen v. Bonner, 45 M. 10—abat. & r. 72; app. & e. 880, 1196; judgm. 18, 69, 870, 870c.
Bowen v. Duncan, 1 Miss. Dec. 400—inj. 124.
Bowen v. Gilleylen, 58 M. 813—app. & e. 69; courts, 69; statut. 34.
Bowen v. Hoskins, 45 M. 183—fraud. conv. 237; inj. 161; princ. & s. 200.
Bowen v. Mobile &c. R. Co., 33 So. 441—trial, 143.
Bowen v. Seale, 45 M. 30—app. & e. 904; courts, 31, 202c; eq. 452; ex. & ad. 508b, 510, 510a; judgm. 749.
Bowen, Benelli v.—70 M. 142.
Bowen, Carpenter v.—42 M. 28.
Bowen, Hargus v. 46 M. 72.
Bowen, State v.—45 M. 347.
Bower v. Chess &c. Co. 83 M. 218—plead. 214; tax. 620, 809.
Bower v. Henshaw, 53 M. 345—acct. acti. on, 9, 13; atty. & c. 103; lim. of act. 86; trial, 5.
Bower v. Henshaw, 56 M. 619—app. & e. 999.
Bowers v. Andrews, 52 M. 596—deeds, 118; tax. 769.
Bowers v. Chambers, 53 M. 259—app. & e. 204, 676; deeds, 37; eject. 121; int. liq. 75; tax. 754, 764, 765.

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Bowers v. Johnson, 10 S. & M. 169—app. & e. 1003; princ. & a. 155.
Bowers v. Ross, 55 M. 213—app. & e. 153, 299, 548, 695, 701, 867; attach. 25; excep. 11.
Bowers v. Virden, 56 M. 595—atty. & c. 125; tax. 674a.
Bowers v. Williams, 34 M. 324—ex. & ad. 110, 510a.
Bowers, Boon v.—30 M. 246.
Bowers, Dinkins v.—49 M. 219.
Bowers, Graves v.—2 Miss. Dec. 374.
Bowers, Gulf Coast Ice Mfg. Co. v.—80 M. 570.
Bowers, Kerr v.—1 S. & M. 584.
Bowers, Kerr v.—3 S. & M. 641.
Bowers, Lecharie v.—3 S. & M. 641.
Bowers, Virden v.—55 M. 1.
Bowers, Zecharie v.—1 S. & M. 584.
Bowers, Zecharie v.—3 S. & M. 641.
Bowie v. Greenville St. R. Co. 69 M. 196—carr. 333, 341; neg. 113, 115.
Bowie v. Hagan, 5 H. 13—app. & e. 384.
Bowie, Ingraham v.—33 M. 17.
Bowie, Wolley v.—41 M. 553.
Bowland, Loughridge v.—52 M. 546.
Bowler v. State, 41 M. 570—crim. l. 789; false pret. 2, 3, 25, 39; forn. 3; incest, 9.
Bowles v. Dean, 84 M. 376—j. p. 174; land. & t. 293, 307, 315.
Bowles v. Leflore County, 85 M. 387, anim. 47.
Bowles v. State, 14 So. 261—tresp. 9.
Bowles v. State, 40 So. 165—crim. l. 1119; hom. 332; witn. 379.
Bowles v. Wood, 90 M. 742—costs, 171; courts, 102.
Bowles v. Wright, 34 M. 409—app. & e. 173.
Bowles, Illinois Cent. R. Co. v.—71 M. 994, 1003.
Bowles, Sandler v.—42 M. 414.
Bowles, Southard v.—W. 325.
Bowles, Woods v.—92 M. 843.
Bowling v. Arthur, 34 M. 41—bills & n. 403, 414; notaries, 10.
Bowling v. Bowling, 88 M. 144—ven. & pur. 296.
Bowling v. Bowling, 47 So. 802—app. & e. 1056; forc. e. & d. 29; vend. & pur. 298.
Bowling, Phil. Inc. Co. v.—72 M. 565.
Bowman v. McLaughlin, 45 M. 461—app. & e. 881, 909; mech. lien, 291; plead. 340.
Bowman v. McLaughlin, 45 M. 499—judgm. 220.
Bowman v. McLaughlin, 48 M. 175—judgm. 17.
Bowman v. O'Reily, 31 M. 261—eq. 327; partners, 344; trusts, 77.
Bowman v. Pope, 33 M. 94—bankr. 427.
Bowman v. Roberts, 58 M. 126—chat. m. 49, 107, 223, 257, 261; mtg. 110; trial, 197, 252.
Bowman v. Roe, 62 M. 513—tax. 439, 476, 688.
Bowman, Bonney v.—63 M. 166.
Bowman, Davis v.—55 M. 671.
Bowman, Hood v.—Freem. Ch. 290.
Bowman, Jackson v.—39 M. 671.
Bowman, Langan v.—12 S. & M. 715.
Bowman, Pope v.—27 M. 194.
Bowman, Pope v.—31 M. 639.
Bowman, Richardson v.—40 M. 782.
Bowmar v. Peine, 64 M. 99—lim. of act. 148; mtg. 168, 171; vend. & pur. 230.
Bowmar, Wooldridge v.—64 M. 34.
Box v. Standford, 13 S. & M. 93—eq. 79; frds. st. of, 129, 150.
Box v. State, 34 M. 614—gr. jury, 3, 8.
Box, McCullom v.—8 S. & M. 619.
Boyce v. Francis, 56 M. 573—lim. of act. 83; spec. perf. 24.
Boyce, Clayton v.—62 M. 390.
Boyce, Cowen v.—5 H. 769.
Boyd v. Barringer, 23 M. 269—judgm. 934; lim. of act. 183.
Boyd v. Fidelity Mut. Life Ins. Co., 88 M. 562—ins. 638.
Boyd v. Hawkins, 59 M. 325—app. & e. 543, 630.
Boyd v. Hawkins, 60 M. 277—guard. & w. 54, 58.
Boyd v. Lambeth, 24 M. 433—ex. & ad. 525; trusts, 224.
Boyd v. Lowry, 53 M. 352—ex. & ad. 246; judgm. 870b.
Boyd v. Mississippi Home Ins. Co., 75 M. 47—ins. 146, 165.
Boyd v. Quinn, 22 So. 802—j. p. 164, 166; plead. 25.
Boyd v. Ricketts, 60 M. 62—ev. 130, 315; partners, 45, 217; witn. 144.
Boyd v. State, 37 So. 834—hom. 288.
Boyd v. State, 84 M. 414—crim. l. 338, 366, 385; ex. & ad. 214; hom. 173, 174, 288; witn. 414.
Boyd v. Swing, 38 M. 182—disc. 6; courts, 198; eq. 45, 48, 150; ex. & ad. 22, 529, 531; guard. & w. 182.
Boyd v. Thornton, 13 S. & M. 338—eq. 66; execution, 283; quiet. t. 43.
Boyd v. Warmack, 62 M. 536—usury, 82, 131.
Boyd, Barringer v.—27 M. 473.
Boyd, Burnet v.—60 M. 627.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Boyd, Dean v.—86 M. 204.
Boyd, Dowell v.—3 S. & M. 592.
Boyd, Ebson v.—23 So. 586.
Boyd, Pugh v.—38 M. 326.
Boyd, Surget v.—57 M. 485.
Boyd, Thornton v.—25 M. 598.
Boyd, Warmack v.—63 M. 488.
Boyd, Womack v.—31 M. 443.
Boyet, L'Hote v.—85 M. 636.
Boyett, Burney v.—1 H. 39.
Boygents v. Beard, 41 M. 531—eq. 327.
Boykin v. State, 50 M. 375—dam. 197; offic. 37; tax. 570.
Boykin v. State, 86 M. 481—crim. l. 785a, 814, 825, 826; hom. 124, 300b, 300g.
Boykin v. State, 89 M. 19—crim. l. 338.
Boykin, Lee v.—13 S. & M. 528.
Boykin, Smith v.—61 M. 110.
Boylan v. Holt, 45 M. 277—atty. & c. 134, 139, 166; witn. 79, 140.
Boyland, Hill v.—40 M. 618.
Boyle v. Griffin, 84 M. 41—guard. & w. 168, 171; parent & c. 2.
Boyle v. Manion, 74 M. 572—assum. 8; interpl. 11, 36.
Boyle v. Manion, 22 So. 947—tax. 794.
Boyles, Alabama &c. R. Co. v.—37 So. 498.
Boyt, Hart v.—54 M. 547.
Bozeman v. Laird, 91 M. 719—sheriffs, 5.
Bozeman, Hale v.—60 M. 965.
Bozman v. Brower, 6 H. 9—judgm. 17d; proc. 132; sales, 418.
Bozman v. Brown, 6 H. 349—ex. & ad. 433, 449, 451; judgm. 531; plead. 164.
Brabham v. Day, 75 M. 923—deeds, 136.
Brabham v. Hinds County, 54 M. 363—bridges, 34; counties, 144.
Brabston v. State, 68 M. 208—crim. l. 685, 793; hom. 29, 174, 300c, 301; witn. 268.
Bracey v. State, 64 M. 17—clks. of c. 73, 76.
Bracey v. State, 64 M. 26—false pret. 3, 23.
Bracey, Stamps v.—1 H. 312.
Brack, McClanahan v.—46 M. 246.
Bracy, Mandeville v.—31 M. 460.
Bradfield, Georgia Pac. R. Co. v.—10 So. 577.
Bradford v. Bradford, 80 M. 467—div. 12, 196, 218, 220.
Bradford v. Curlee, 41 M. 558—bonds, 144; parties, 97.
Bradford v. Jenkins, 41 M. 328—cncts. 103; mtg. 342; sales, 281; slaves, 7.
Bradford v. Moore, 2 Miss. Dec. 432—tax. 618.
Bradford v. Taylor, 85 M. 409—app. & e. 1063; mast. & s. 190, 218, 265.
Bradford, American Express Co. v.—82 M. 130.
Bradford Construction Co. v. Heflin, 88 M. 314—app. & e. 878—mast. & s. 186, 198.
Bradford, Herrington v.—W. 520.
Bradford, Moore v.—70 M. 70.
Bradford, Taylor v.—83 M. 157.
Bradley v. Byrd, 12 S. & M. 269—ex. & ad. 314, 314g, 314h.
Bradley v. Peggott, W. 348—land. & t. 269.
Bradley v. State, W. 156—assa. 62; hus. & w. 3.
Bradley v. State, 10 S. & M. 618—hom. 141, 257.
Bradley v. Villere, 66 M. 399—const. l. 14; lim. of act. 19.
Bradley, Marks v. 69 M. 1.
Bradley, Rothenberg v.—10 So. 922.
Bradley, Smith v.—6 S. & M. 179, 485.
Bradley, Vicksburg &c. R. Co. v.—66 M. 518.
Bradstreet Co. v. Jackson, 81 M. 233—licens. 8; statut. 232.
Brady v. Cook, 68 M. 636—replev. 96.
Brady v. Howe, 50 M. 607—clks. of c. 3, 10; judges, 3, 6, 11; offic. 27, 31, 56; sheriffs, 3; states, 42.
Brady v. West, 50 M. 68—counties, 2; offic. 9, 30, 51; statut. 285, 286.
Brady, Locke v.—30 M. 21.
Brady, Moore v.—11 So. 723.
Brady, Summers v.—56 M. 10.
Brahan v. First National Bank, 72 M. 266—bills & n. 110, 126; garn. 157, 191; usury, 62.
Brahan v. Meridian Home Telephone Co. 52 So. 485—mun. corp. 663, 682.
Brahan, National Mut. B. & L. Assn. v.—80 M. 407.
Braman v. Catlett, 13 S. & M. 149—judgm. 780.
Bramblet v. Webb, 11 S. & M. 438—ex. & ad. 410, 411.
Brame v. Light &c. Co. 95 M. 26—torts, 15; waters, 204.
Brame, Holloway & McRaney v.—83 M. 335.
Bramlett v. Adams, 96 M. 61—stip. 6.
Bramlett v. Reily, 3 So. 658—inj. 163.
Bramlett v. Roberts, 68 M. 325—deeds, 116, 121; estop. 35.
Bramlett v. Southern Mutual Aid Association, 2 Miss. Dec. 477—ins. 58.
Bramlett v. Wetlin, 71 M. 902—mtg. 221; statut. 263, 267; vend. & pur. 267.
Bramlett, State v.—47 So. 433.
Bramlitt, Coffin v.—42 M. 194.
Branch Bank v. Rhew, 37 M. 110—ex. & ad. 222, 431, 442.

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Branch Bank v. Windham, 31 M. 317—ex. & ad. 226; lim. of act. 83.
Brand v. Learned, 38 So. 43—eject. 107.
Brander, Billups v.—55 M. 495.
Brander, Wells v.—10 S. & M. 348.
Brander, Wright v.—62 M. 82.
Brandon v. Benjamin, 39 M. 505—eq. 2.
Brandon v. Brandon, 46 M. 222—trusts, 363; vend. & pur. 268.
Brandon v. Greer, 95 M. 100—guard. & w. 61, 62, 69, 70.
Brandon v. Hoggatt, 32 M. 335—ex. & ad. 60, 104, 485, 495.
Brandon v. State, 75 M. 904—crim. l. 658; hom. 146, 309.
Brandon, Davis v.—1 H. 154.
Brandon, Green v.—W. 372.
Brandon, Haughton v.—40 M. 729.
Brandon, Jones v.—59 M. 585.
Brandon, Jones v.—60 M. 556.
Brandon, Kerr v.—2 H. 810.
Brandon, Metcalf v.—58 M. 841.
Brandon, Metcalf v.—60 M. 685.
Brandon, Mobile &c. R. Co. v.—53 So. 957.
Brandon, Nutt v.—85 M. 702.
Brandon, Winner v.—82 M. 767.
Brandt v. Murphy, 68 M. 84—mand. 118; tax. 910.
Brandy, Carter v.—71 M. 240.
Brannin, Lake v.—90 M. 737.
Brannon v. Lyon, 86 M. 401—ev. 416; tax. 532.
Brannon v. Pringle, 94 M. 215—tax. 768.
Brannon v. Pringle, 46 So. 161—tax. 684.
Brantley v. Batson, 84 M. 411—home. 204.
Brantley v. Carter, 26 M 482—app. & e. 1028; ev. 408, 461; frds. st. of, 28; new tr. 41; plead. 330.
Brantley v. State, 13 S. & M. 468—crim. l. 970, 1131, 1135; ind. 129, 133, 203.
Brantley Granite Co. Standard Const. Co. v.—90 M. 16.
Brantley, Hoskins v.—57 M. 814.
Brantley, Huntington v.—33 M. 451.
Brantly v. Wolf, 60 M. 420—estop. 54; inf. 25, 29, 31, 57, 58.
Branton v. Buckley, 54 So. 850—wills, 521, 524, 537, 629.
Branton v. Washington County, 79 M. 277—convt. 10.
Brasfield v. French, 59 M. 632—app. & e. 154; ex. & ad. 93, 94, 508; hus. & w. 110.
Bratton v. Howard, 52 So. 210—cncts. 245.
Bratton v. Rogers, 62 M. 281—trusts, 63½, 81; vend. & pur. 232.
Bratton, Allen v.—47 M. 119.
Brazealle, Hinds v.—2 H. 837.
Brazele v. State, 86 M. 286—gaming, 90.
Brazil, Commander v.—88 M. 668.
Breckenridge v. Johnson, 57 M. 871—agric. 15; j. p. 41, 44.
Breckenridge v. Mellon, 1 H. 273—abate. & r. 73, 75; ex. & ad. 411, 441, 453, 453b; sci. fa. 6.
Breck v. Smith, 44 M. 690—app. & e. 1140; judgm. 118; plead. 433.
Breed, Sampson v.—W. 267.
Breeden, Harrison v.—7 H. 670.
Breeland v. State, 79 M. 527—ind. 55, 65, 125f; mast. & s. 345a.
Breen, Velie v.—28 So. 25.
Breiner, Bosley v.—24 M. 457.
Breland v. O'Neal, 88 M. 449—adv. pos. 85.
Breland, Cue v.—78 M. 864.
Brem, Hoover v.—43 M. 603.
Brem, Wheeler v.—33 M. 126.
Brennan v. Mississippi Home Ins. Co., 70 M. 531—tax. 42, 191.
Brennan v. Straas, 85 M. 341—j. p. 164.
Brennan, Alabama &c. R. Co. v.—69 M. 103.
Brennan, Ketchum v.—53 M. 596.
Brennan, Vicksburg Grocery Co. v.—20 So. 845.
Brennen, State v.—72 M. 894.
Brenner v. Hirsch, 69 M. 369—garn. 13; partners. 255.
Brenner, Dillard v.—73 M. 130.
Brent v. Heard, 40 M. 870—contin. 32.
Brent v. Williams, 79 M. 355—inf. 91.
Brett v. Brett, 5 So. 105—eq. 17.
Brett v. Sayle, 60 M. 192—land. & t. 223; set off, 30.
Brett v. State, 94 M. 669—crim. l. 431, 763, 829; hom. 286f.
Brevard, Coker v.—90 M. 64.
Brewer v. Abbay, 82 M. 559—mand. 74.
Brewer v. Beckwith, 35 M. 467—dep. 90; eject. 65, 127, 135.
Brewer v. Bessinger, 25 M. 86—ven. & pur. 12.
Brewer v. Gates, 31 So. 205—attach. 308.
Brewer v. Harris, 2 S. & M. 84—cncts. 94; fraud. 31; plead. 382; ven. & pur. 36, 314.
Brewer v. Mullins, 52 So. 257—witn. 318.
Brewer, Cocke v.—68 M. 775.
Brewer, Louisville &c. R. Co. v.—1 Miss. Dec. 42.
Brewer, Read v.—16 So. 350.
Brewer, Toof v.—3 So. 571.
Brewster, Demoss v.—4 S. & M. 661.
Brewster, Knott v.—27 So. 758.
Brewster, Van Vacter v.—1 S. & M. 400.

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Brian v. Davidson, 25 M. 213—judgm. 766.
Brian, Buck v.—2 H. 874.
Brichetto, Alabama &c. R. Co. v.—72 M. 891.
Brickell, Williams v.—37 M. 682.
Bridault, Heirn v.—37 M. 209.
Bridewell, Ex parte, 57 M. 39—bail, 41; crim. l. 1140.
Bridewell, Jacks v.—51 M. 881.
Bridewell, Wade v.—38 M. 420.
Bridgeforth v. Gray, 39 M. 136—app. & e. 1097; judgm. 749; lim. of act. 70a; wills, 436.
Bridgeforth v. Maxwell, 42 M. 743—dower, 22.
Bridges v. Ballard, 62 M. 237—mtg. 335.
Bridges v. Clay County, 57 M. 252—app. & e. 136; counties, 58, 225; ev. 387.
Bridges v. Clay County, 58 M. 817—counties, 113.
Bridges v. Jackson Electric R. &c. Co. 86 M. 584—carr. 288, 294, 316, 331, 346; ev. 14; neg. 65, 122, 136; trial, 32.
Bridges v. Maxwell, 34 M. 309—ex. & ad. 527.
Bridges v. State, 24 M. 153—recogn. 11.
Bridges v. State, 86 M. 377—burg. 36; crim. l. 408, 520, 650.
Bridges v. Winters, 42 M. 135—alt. of inst. 1, 11; princ. & s. 126.
Bridges, Carpenter v.—32 M. 265.
Bridges, Keerl v.—10 S. & M. 612.
Bridges, Koch v.—45 M. 247.
Bridges, Lenoir v.—2 Miss. Dec. 554.
Bridgforth v. Payne, 62 M. 777—lim. of act. 171, 181, 193.
Bridgforth, Ex parte, 77 M. 418—bast. 84; const. l. 83.
Bridgforth, Sample v.—72 M. 293.
Briel v. Natchez, 48 M. 423—adv. pos. 8; dedi. 18; ease. 4; high. 159; inj. 15; mun. corp. 664; nuis. 19.
Brien v. Williamson, 7 H. 14—courts, 97, 103, 108; const. l. 11, 14, 28; slaves, 2; statut. 187.
Brien, Hardenstein v.—96 M. 493.
Briggs v. Clarke, 7 H. 457—app. & e. 906; excep. 9.
Briggs v. Hill, 6 H. 362—ven. & pur. 254, 261, 262.
Briggs v. Planters' Bank, Freem. Ch. 574—liens, 16, 17; marshaling, 4; ven. & pur. 261.
Briggs, Berthe v.—1 H. 195.
Briggs, Harvey v.—68 M. 60.
Briggs, Newell v.—3 H. 45.
Briggs, Steen v.—3 S. & M. 326.
Bright v. Ross, 11 S. & M. 289—atty. & c. 89; elect. rem. 7; execution, 348, 357.
Bright v. Rowland, 3 H. 398—dam. 75, 79; ven. & pur. 141, 303.
Bright v. State, 28 So. 845—hom. 257.
Bright, Campbell v.—87 M. 443.
Bright, Jones v.—33 So. 655.
Brigins v. Chandler, 60 M. 862—counties, 52; tax. 301, 310, 431, 435, 736, 787.
Brigs, Gridley v.—2 H. 830.
Briley, Fairbanks Co. v.—25 So. 354.
Brill v. Merchants' & Planters' Bank, 12 So. 29—ven. & pur. 114.
Brill, Benoit v.—7 S. & M. 32.
Brill, Koen v.—75 M. 870.
Brimage, Holden v.—72 M. 228.
Brinker v. Leinkauff, 64 M. 236—attch. 351.
Brinker, Leinkauf v.—62 M. 255.
Brinkley, Levee Commissioners v.—19 So. 296.
Brinson v. Berry, 7 So. 322—partners. 17; ref. of inst. 27.
Brinson v. Sandifer, 90 M. 41—deeds, 124; wills, 88.
Briscoe v. Anketell, 28 M. 361—const. law 169, 171; lim. of. act. 4, 6, 43, 48, 143, 151, 193; statut. 200, 267.
Briscoe v. Anketell, 31 M. 361—lim. of act. 186.
Briscoe v. McElween, 43 M. 556—det. 19; land. & t. 265, 274; trover, 46, 65.
Briscoe v. Thompson, Freem. Ch. 155—ex. & ad. 101, 157, 202, 360.
Briscoe, Chaplin v.—5 S. & M. 198.
Briscoe, Chaplain v.—11 S. & M. 372.
Briscoe, Holt v.—W. 19.
Brister v. Illinois Cent. R. Co. 84 M. 33—app. & e. 1031; r. r. 457, 485.
Brister v. Illinois Cent. R. Co. 88 M. 431—ev. 587.
Brister v. Joseph Bowling Co., 29 So. 830—app. & e. 671; partners. 43; witn. 331½, 381.
Brister v. State, 86 M. 461—crim. l. 925½, 957; gaming, 91.
Brister, Exum v.—35 M. 391.
Brister, Rutland v.—53 M. 683.
Brister, Swing v. 87 M. 516.
British-American Assurance Co. Sneed v.—73 M. 279.
British-American Mortg. Co. Brown v.—86 M. 388.
British &c. Mortg. Co. v. Burke, 80 M. 643—mtg. 312; statut. 241.
British &c. Mortg. Co. v. Todd, 84 M. 522—cov. 108, 130, 131.
British &c. Mortg. Co. Stauffer v.—77 M. 127.

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Britney v. Bolding, 28 M. 53—cncts. 197.
Brittain v. Bethany, 31 M. 331—inn. 2.
Brittain, Bank of Duncan v.—92 M. 545.
Brittain, Barlow v.—70 M. 427.
Brittain, Binns v.—30 M. 693.
Britt, Coker v.—78 M. 583.
Brittenum, Gibbons v.—56 M. 232.
Britton v. Criswell, 63 M. 394—chat. m. 188; judgm. 494; mtg. 305.
Britton, Dyer v.—53 M. 270.
Britton &c. Bank, Charlotte Supply Co. v.—23 So. 630.
Britton, Robertshaw v.—74 M. 873.
Britton, Robertshaw v.—24 So. 307.
Broach v. Sing, 57 M. 115—trial, 150; wills, 140, 239, 322, 325.
Broach v. Wortheimer-Swartz Shoe Co. 21 So. 300—attch. 308; ev. 166.
Broach v. Wortheimer-Swartz Shoe Co. 21 So. 307—app. & e. 1061.
Broach, Berry v.—65 M. 450.
Broach, Brown v.—52 M. 536.
Broach, Rule v.—58 M. 552.
Broaddus, Clarksdale v.—77 M. 667.
Broadnax, Anglin v.—52 So. 865.
Broadus, Martin v.—Freem. Ch. 35.
Brock v. Luckett, 4 H. 459—wills, 31, 55, 303.
Brock v. State, 92 M. 712—witn. 225.
Brockett v. Richardson, 61 M. 766—courts, 371; ex. & ad. 435; guard. & w. 69; judgm. 471; lim. of act. 72a.
Brock, Griffin v.—33 So. 968.
Brock, Speight v.—Freem. Ch. 389.
Brodnax v. Brodnax—13 S. & M. 369—witn. 98.
Brody v. Doherty, 30 M. 40—lim. of act. 148, 150.
Brogan, Bernheim v.—66 M. 184.
Brogan, Gregory v.—74 M. 694.
Brogan, Hearn v.—64 M. 334.
Brogan, Senior v.—66 M. 178.
Bronson v. Kinzie, 1 H. 311—mtg. 501.
Brooke, Coleman v.—37 M. 71.
Brookhaven v. Baggett, 61 M. 383—land. & t. 5; mun. corp. 250.
Brookhaven v. Lawrence County—2 Miss. Dec. 455—tax. 543, 910.
Brookhaven v. Lawrence County, 55 M. 187—counties, 53; ev. 387.
Brookhaven, Chrisman v.—70 M. 477.
Brookhaven, Lawrence County v.—51 M. 68.
Brookhaven, Lincoln County v.—90 M. 5.
Brookhaven Lumber Co. Catlett v.—38 So. 320.
Brookhaven Lumber &c. Co. v. Ill. Cent. R. Co. 68 M. 432—app. & e. 929, 1033; dam. 214; neg. 12; new tr. 44; r. r. 357, 485; trial, 304.
Brookhaven Mach. Co. Illinois Cent. R. Co. v.—71 M. 663.
Brookhaven, Potera v.—95 M. 774.
Brookhaven &c. R. Co. Morris v.—88 M. 539.
Brooks v. Barkley, 72 M. 320—hus. & w. 151; nova. 5.
Brooks v. Black, 68 M. 161—cov. 130, 131.
Brooks v. Cunningham, 49 M. 108—land. & t. 229c.
Brooks v. Gillis, 12 S. & M. 438—eq. 340.
Brooks v. Hatto, 33 M. 575—app. & e. 828.
Brooks v. Kelly, 63 M. 616—eq. 423; execution, 35, 36; jud. s. 49; lis. pens. 23; mtg. 26, 33, 136, 199, 272, 526.
Brooks v. Lewis, 1 H. 207—des. & d. 122; execution, 130; ex. & ad. 454.
Brooks v. Martin, 62 M. 217—cov. 107; eq. 195.
Brooks v. Mississippi Cotton Oil Co. 76 M. 874—mast. & s. 178.
Brooks v. Robinson, 54 M. 272—app. & e. 266; eq. 375; interest, 59; liens, 17; refer. 100; ven. & pur. 284, 285.
Brooks v. Spann, 63 M. 198—app. & e. 1175; eq. 273; ex. & ad. 516; inf. 111; judgm. 386, 456; lim. of act. 39, 72b; tax. 817.
Brooks v. Shelton, 47 M. 243—inj. 15; tax. 451, 494, 606.
Brooks v. Shelton, 54 M. 353—hus. & w. 119, 149.
Brooks v. Snead, 50 M. 416—afft. 11.
Brooks v. State, 65 M. 445—int. liq. 126.
Brooks v. State, 67 M. 577—dis. c. 6; breach of p. 3.
Brooks v. Whiston, 7 S. & M. 513—bills & n. 352; judgm. 412; new tr. 85; sales, 234.
Brooks, Alabama &c. R. Co. v.—69 M. 168.
Brooks, Bain v.—46 M. 537.
Brooks, Board of Levee Com'rs v.—76 M. 635.
Brooks, Campbell v.—93 M. 853.
Brooks, Georgia Pac. R. Co. v.—66 M. 583.
Brooks, Grayson v.—64 M. 410.
Brooks, Hatto v.—33 M. 575.
Brooks, Kelly v.—57 M. 225.
Brooks, Hutchins v.—31 M. 430.
Brooks, Johnson v.—31 M. 17.
Brooks, McDougal v.—18 So. 657.
Brooks, McGowan v.—16 So. 436.
Brooks, Miller v.—4 S. & M. 175.
Brooks, New Orleans &c. R. Co. v.—85 M. 269.
Brooks, O'Herrin v.—67 M. 266.
Brooks Oil Co. v. Weatherford, 91 M. 501—judgm. 874; sheriffs, 77.
Brooks, Richardson v.—52 M. 118.

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Brooks, Stewart v.—62 M. 492.
Brooks, Stone v.—6 H. 373.
Brooks, Willie v.—45 M. 542.
Brooks, Wise v.—69 M. 891.
Broome v. Duncan, 29 So. 394—death, 6; witn. 91.
Brothers v. Beck, 75 M. 482—judgm. 734; tax. 439.
Brotherhood Locomotive Firemen v. Hand, 90 M. 893—ins. 713.
Brothers, Judah v.—71 M. 414.
Brothers, Judah v.—72 M. 616.
Brothers, Smith v.—86 M. 241.
Brougher v. Conley, 62 M. 358—tax. 663.
Brougher v. Stone, 72 M. 647—adv. pos. 14, 99; tax. 735.
Broussard, Rush v.—30 So. 635.
Browder, Carmichael v.—3 H. 252.
Browder, Carmichael v.—4 H. 431.
Browder, Hall v.—4 H. 224.
Brower, American Freehold Mortgage Co. v. —32 So. 906.
Brower, Bozman v.—6 H. 9.
Brown v. Ashford, 56 M. 677—forc. e. & d. 22, 42; j. p. 166; plead. 229.
Brown v. Bacon, 27 M. 589—execution, 326; interpl. 4; judgm. 300b, 755.
Brown v. Bank of Mississippi, 31 M. 454—cred. s. 11; eq. 3, 44, 294; fraud. conv. 241.
Brown v. Barlow, 51 M. 7—guard. & w. 76, 108, 163.
Brown v. Bartee, 10 S. & M. 268—execution, 36; mtg. 86, 304, 372.
Brown v. Beatty, 34 M. 227—action, 33; em. dom. 1, 12, 20, 122, 124, 144, 167, 213, 274; j. p. 32; statut. 64.
Brown v. British American Mortg. Co., 86 M. 388—corp. 285, 455; eq. 312, 340; mtg. 342e, 358, 369a.
Brown v. Broach, 52 M. 536—bankr. 417, 420; partners. 146, 286; plead. 67.
Brown v. Brown, 33 M. 39—exemp. 30.
Brown v. Brown, 90 M. 410—husb. & w. 46; subrog. 23.
Brown v. Carraway, 47 M. 668—app. & e. 110; courts, 204.
Brown v. Crane, 69 M. 678—attch. 25.
Brown v. Dillahunty, 4 S. & M. 713—bail, 18.
Brown v. Forbes, 8 S. & M. 498—app. & e. 1003.
Brown v. Freeland, 34 M. 181—cncts. 144, 276, 347; usury, 2.
Brown v. Goldsby, 34 M. 437—eq. 427; slaves, 5.
Brown v. Guice, 46 M. 299—deeds, 109; tax. 764.
Brown v. Hamblin, 23 M. 392—sheriffs, 168.
Brown v. Hill, 26 M. 643—ex. & ad. 29, 222, 226.
Brown v. Issaquena County, 54 M. 230—adv. pos. 10; eject. 39; land. & t. 66; lim. of act. 1.
Brown v. James, 24 So. 908—mtg. 529.
Brown v. Johnson, 12 S. & M. 398—princ. & a. 147, 150.
Brown v. Kidd, 34 M. 291—execution, 99, 351; princ. & s. 190.
Brown v. Lester, 13 S. & M. 392—clks. of c. 73; offic. 134; parties, 4.
Brown v. Levee Commissioners, 50 M. 468—const. l. 282, 304, 309; lev. 2.
Brown v. Lyon, 81 M. 438—fraud, 28, 34; tax. 796.
Brown v. McGraw, 12 S. & M. 267—assign. 135; ev. 202, 235.
Brown v. Matthews, 40 So. 66—chat. m. 117, 138.
Brown v. Mosely, 11 S. & M. 354—sheriffs, 168.
Brown v. Mullins, 24 M. 204—guard. & w. 47, 56, 58, 68, 147, 147a, 148.
Brown v. Murphee, 31 M. 91—sales, 273, 346.
Brown v. Nevitt, 27 M. 801—cncts. 101, 144; mtg. 433; usury, 2, 19, 29, 74.
Brown v. Norman, 65 M. 369—exch. of prop. 5; sales, 37, 51, 122.
Brown v. Owen, 75 M. 319—mand. 79; schools, 134, 138.
Brown v. Phipps, 6 S. & M. 51—tax. 568.
Brown v. Poindexter, 10 S. & M. 596—judgm. 428; pub. lands, 34.
Brown v. Prophit, 53 M. 649—bills & n. 139; princ. & s. 106, 108, 128.
Brown v. Sharp, 31 So. 712—mun. corp. 980.
Brown v. Smith, 5 H. 387—cov. 8; judgm. 29; plead. 88; sales, 2, 263; ven. & pur. 308a.
Brown v. Speight, 30 M. 45—ex. & ad. 111; inj. 135, 148.
Brown v. State, 32 M. 433—crim. l. 763, 1056, 1089; hom. 209, 216.
Brown v. State, 57 M. 424—app. & e. 217; crim. l. 1166½; jury, 50, 83, 103, 110, 133, 135; perj. 26, 30, 37.
Brown v. State, 60 M. 447—crim. l. 923.
Brown v. State, 69 M. 398—crim. l. 855, 929.
Brown v. State, 72 M. 95—crim. l. 295, 561, 789; trial, 85.
Brown v. State, 72 M. 990—burg. 17, 28; crim. l. 834.
Brown v. State, 72 M. 997—crim. l. 366, 380, 561, 761, 789, 796; rape, 37, 40, 59, 61.

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Brown v. State, 75 M. 842—crim. l. 785b, 1170½; j. p. 5.
Brown v. State, 78 M. 637—crim. l. 366, 407; hom. 203.
Brown v. State, 81 M. 137—crim. l. 260c; obst. just. 7.
Brown v. State, 81 M. 143—burg. 22; crim. l. 1171.
Brown v. State, 83 M. 645—crim. l. 126.
Brown v. State, 85 M. 27—crim. l. 533.
Brown v. State, 85 M. 511—crim. l. 396, 1120; hom. 189.
Brown v. State, 87 M. 800—hom. 189.
Brown v. State, 88 M. 166—crim. l. 680; hom. 171, 174, 189; witn. 267.
Brown v. State, 95 M. 670—hom. 228.
Brown v. State, 96 M. 134—crim. l. 1170.
Brown v. State, 96 M. 534—witn. 348.
Brown v. State, 7 So. 359—hom. 251.
Brown v. State, 8 So. 257—forn. 1; lewd. 1.
Brown v. State, 38 So. 316—jury 72, 75.
Brown v. State, 54 So. 305—crim. l. 317, 721½; hom. 32, 231, 282, 308; ind. 189.
Brown v. State, 55 So. 961—crim. l. 419.
Brown v. Thomas, 26 M. 335—det. 11; execution, 90; parties, 4; tresp. 36.
Brown v. Troup, 33 M. 35—app. & e. 69, 1180; judgm. 854.
Brown v. Union Bank, 62 M. 754—bills & n. 329.
Brown v. Walker, 11 So. 724—ev. 584; trial, 190, 294; wills, 287, 328.
Brown v. Weast, 7 H. 181—eject. 22; trusts, 133.
Brown v. Weaver, 76 M. 7—hom. 103; sheriffs, 157, 166.
Brown v. West, 80 M. 764—usury, 16, 119.
Brown v. Wilcox, 14 S. & M. 127—execution, 98; lim. of act. 5, 6; statut. 263, 267.
Brown v. Yazoo &c. R. Co. 88 M. 687—carr. 316.
Brown, Baker v.—83 M. 793.
Brown, Bozman v.—6 H. 349.
Brown, Bullard v.—93 M. 104.
Brown, Burton v.—25 So. 61.
Brown, Campbell v.—6 H. 106, 230.
Brown, Chapman v.—7 H. 636.
Brown, Clements v.—31 M. 93.
Brown, Coffman v.—7 S. & M. 125.
Brown, Coppage v.—10 S. & M. 605.
Brown, Crum v.—63 M. 495.
Brown, Davis v.—27 M. 265.
Brown, Davis v.—29 So. 172.
Brown, Dickerson v.—49 M. 357.
Brown, Dickinson v.—9 S. & M. 130.
Brown, Dix v.—41 M. 131.
Brown, Dogan v.—44 M. 235.
Brown, Dowell v.—13 S. & M. 43.
Browne v. Carlisle, 62 M. 595—tax. 674.
Browne v. Hernsheim, 71 M. 574—cred. s. 37; fraud. conv. 217.
Brown, Ex parte, 1 H. 303—atty. & c. 37.
Brown, Fellows v.—38 M. 541.
Brown, Ferguson v.—75 M. 214.
Brown, Foote v.—60 M. 155.
Brown, Ganong v.—88 M. 53.
Brown, Georgia State Building &c. Assn. v.—31 So. 911.
Brown, Gilliam v.—43 M. 641.
Brown, Gilmore v.—93 M. 63.
Brown, Grangers' Life Ins. Co. v.—57 M. 308.
Brown, Green v.—34 So. 147.
Brown, Illinois Cent. R. Co. v.—89 So. 531.
Brown, Illinois Cent. R. Co. v.—77 M. 338.
Browning v. Mathews, 73 M. 343—anim. 91.
Browning v. State, 30 M. 656—crim. l. 141, 423, 427, 561, 813.
Browning v. State, 33 M. 47—app. & e. 1123; crim. l. 141, 416, 552, 631, 813, 935, 1169, 1174; hom. 234; jury, 80.
Browning v. Watkins, 10 S. & M. 482—ex. & ad. 420; interpl. 1.
Brown, Kelly v.—32 M. 202.
Brown, Kenoye v.—32 M. 607.
Brown, Lake v.—7 H. 661.
Brownlee v. Steel, W. 179—wills, 734.
Brownlee, Carpenter v.—38 M. 200.
Brown, Levy v.—56 M. 83.
Brownlow, Southworth v.—34 M. 405.
Brown, McCaughan v.—76 M. 496.
Brown, McCorkle v.—9 S. & M. 167.
Brown, Madison County v.—67 M. 684.
Brown, Mount v.—33 M. 566.
Brown, New Orleans &c. R. Co. v.—64 M. 479.
Brown, Orton v.—35 M. 426.
Brown, Osgood v.—Freem. Ch. 392.
Brown, Ramsey v.—77 M. 124.
Brown, Read v.—36 M. 329.
Brown, Shackelford v.—72 M. 380.
Brown, Shaw v.—35 M. 246.
Brown, Shaw v.—42 M. 309.
Brown, Shelby v.—24 So. 531.
Brown, Shewalter v.—35 M. 428.
Brown, Smith v.—28 M. 810.
Brown, Southern Express Co. v.—67 M. 260.
Brown, Stamps v.—W. 526.
Brown, State v.—32 M. 275.
Brown, State v.—33 M. 500.
Brown, State v.—34 M. 688.
Brown, State v.—58 M. 835.
Brown, State v.—90 M. 876.
Brown, State v.—28 So. 752.

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Brown, Stevens v.—49 M. 597.
Brown, Tierman v.—65 M. 563.
Brown, Tierney v.—67 M. 109.
Brown, Tinnin v.—53 So. 780.
Brown, Turner v.—3 S. & M. 425.
Brown, Tuteur v.—74 M. 774.
Brown, Walker v.—45 M. 615.
Brown, Warren v.—25 M. 66.
Brown, Wilson v.—94 M. 608.
Brown, Wolfe v.—11 So. 879.
Brown, Wyatt v.—8 S. & M. 365.
Brown, Yazoo &c. R. Co. v.—54 So. 804.
Broyles, Klyce v.—37 M. 524.
Bruce, Yazoo &c. R. Co. v.—54 So. 241.
Brulie v. Cooney, 12 So. 463—tax. 809.
Brumfield v. Hoover, 90 M. 502—courts, 119; partners. 200.
Brumfield, Andrews v.—32 M. 107.
Brumfield, Yazoo &c. R. Co. v.—64 M. 637.
Bruner v. Planters' Bank, 23 M. 406—new tr. 95.
Bruner v. Sherley, 27 M. 407—bankr. 187.
Bruner, Robertson v.—24 M. 242.
Bruner, Smith v.—23 M. 508.
Brungard, Moore v.—5 H. 557.
Brungard, Walker v.—13 S. & M. 723.
Brunini v. Pera, 54 M. 649—ex. & ad. 537d.
Brunson v. Lea, 5 S. & M. 149—dism. 23.
Brunson v. Volunteer Carriage Co. 93 M. 793—replev. 70, 72; sales, 478.
Brunswick-Balke-Collender Co. v. Murphy, 89 M. 264—chat. m. 173; ware. 29.
Brunswick, Stein v.—69 M. 277.
Bryan v. Lashly, 13 S. & M. 284—attch. 49, 322; garn. 96.
Bryan, Grand Gulf Bank v.—8 S. & M. 234.
Bryant v. Enochs Lumber & Mfg. Co. 94 M. 454—trial, 139.
Bryant v. Harris, 70 M. 683—j. p. 98; sales, 331.
Bryant v. Rosenbaum, 62 M. 191—app. & e. 906.
Bryant v. State, 33 M. 225—crim. l. 729.
Bryant v. State, 65 M. 435—crim. l. 935, 1033, 1057, 1184; int. liq. 236.
Bryant v. State, 92 M. 822—schools, 129.
Bryant, Cole v.—73 M. 297.
Bryant, Graham v.—95 M. 180.
Bryant, Herndon v.—39 M. 335.
Bryant, Illinois Cent. R. Co. v.—70 M. 665.
Bryant, Moak v.—51 M. 560.
Bryant, Staton v.—55 M. 261.
Bryant, Tabler v.—62 M. 350.
Bryant, Thompson v.—75 M. 12.
Bryant, Wood v.—68 M. 198.
Bryson, Gray v.—87 M. 304.
Buchanan v. Grimes, 52 M. 82—guard. & w. 160.
Buchanan v. Morton, 63 M. 280—partners. 162.
Buchanan v. Smith, 43 M. 90—mech. liens 1, 233; states, 18b; statut. 85.
Buchanan v. State, 84 M. 332—crim. l. 1166½; hom. 250.
Buchanan v. State, 5 So. 617—larc. 3, 11.
Buchanan v. State, 53 So. 399—hom. 129.
Buchanan, Airey v.—64 M. 181.
Buchanan, Faut v.—17 So. 371.
Buchanan, Love v.—40 M. 758.
Buchanan, Mobley v.—30 M. 174.
Buchanan, Myers v.—46 M. 397.
Buchanan, Snoddy v.—2 Miss. Dec. 637.
Buchanan, State v.—75 M. 349.
Buchanan, Tishimingo Sav. Inst. v.—60 M. 496.
Buchanan, Watts Mercantile Co. v.—92 M. 540.
Buchanan, Wooten v.—49 M. 386.
Buck v. Brian, 2 H. 874—mech. liens, 1, 3.
Buck v. Little, 24 M. 463—app. & e. 1140; bills & n. 533; trial, 338.
Buck v. Macon, 85 M. 580—deeds, 159.
Buck v. Moseley, 24 M. 170—jury, 148; partners. 144; plead. 164.
Buck v. Paine, 50 M. 648—agric. 13; chat. m. 3, 153.
Buck v. Paine, 52 M. 271—agric. 13, 14; chat. m. 172, 173, 223; replev. 8; sales, 235; ven. & pur. 227.
Buck v. Vasser, 47 M. 551—states, 18a, 56.
Buck, Beaman v.—9 S. & M. 207.
Buckels v. Cunningham, 6 S. & M. 358—ev. 432; ex. & ad. 157, 449; plead. 382.
Buckels, Suzett v.—7 H. 663.
Buckeye Cotton Oil Co. Gloster Oil Works v.—87 M. 618.
Buck, Grand Gulf &c. R. Co. v.—53 M. 246.
Buckhalter v. Mississippi &c. R. Co. 32 M. 119—attch. 20.
Buckholtz, Blanchard v.—W. 64.
Buckingham v. Bailey, 4 S. & M. 538—app. & e. 840; courts, 37, 103; execution, 153c, 153d, 153e, 159; garn. 92, 179, 193.
Buckingham v. Elliott, 62 M. 296—adj. land. 1; nuis. 3; waters, 104.
Buckingham v. Levi, 23 M. 590—hab. corp. 24.
Buckingham v. Nelson, 42 M. 417—app. & e. 1149; exemp. 65.
Buckingham v. Owen, 6 S. & M. 502—ex. & ad. 453, 537d.

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Buckingham v. Riggs, 27 M. 751—costs, 273; lim. of act. 5.
Buckingham v. Smith, 23 M. 521—clks of c. 72.
Buckingham v. Walker, 48 M. 609—app. & e. 999, 1002; bills & n. 430; ex. & ad. 87, 90, 437; ev. 29; guard. & w. 36, 47; lim. of act. 114, 181; nova. 3; paym. 17; princ. & s. 109; witn. 137.
Buckingham v. Walker, 51 M. 491—cred. s. 24; fraud. conv. 250, 254, 258; judgm. 912.
Buckingham v. Wesson, 54 M. 526—eq. 195; ex. & ad. 115, 141, 334, 433; hus. & w. 10; judgm. 460; lim. of act. 105; powers, 3; trusts, 102; witn. 143, 149.
Buckingham, Dalrymple v.—23 M. 597.
Buckingham, Hughes v.—5 S. & M. 632.
Buckingham, Prewett v.—28 M. 92.
Buckingham, State v.—93 M. 846.
Buckingham, Thrasher v.—40 M. 67.
Buck, Klein v.—73 M. 133.
Buckley v. Baldwin, 69 M. 804—cred. s. 33; rec. 35, 39.
Buckley v. Daley, 45 M. 338—execution, 37, 38.
Buckley v. Dunn, 67 M. 710—fraud. conv. 95; hus. & w. 49½, 157.
Buckley v. George, 71 M. 580—app. & e. 476, 484; rec. 174.
Buckley v. State, 62 M. 705—crim. l. 763b, 786.
Buckley v. Thornton, 1 Miss. Dec. 220—chat. m. 158.
Buckley v. VanDiver, 70 M. 622—attch. 330, 351, 367.
Buckley, Branton v.—54 So. 850.
Buckley, Grinstead v.—32 M. 148.
Buckley, Lewis v.—73 M. 58.
Buckley, McFadden v.—53 So. 351.
Buckley, Miller v.—85 M. 706.
Buckley, Scottish-American Mortg. Co. v.—81 M. 599.
Buckley, Simpson County v.—81 M. 474.
Buckley, Simpson County v.—85 M. 713.
Buckley, Van Diver v.—1 So. 633.
Buck, Magruder v.—56 M. 314.
Buckner v. Bierne, 9 S. & M. 304—inj. 172.
Buckner v. Calcote, 28 M. 432—bankr. 247, 256, 329, 352, 419; eq. 71; judgm. 561, 713; lim. of act. 61.
Buckner v. Ferguson, 44 M. 677—disc. 19.
Buckner v. Pipes, 56 M. 366—execution, 75; judgm. 870b; lim. of act. 38.
Buckner v. Railroad Co., 72 M. 873—mast. & s. 88, 228, 258; r. r. 259.
Buckner v. State, 81 M. 140—crim. l. 937.
Buckner v. Wood, 45 M. 57—ex. & ad. 351.
Buckner, Hundley v.—6 S. & M. 70.
Buckner, Natchez Ins. Co. v.—4 H. 63.
Buckner, Natchez Ins. Co. v.—5 H. 744.
Buckner, Natchez Ins. Co. v.—2 S. & M. 340.
Buckner, Pickett v.—45 M. 226.
Buckner, Pipes v.—51 M. 848.
Buckner, Stone v.—12 S. & M. 73.
Buck, Stewart v.—2 Miss. Dec. 440.
Buck, Swann v.—40 M. 268.
Bucy v. Kansas City &c. R. Co. 22 So. 296—garn. 76.
Buddendorff, Corry v.—54 So. 84.
Buddig, Citizens' Bank v.—65 M. 284.
Budlong, Kellogg v.—7 H. 340.
Buffington v. Thomas, 84 M. 157—wills, 130.
Buford, Louisville &c. R. Co. v.—73 M. 494.
Bufford, Acre v.—80 M. 565.
Bufkin v. Lyon, 68 M. 255—execution, 54; princ. & a. 145.
Bugg, Hill v.—52 M. 397.
Buie v. Buie, 67 M. 456—lim. of act. 48, 101; witn. 150.
Buie v. Pollock, 55 M. 309—eq. 22; ex. & ad. 115, 157, 318, 435, 537d; guard. & w. 182c; trusts, 102.
Buie v. Pollock, 2 Miss. Dec. 151—app. & e. 1110; eq. 442; ex. & ad. 135, 282, 292, 512, 531.
Buie v. Pollock, 2 Miss. Dec. 426—ex. & ad. 345.
Building &c. Association v. Leonard, 74 M. 810—b. & l. assn. 14, 33; comp. 10.
Building &c. Assn. v. Shields, 71 M. 630—b. & l. assn. 33.
Building &c. Association, Goodman v.—71 M. 310.
Buie, Pollock v.—43 M. 140.
Buie, Woods v.—5 H. 285.
Bulger, Hardie v.—66 M. 577.
Bull v. Dagenhard, 55 M. 602—guard. & w. 38, 128; inf. 80.
Bull v. Harrell, 7 H. 9—app. & e. 803; bills & n. 428; paym. 12; set-off, 22.
Bullard v. Brown, 93 M. 104—cncts. 143; exch. of prop. 8.
Bullard v. Dorsey, 7 S. & M. 9—app. & e. 909; costs, 117; plead. 139; set-off, 35, 41, 43, 51.
Bullard, Payne v.—23 M. 88.
Bullington, McKissack v.—37 M. 535.
Bullington, Reed v.—49 M. 223.
Bullitt v. Taylor, 34 M. 708—ack. 49; cred. s. 22; deeds, 54, 191; fraud. conv. 207, 241.
Bullitt v. Thatcher, 5 H. 689—princ. & s. 126.
Bullock v. Sneed, 13 S. & M. 293—ex. & ad. 129.

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Bullock, Adams v.—94 M. 27.
Bullock, Beall v.—11 So. 720.
Bullock, Berry v.—81 M. 463.
Bullock, Foxworth v.—44 M. 457.
Bullock, Holloman v.—82 M. 405.
Bullock, Withers v.—53 M. 539.
Bumpass, Young v.—Freem. Ch. 241.
Bunch v. Shannon, 46 M. 525—cncts. 96; exch. of prop. 5; ins. p. 98; ven. & pur. 108.
Bunch v. Wolerstein, 62 M. 56—const. law, 139; lev. 21, 28f, 34.
Bunch, Gibbs v.—63 M. 47.
Bunch, Vaughan v.—53 M. 513.
Bunckley v. Jones, 79 M. 1—app. & e. 671, 695; deeds, 38; ev. 77.
Bunckley v. State, 77 M. 540—crim. l. 385, 405, 721; larc. 51, 68.
Bunckley, Scottish-American Mortg. Co. v.—88 M. 641.
Bunkley, Cain v.—35 M. 119.
Buntyn v. National Mut. B. & L. Assn. 86 M. 454—b. & l. assn. 46; lim. of act. 28; usury, 109.
Buntyn v. Shippers' Compress Co. 63 M. 94—ack. 28, 35; mech. liens, 198, 253.
Buntyn, Baum v.—62 M. 110.
Burbridge v. Gumbel, 72 M. 371—cust. & u. 5, 13, 15; ev. 332; fact. 43.
Burch v. State, 2 Miss. Dec. 33—crim. l. 935, 1160.
Burch v. Stovall, 27 M. 725—wills, 303.
Burchart, Deaton v.—59 M. 144.
Burden v. State, 45 So. 705—crim. l. 1188; hom. 315.
Burden, ex parte, 92 M. 14—crim. l. 886; hab. corp. 28, 113.
Burdette, Beirne v.—52 M. 795.
Burdridge, Barrow v.—41 M. 622.
Burford v. Kersey, 48 M. 642—eq. 119, 297; judgm. 564.
Burford v. Nolan, 30 M. 427—forc. e. & d. 5.
Burford v. State, 56 So. 162—crim. l. 419.
Burford, Goodman v.—10 S. & M. 385.
Burford, Jones v.—26 M. 194.
Burge, Neylaus v.—14 S. & M. 201.
Burgess v. State, 81 M. 482—crim. l. 1167; ind. 132.
Burgess, Sovereign Camp Woodmen of the World v.—31 So. 809.
Burgin, Crow v.—38 So. 625.
Burke v. Gray, 6 H. 527—spec. perf. 66; ven. & pur. 254a, 266a, 268.
Burke v. Murphy, 27 M. 167—fraud. conv. 29b.
Burke v. Shaw, 59 M. 443—app. & e. 102, 1033; mast. & s. 300; neg. 32.
Burke v. Water Valley, 87 M. 732—waters, 203.
Burke, Anderson v.—6 S. & M. 475.
Burke, British &c. Mortg. Co. v.—80 M. 643.
Burke, Ex parte, 58 M. 50—crim. l. 240.
Burke, Flournoy v.—4 H. 337.
Burke, New Orleans &c. R. Co. v.—53 M. 200.
Burkett v. Burkett, 81 M. 593—judgm. 589, 692.
Burkett v. State, 33 So. 221—high. 198.
Burkett, Baker v.—75 M. 89.
Burkett, State v.—83 M. 301.
Burke, Whitfield v.—86 M. 435.
Burke, Yeizer v.—3 S. & M. 439.
Burkhalter, Leggett v.—30 M. 421.
Burkhalter, McLeod v.—57 M. 65.
Burkhalter, Stewart v.—28 M. 396.
Burks v. Burks, 66 M. 494—afft. 2, 3; app. & e. 880, 1173, 1234; eq. 319; proc. 96.
Burks v. Loggins, 39 M. 462—hus. & w. 48, 49¾, 138; witn. 399.
Burleson v. Milan, 56 M. 399—garn. 57.
Burn v. Yeizer, 27 M. 188—mtg. 316.
Burnet v. Boyd, 60 M. 627—eq. 427; mtg. 57, 457, princ. & a. 11.
Burnet v. State, 72 M. 994—crim. l. 1029.
Burnett v. Millsaps, 59 M. 383—offic. 127, sheriffs, 155.
Burnett v. Smith, 93 M. 566—deeds, 10, 14, 72; witn. 135.
Burnett v. State, 72 M. 994—crim. l. 246, 1033; int. liq. 288.
Burnett v. State, 92 M. 826—hom. 10, 146.
Burnett v. Strong, 26 M. 116—ex. & ad. 62; wills, 629, 655, 657.
Burnett, Anderson v.—5 H. 165.
Burnett, Calhoun v.—40 M. 599.
Burnett, Dunlap v.—5 S. & M. 702.
Burnett, Hogan v.—37 M. 617.
Burnett, Hooper v.—26 M. 428.
Burnett, McCaleb v.—55 M. 83.
Burnett, Norman v.—25 M. 183.
Burney v. Boyett, 1 H. 39—guard. & w. 30; judgm. 775, 784, 916.
Burney, Houston v.—2 S. & M. 583.
Burnham v. Alabama &c. R. Co., 81 M. 46—carr. 119.
Burnham v. Huffman, W. 381—eq. 278.
Burnham v. Sumner, 50 M. 517—schools, 48; statut. 61.
Burnham, Reeves v.—3 H. 25.
Burnley v. Mullins, 86 M. 441—high. 7, 8; trial, 252.
Burnley v. Tufts, 66 M. 48—sales, 203, 346.

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Burns v. Alabama &c. R. Co. 93 M. 816—app. & e. 1004; carr. 277a, 277b.
Burns v. Dreyfus, 69 M. 211—inj. 185; partit. 87; ten. in c. 37.
Burns v. Kelley, 41 M. 339—princ. & a. 170; trial, 189.
Burns v. Loeb, 59 M. 167—exemp. 93; judgm. 119.
Burns v. Stanton, 2 S. & M. 457—execution, 154b; judgm. 890.
Burns v. Stanton, 24 M. 580—abate. & r. 69; app. & e. 797; judgm. 296.
Burns v. Yeizer, 27 M. 188—princ. & a. 171.
Burns, Baum v.—66 M. 124.
Burns, Carberry v.—68 M. 573.
Burnsed, Richmond &c. R. Co. v.—70 M. 437.
Burns, O'Leary v.—53 M. 171.
Burns, Smith v.—25 M. 422.
Burns, Smith v.—72 M. 966.
Burns, Smythe v.—25 M. 422.
Burrage v. Melson, 48 M. 237—dam. 142; replev. 1, 62.
Burrell v. Anderson, 1 Miss. Dec. 357—assist. 4; inf. 89; proc. 33.
Burrell v. State, 96 M. 202—crim. l. 1166½.
Burris, Carter v.—10 S. & M. 527.
Burritt, Robinson v.—66 M. 356.
Burroughs v. Gilliland, 90 M. 127—cncts. 212; plead. 193; ven. & pur. 266.
Burroughs v. Jones, 78 M. 235—app. & e. cov. act. 11; set-off, 35.
Burroughs v. Jones, 79 M. 214—inj. 39; mtg. 338; spec. perf. 65; ven. & pur. 95, 282, 298.
Burroughs v. Vance, 75 M. 696—app. & e. 1201; tax. 531, 690, 693.
Burrow v. Sanders, 57 M. 211—agric. 15; app. & e. 1028; j. p. 196.
Burrowes Co. v. Crittenden. 37 So. 504—cncts. 351.
Burrow, Morgan v.—16 So. 432.
Burrus v. Burrus, 56 M. 92—courts, 202a; em. dom. 179; ex. & ad. 349, 512; guard. & w. 8, 76; inf. 80, 89; judgm. 577; proc. 92.
Burrus v. Fisher, 23 M. 228—ex. & ad. 416, 417; plead. 229, 245.
Burrus v. Fisher, 27 M. 418—partners. 198.
Burrus v. Gordon, 57 M. 93—accd. 1, 8, 25; cov. act. 11; set-off. 35.
Burrus v. Thomas, 13 S. & M. 459—ex. & ad. 536; guard. & w. 175, 182a.
Burrus v. Wilkinson, 31 M. 537—bankr. 420; cov. act. 8, 102; lim. of act. 5; ven. & pur. 308a.
Burrus, Kane v.—2 S. & M. 313.
Burrus, Philips v.—13 S. & M. 31.
Burrus, Powell v.—35 M. 605.
Burrus, Thomas v.—23 M. 550.
Burt v. Harwood, 39 M. 756—clks. of c. 10; costs, 294.
Burt v. State, 72 M. 408—crim. l. 561, 763, 784, 789; hom. 158.
Burt v. State, 86 M. 280—jury, 58; statut. 85.
Burton v. Brown, 25 So. 61—wills, 113.
Burton v. Wells, 30 M. 688—deeds, 179, 181.
Burton, Ewing v.—5 H. 660.
Burton, Irvine v.—24 So. 962.
Burton, M'Niell v.—1 H. 510.
Burton, Spears v.—31 M. 547.
Burwell v. Herron, 16 So. 356—execution, 54.
Busby v. Graham, 26 M. 210—j. p. 159.
Busby v. Rhodes, 58 M. 237—perp. 4.
Busby v. Yazoo &c. R. Co. 90 M. 13—princ. & a. 147.
Busby, Cummings v.—62 M. 195.
Busby, Graham v.—34 M. 272.
Bush v. Cooper, 26 M. 599—bankr. 420, 433; cov. 12; ven. & pur. 190.
Bush v. Foote, 58 M. 5—assign. 50; bills & n. 24.
Bush v. Nance, 61 M. 237—app. & e. 14; brok. 20; garn. 76.
Bush v. Quick, 90 M. 32—app. & e. 92; eq. 114.
Bush v. Southern Brewing Co. 69 M. 200—princ. & a. 98.
Bush v. Stamps, 26 M. 463—princ. & a. 147.
Bush v. State, 6 So. 647—crim. l. 260b, 1023.
Bush v. Vail, 2 Miss. Dec. 519—fraud, 41.
Bush, Greer v.—57 M. 575.
Bush, Howell v.—54 M. 437.
Bush, Kilpatrick v.—23 M. 199.
Bush, Leflore County v.—76 M. 551.
Bush, McQueen v.—76 M. 283.
Bush, Marks v.—14 So. 89.
Bush, Stamps v.—7 H. 255.
Bush, Standifer v.—8 S. & M. 383.
Bush, Steger v.—Sm. & M. Ch. 172.
Bush, Tate v.—62 M. 145.
Busick v. Watson, 72 M. 244—execution, 250.
Busick, Rankin County v.—22 So. 801.
Bussey v. Gulf &c. R. Co. 79 M. 597—death, 9, 12.
Bussey, Gulf &c. R. Co. v.—82 M. 616.
Bustamente v. Bescher, 43 M. 172—proc. 135, 167.
Bustamente, Carter v.—59 M. 559.
Buster Brown Co. v. Valley Dry Goods Co. 94 M. 856—cncts. 189.
Buster, Miss. Cotton Oil Co. v. 84 M. 91.

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Butler v. Alcus, 51 M. 47—attch. 349, 350; bonds, 1; indem. 15.
Butler v. Benton, 46 M. 118—judgm. 24; replev. 99; trial, 326.
Butler v. Craig, 27 M. 628—app. & e. 351; lim. of act. 5.
Butler v. Hicks, 11 S. & M. 78—deeds, 82; eq. 17; trusts, 231, 232.
Butler v. Jones, 7 H. 587—atty. & c. 97; sheriffs, 122.
Butler v. Lee, 54 M. 476—attch. 308; execution, 37, 194.
Butler v. McPherson, 95 M. 635—logs, 1.
Butler v. Oxford, 69 M. 618—high. 198; mun. corp. 753, 763, 781, 791, 800.
Butler v. Scottish-American Mortg. Co. 93 M. 215—inj. 26.
Butler v. Smith, 35 M. 457—ev. 461; princ. & a. 29½; ship. 106; wharves, 15.
Butler v. Spann, 27 M. 234—eq. 146, 150; lim. of act. 45; trusts, 139.
Butler v. State, 12 S. & M. 470—judgm. 386; recog. 2, 3.
Butler v. State, 57 M. 630—judges, 14.
Butler v. State, 81 M. 734—counties, 101; crim. l. 789; ev. 434.
Butler v. State, 24 So. 316—crim. l. 683.
Butler v. State, 39 So. 1005—crim. l. 52, 126, 1124; hom. 28.
Butler v. Williams, 14 S. & M. 54—execution, 225.
Butler v. Vicksburg, 17 So. 605—bound. 48.
Butler, Echols v.—28 M. 114.
Butler, Edwards v.—89 M. 179.
Butler, Kibble v.—14 S. & M. 207.
Butler, Kibble v.—27 M. 586.
Butler, Klotz v.—56 M. 333.
Butler, Miss. Cent. R. Co. v.—93 M. 654.
Butler, Pollock v.—23 So. 577.
Butler, Porterfield v.—47 M. 165.
Butler, Rankin v.—2 S. & M. 473.
Butler, Scottish-American Mortg. Co. v.—54 So. 666.
Butler, Snodgrass v.—54 M. 45.
Butler, Steadman v.—95 M. 695.
Butler, Vicksburg v.—56 M. 72.
Butler, Watson v.—26 M. 178.
Butt v. Montgomery County, 62 M. 213—tax. 549.
Butt v. Williams, 15 So. 130—work & lab. 8.
Butter, Crusoe v.—36 M. 150.
Butterfield Lumber Co. v. Hartman, 82 M. 494—cncts. 108; eq. 23; hus. & w. 30, 47, 49½, 144, 149, 167; logs, 3; pub. lands, 139.
Butterfield Lumber Co. Illinois Cent. R. Co. v.—95 M. 357.
Butts v. Ricks, 82 M. 533—tax. 310, 802.
Butts v. Vicksburg &c. R. Co. 63 M. 462—banks, 207; bills & n. 129, 445; interest, 46.
Butts, Smith v.—72 M. 269.
Butt, Southern Home B. & L. Assn. v.—77 M. 944.
Byars v. Griffin, 31 M. 603—assign. 10, 35 98; garn. 132; witn. 82.
Byers v. McDonald, 54 So. 664—bills & n. 444; trial, 143.
Byers v. Tabb, 76 M. 843—assign. f. b. c. 199; sales, 55.
Byers, Tucker v.—46 M. 549.
Bynum v. Dalton, 95 M. 429.
Bynum v. Meyer, 48 So. 289—inj. 163.
Bynum v. Stinson, 81 M. 25—adv. pos. 110, 111; quiet. t. 36.
Bynum, Bonner v.—72 M. 442.
Bynum, Mobile &c. R. Co. v.—15 So. 795.
Byram, Bennett v.—38 M. 17.
Byrd v. Byrd, 28 M. 144—judgm. 861; lim. of act. 83.
Byrd v. Clarke, 52 M. 623—app. & e. 102; execution, 37, 38, 172; mtg. 177, 362.
Byrd v. Gibson, 1 H. 568—ex. & ad. 17.
Byrd v. Holloway, 6 S. & M. 199—ex. & ad. 170.
Byrd v. Holloway, 6 S. & M. 423—ex. & ad. 120a.
Byrd v. Hopkins, 8 S. & M. 441—attch. 157.
Byrd v. McDonald, 28 So. 847—tax. 656, 734a.
Byrd v. State, 1 H. 163—app. & e. 851, 906; courts, 161; hab. corp. 102; jury, 4, 38.
Byrd v. State, 1 H. 247—courts, 110; crim. l. 638, 970, 1111, 1140; gr. jury, 40; slaves, 18a.
Byrd v. State, 57 M. 243—statut. 223; witn. 52a.
Byrd v. Wells, 40 M. 711—ex. & ad. 213, 481, 482, 504; lim. of act. 143.
Byrd, Albert Mackie Grocer Co. v—25 So. 156.
Byrd, Bradley v.—12 S. & M. 269.
Byrd, Griffin v.—74 M. 32.
Byrd, Watson v.—53 M. 480.
Byrd, Yazoo &c. R. Co. v.—89 M. 308.
Byrne v. Anderson, 10 S. & M. 81—cred. s. 22.
Byrne v. Cummings, 41 M. 192—cncts. 54.
Byrne v. Jeffries, 38 M. 533—app. & e. 337, 838; appr. 20; cert. 69; judgm. 17d; proc. 3.
Byrne v. State, 50 M. 688—tax. 545, 567, 568c.
Byrne v. Taylor, 46 M. 95—deeds, 33; dower, 49; mtg. 426, 433, 485.
Byrne v. Taylor, 46 M. 553—eq. 152.

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Byrne, Baker v.—2 S. & M. 193.
Byrne, Hardeman v.—7 H. 365.
Byrne, Kilpatrick v.—25 M. 571.
Byrne, Vardeman v.—7 H. 365.

C

Cabaniss v. Clark, 31 M. 423—ex. & ad. 388b; partners. 67.
Cabaniss, Peyton v.—44 M. 808.
Cabel, Hackler v.—W. 91.
Cable v. Martin, 1 H. 558—des. & d. 6; eq. 18, 44; ex. & ad. 136, 141, 157, 367; hus. & w. 10, 11.
Cable v. State, 38 So. 98—crim. l. 874, 1085; int. liq. 236.
Cachute v. State, 50 M. 165—crim. l. 261, 1085; ev. 158; ind. 11a, 11b.
Cade v. State, 96 M. 434—crim. l. 595.
Cade, Whitehead v.—1 H. 95.
Cady v. Cady, 67 M. 425—eq. 22; wills, 820, 826, 849.
Cady v. State, 44 M. 332—crim. l. 519, 520, 522, 531.
Caffee, Allen v.—85 M. 766.
Caffey v. State, 78 M. 645—crim. l. 1025; ins. p. 86.
Caffey v. State, 24 So. 315—crim l. 331, 761; hom. 294.
Caffey v. Tindall, 56 So. 177—ev. 65; wills, 287, 575.
Caffey, Leake v.—19 So. 716.
Cage v. Iler, 5 S. & M. 410—mtg. 376; partners. 241; payment, 63.
Cage v. Louisville &c. R. Co. 7 So. 509—r. r. 443.
Cage v. Trage, 60 M. 563—em. dom. 167, 179, 238.
Cage v. Wilkinson, 3 S. & M. 223—atty. & c. 182.
Cage, Banks v.—1 H. 293.
Cage, Dreyfus v.—62 M. 605.
Cage, Dreyfus v.—62 M. 733.
Cage, Phillips v.—12 S. & M. 141.
Cage, Reed v.—4 H. 253.
Cage, Stewart v.—59 M. 558.
Cage, Woolfolk v.—W. 300.
Cagle, Hilliard v.—46 M. 309.
Cahn v. Person, 56 M. 360—conv. 5; execution, 135; judgm. 752, 777, 782; liens, 11.
Caillaret v. Bernard, 7 S. & M. 316—dower, 78.
Caillaret v. Bernard, 7 S. & M. 319—trusts, 117.
Cain v. Bunkley, 35 M. 119—wills, 27.
Cain v. Kelly, 57 M. 830—ven. & pur. 19, 343, 351.
Cain v. Moyse, 71 M. 653—chat. m. 263; deeds, 196; ev. 97; marshaling, 8; replev. 12.
Cain v. Simpson, 53 M. 521—j. p. 40, 73; replev. 19.
Cain v. State, 13 S. & M. 456—crim. l. 1088; gaming, 63, 64, 88.
Cain v. State, 81 M. 420—high. 108.
Cain v. State, 86 M. 505—gr. jury, 19.
Cain, Carey Halliday Lumber Co. v.—70 M. 628.
Cain, Temples v.—60 M. 478.
Cain, Witherspoon v.—W. 407.
Calcote, Buckner v.—28 M. 432.
Calcote, Smith v.—41 M. 656.
Caldwell v. George, 96 M. 484—mun. corp. 64, 680.
Caldwell v. Hall, 60 M. 330—bailm. 12.
Caldwell v. Hart, 57 M. 123—hus. & w. 138, 151, 228.
Caldwell v. Kimbrough, 91 M. 877—mtg. 335.
Caldwell v. State, 85 M. 383—crim. l. 600, 1166.
Caldwell v. State, 87 M. 420—crim. l. 1222; int. liq. 242.
Caldwell v. Walker, 76 M. 879—fraud. conv. 22.
Caldwell v. Willis, 57 M. 555—conv. 14; est. tail, 5; perp. 4; wills, 463, 592.
Caldwell, Clarksdale Compress &c. Co. v.—80 M. 343.
Caldwell, Ex parte, 62 M. 774—j. p. 161.
Caldwell, George v.—54 So. 316.
Caldwell, Glenn v.—74 M. 49.
Caldwell, Marqueze v.—48 M. 23.
Caldwell, Moore v.—Freem. Ch. 222.
Caldwell, Pearson v.—93 M. 637.
Caldwell, Ragdale v.—2 H. 930.
Caldwell, Starling &c. Co. v.—18 So. 376.
Caldwell, State v.—17 So. 372.
Caldwell, Stockton v.—86 M. 477.
Caleb v. State, 39 M. 721—crim. l. 472, 477, 552, 924, 1142, 1174; ev. 535; slaves, 18c.
Calhoun v. Burnett, 40 M. 599—eq. 17; ev. 74, 77; sales, 235; trusts, 105.
Calhoun v. Calhoun, 37 M. 668—bills & n. 91; ev. 411.
Calhoun v. Grimes, 25 M. 47—attch. 258.
Calhoun v. Rail, 26 M. 414—ex. & ad. 314h, 314j.
Calhoun v. State, 86 M. 553—crim. l. 260a, 1031.
Calhoun v. Ware, 34 M. 146—attch. 206.
Calhoun, Harper v.—7 H. 203.
Calhoun, Lance v.—85 M. 375.
Calhoun, Rich v.—12 So. 707.

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Calhoun, Steele v.—61 M. 556.
Calhoun, Thomas v.—58 M. 80.
Callaghan, Bentley v.—79 M. 302.
Callahan v. Newell, 61 M. 437—j. p. 174.
Callahan, Norris v.—59 M. 140.
Callender, Rollins v.—Freem. Ch. 295.
Callender v. McCreary, 4 H. 356—des. & d. 108.
Callicott v. Parks, 58 M. 528—life est. 16; remaind. 13.
Callicott, House v.—83 M. 506.
Callicott, Norfleet v.—90 M. 221.
Callicott, Schlicht v.—76 M. 487.
Callihan, Richardson v.—73 M. 4.
Calloway, Howry v.—48 M. 587.
Calmes v. Ford, 6 S. & M. 190—execution, 322; judgm. 784.
Calmes, Kyle v.—1 H. 121.
Calvert, Chew v.—W. 54.
Calvert, Floyd v.—53 M. 37.
Calvert, Mundy v.—40 M. 181.
Calvin, Hill v.—4 H. 231.
Calvit v. Calvit, 32 M. 124—ex. & ad. 193.
Calvit v. Markham, 3 H. 343—acct. 1; partit. 193.
Calvit, Kerr v.—W. 115.
Calvit, Nolan v.—12 S. & M. 273.
Calvit, Planters' Bank v.—3 S. & M. 143.
Calvit, Scott v.—3 H. 148.
Cameron v. Cameron, 10 S. & M. 394—deeds, 4; dower, 5, 44; hus. & w. 6; wills, 88.
Cameron v. Cameron, 29 M. 112—hus. & w. 10, 111.
Cameron v. Lewis, 56 M. 76—princ. & a. 177; trusts, 92½, 103.
Cameron v. Lewis, 56 M. 601—atty. & c. 125.
Cameron v. Lewis, 59 M. 134—adv. pos. 14; curt. 11; estop. 44; ev. 119, 120, 248; fraud. conv. 285; judgm. 747.
Cameron v. Railway Co. 69 M. 78—const. l. 285; lev. 28; lim. of act. 4.
Cameron v. Washington County, 47 M. 264—em. dom. 273; high. 64; inj. 14.
Cameron v. Watson, 40 M. 191—app. & e. 1028; new tr. 41; wills, 222, 249, 308.
Cameron, Anderson v.—63 M. 114.
Cameron, Arky v.—92 M. 632.
Cameron, Clymer v.—55 M. 593.
Cameron, Hannum v.—12 S. & M. 509.
Cameron, Henderson v.—73 M. 843.
Cameron, Hyman v.—46 M. 725.
Cameron, Kiernan v.—66 M. 442.
Cameron, Leonard v.—39 M. 419.
Cameron, Planters' Bank v.—3 S. & M. 609.
Cameron, Vicksburg R. &c. Co. v.—88 M. 412.
Camfield, Lockhart v.—48 M. 470.
Cammack, Williams v.—27 M. 209.
Camp v. Davis, 14 So. 433—trial, 332.
Campbell v. Adair, 45 M. 170—home. 33, 38, 160, 162, 181.
Campbell v. Bright, 87 M. 443—frds. st. of, 78.
Campbell v. Brooks, 93 M. 853—replev. 3.
Campbell v. Brown, 6 H. 106, 230—ex. & ad. 337, 358, 388b, 389; judgm. 486; trusts, 201.
Campbell v. Chapman, 31 So. 101—corp. 562.
Campbell v. Davis, 94 M. 164—ev. 419; Sunday, 10.
Campbell v. Doggett, 23 So. 371—chat. m. 80, 161.
Campbell v. Doyle, 57 M. 292—app. & e. 374, 461; ex. & ad. 39, 86, 456.
Campbell v. Hays, 41 M. 561—judgm. 103.
Campbell v. Henry, 45 M. 326—ev. 265; ref. of inst. 33; ven. & pur. 254.
Campbell v. Mississippi, 1 Miss. Dec. 413—crim. l. 1157.
Campbell v. Mississippi Union Bank, 6 H. 625—banks, 23, 25, 64, 97, 197; const. l. 44, 45; corp. 623; statut. 64.
Campbell v. New Orleans Nat. Bank, 74 M. 526—gaming, 3, 10; judgm. 487, 906; statut. 158.
Campbell v. Pittman, 3 So. 455—app. & e. 270.
Campbell v. State, 81 M. 417—crim. l. 1169.
Campbell v. State, 17 So. 441—crim. l. 674; jury, 65; rec. s. goods, 7, 9.
Campbell v. State, 50 So. 499—crim. l. 615.
Campbell v. Triplett, 74 M. 365—venue, 28.
Campbell v. Webster, 31 M. 345—wills, 205.
Campbell v. Yazoo &c. R. Co. 95 M. 309—carr. 327.
Campbell v. Young, 3 H. 301—ex. & ad. 431.
Campbell, Beall v.—1 H. 24.
Campbell, Foute v.—7 H. 377.
Campbell, Sandford v.—7 S. & M. 107.
Campbell, Vanderburg v.—64 M. 89.
Campbell, Williams v.—46 M. 57.
Campbell, Woods v.—87 M. 782.
Campbell, Wooldrige v.—61 M. 634.
Camp, De Moss v.—5 H. 516.
Campe v. Renandine, 64 M. 441—eject. 64; ev. 390.
Campe v. Saucier, 68 M. 278—jud. s. 21.
Camp, Texada v.—W. 150.
Canadian &c. Trust Co. v. Fitzpatrick, 71 M. 347—dism. 43; inj. 129, 185.
Canady, Armstrong v.—35 So. 138.
Canady, Bomer v.—79 M. 222.
Canavan, Carprew v.—4 H. 370.
Cancelliere v. State, 23 So. 515—hom. 256.

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Candiff v. Thighen, 30 M. 180—bonds, 14, 125; cncts. 340; seals, 1.
Candler, Itawamba County v.—62 M. 193.
Canning Co. Foster v.—71 M. 624.
Cannon v. Barry, 59 M. 289—est. 8; life est. 1, 11; perp. 1, 4; waste, 3, 6, 17.
Cannon v. Benson, 26 M. 395—ex. & ad. 299.
Cannon v. Cooper, 39 M. 784—abat. & r. 71, 76; app. & e. 331, 914; ex. & ad. 537c; judgm. 470, 490, 497, 639, 868, 914; plead. 17.
Cannon v. Gartman, 43 M. 581—counties, 222.
Cannon v. Grantham, 45 M. 88—hus. & w. 18, 221.
Cannon v. Kinney, Sm. & M. Ch. 555—ex. & ad. 411.
Cannon v. State, 57 M. 147—crim. l. 923; hom. 112, 276, 286; ind. 11b; witn. 393.
Cannon v. State, 75 M. 364—crim. l. 598, 878, 1167; ind. 130, 132; jury, 132.
Cannon, Corbin v.—31 M. 570.
Cannon, Leflore County v.—81 M. 334.
Cannon, Moneghan v.—2 Miss. Dec. 509.
Cannon, Rowe v.—84 M. 101.
Cannon, Stone v.—9 S. & M. 595.
Cannon, Strong v.—1 Miss. Dec. 11.
Cansler v. Sallis, 54 M. 446—eq. 20; liens, 16; mtg. 305, 316; subrog. 23, 34; ven. & pur. 266.
Canterberry v. Jordan, 27 M. 96—land. & t. 263, 270, 272.
Canterbury v. State, 90 M. 279—crim. l. 814, 824; hom. 89, 141, 340d.
Canton v. Canton Cotton Warehouse Co. 84 M. 268—em. dom. 81, 94; mun. corp. 684; r. r. 86, 92, 94, 130.
Canton Cotton Co. Pratt v.—51 M. 470.
Canton Cotton-Warehouse Co. v. Pool, 78 M. 147—mast. & s. 302, 302d.
Canton Cotton Warehouse Co. Canton v.—84 M. 268.
Canton Cotton-Warehouse Co. Shingleur-Johnson Co. v.—78 M. 875.
Canton Female Academy v. Gilman, 55 M. 148—lim. of act. 150, 193, 434.
Canton, Kendall v.—53 M. 526.
Canton, Leonard v.—35 M. 189.
Canton, Strong v.—3 So. 465.
Canton Warehouse Co. v. Potts, 68 M. 637—app. & e. 792; eq. 232, 245; plead. 218.
Canton Warehouse Co. v. Potts, 69 M. 31—high. 159; inj. 15; mun. corp. 664; nuis. 19.
Canton Warehouse Co. Potts v.—70 M. 462.
Canton &c. R. Co. v. French, 68 M. 22—tresp. 27.
Canton &c. R. Co. v. French, 75 M. 939—r. r. 406.
Canton &c. R. Co. v. McCoy, 1 Miss. Dec. 47—r. r. 447.
Canton &c. R. Co. v. Paine, 19 So. 199—waters, 118.
Canton &c. R. Co. Fast v.—77 M. 498.
Canton &c. R. Co. French v.—74 M. 542.
Cantrell v. Kansas City &c. R. Co. 69 M. 435—r. r. 305, 419; trial, 143.
Cantrell v. Kansas City &c. R. Co. 24 So. 871—r. r. 416.
Cantrell v. Letninger, 44 M. 437—attch. 125.
Cantrell, Kansas City &c. R. Co. v.—70 M. 329.
Cantrell, Overstreet v.—46 So. 69.
Canty v. Wood, 38 So. 315—attch. 280; garn. 64.
Canty, Exum v.—34 M. 533.
Cantzon v. Dorr, 27 M. 245—eject. 8, 15; execution, 36; judgm. 780.
Cantzon, Wright v.—31 M. 514.
Capel, Anthony v.—53 M. 350.
Capers v. McCaa, 41 M. 479—eq. 22; mtg. 158; trusts, 62, 85.
Caperton, First Nat. Bank v.—74 M. 857.
Capital City Realty Co. Barksdale v.—88 M. 623.
Capital Oil Works v. Black, 70 M. 8—mast. & s. 219, 229, 237.
Capitol State Bank v. Lane, 52 M. 677—banks, 172; bills & n. 393; j. p. 89.
Capital State Bank v. Lewis, 64 M. 727—states, 272; tax. 301, 727, 800, 822.
Capital State Bank, Adams v.—74 M. 307.
Capital State Bank, Eyrich v.—67 M. 60.
Caples, Ex parte, 58 M. 358—crim. l. 573, 1161.
Carberry v. Burns, 68 M. 573—contin. 21; ev. 113, 521; execution, 50, 208; fraud. conv. 309; princ. & a. 145; sheriffs, 171; trial, 192.
Carbolineum Wood-Preserving &c. Co. v. Meyer, 76 M. 586—dam. 209; plead. 106.
Carbry, Powell v.—4 S. & M. 86.
Carbry, Torrence v.—27 M. 697.
Carbry, Yalabusha County v.—3 S. & M. 529.
Carco, Nixon v.—28 M. 414.
Cardwell Mach. Co. Donald v.—38 So. 1039.
Carey v. Fulmer, 74 M. 729—eq. 268; ev. 186; mtg. 338, 342, 417, 580.
Carey, Hopkins v.—23 M. 54.
Carey-Halliday Lumber Co. v. Cain, 70 M. 628—corp. 384, 432, 455; ev. 448; fraud. conv. 33; princ. & a. 120; sales, 471.
Cargill, Ewing v.—13 S. & M. 79.

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Cargill, Henderson v.—31 M. 367.
Cargill, Ragan v.—24 M. 540.
Carleton v. Osgood, 6 H. 285—execution, 153c; judgm. 784.
Carley, Childress v.—92 M. 571.
Carlisle v. Chrestman, 69 M. 392—tax. 734b.
Carlisle v. Goode, 71 M. 453—tax. 435, 688.
Carlisle v. Gunn, 68 M. 243—afft. 1; attch. 91; estop. 2; j. p. 86.
Carlisle v. Silver Creek, 85 M. 380—mun. corp. 183; sheriffs, 105, 169.
Carlisle v. State, 73 M. 387—app. & e. 1048; crim. l. 640, 666; dist. attys. 8; ind. 87; seduct. 37.
Carlisle v. Tindall, 49 M. 229—execution, 41; fraud. conv. 95, 103, 184, 226, 237, 272; quiet. t. 18, 22, 23; trusts, 92½.
Carlisle v. Yoder, 69 M. 384—tax. 526, 692, 734b, 735.
Carlisle, Anderson v.—7 H. 408.
Carlisle, Browne v.—62 M. 595.
Carlisle, Dibrell v.—48 M. 691.
Carlisle, Dibrell v.—51 M. 785.
Carlisle, Ellis v.—8 S. & M. 552.
Carlisle, Rosenbaum v.—78 M. 882.
Carl, Reed v.—3 S. & M. 74.
Carlton, Garrett v.—65 M. 188.
Carman v. Watson, 1 H. 333—eq. 115, 347, 354½, 372, 373, 422.
Carman, Gilmore v.—1 S. & M. 279.
Carman, Holmes v.—Freem. Ch. 408.
Carmichael v. Bank, 4 H. 567—bills & n. 391, 401, 408, 537; ev. 270; trial, 194a.
Carmichael v. Browder, 3 H. 252—courts, 198; eq. 22; ex. & ad. 299, 442, 469.
Carmichael v. Browder, 4 H. 431—excep. 9; judgm. 198; plead. 431; trover, 32.
Carmichael v. Davis, W. 221—forc. e. & d. 14.
Carmichael v. Foley, 1 H. 591—bound. 3; deeds, 38; ev. 165, 390.
Carmichael v. Hunter, 4 H. 308—eq. 156, 302; inf. 73.
Carmichael v. The Governor, 3 H. 236—judgm. 128, 134, 951; sheriffs, 168, 169.
Carmichael v. Trustees of School Lands, 3 H. 84—app. & e. 386, 387; corp. 518; ev. 379; offic. 90; parties, 76; schools, 113.
Carmichael v. West Feliciana R. Co. 2 H. 817—app. & e. 395, 789, 797.
Carmichael, Hattiesburg Plumbing Co. v.—80 M. 66.
Carmichael, Hunter v.—12 S. & M. 726.
Carnahan, Jackson Elec. R. &c. Co. v.—95 M. 66.
Carnes v. Hubbard, 2 S. & M. 108—eq. 141, 327, 365; ven. & pur. 280.
Carney v. Hamilton, 89 M. 747—licens. 16.
Carolina Portland Cement Co. Watson v.—93 M. 553.
Carothers v. Hurly, 41 M. 71—const. l. 175; lim. of act. 4, 7.
Carothers v. Leigh, 60 M. 258—execution, 153.
Carothers v. Mosely, 55 So. 881—relig. soc. 34.
Carotti v. State, 42 M. 334—adult. 1, 9; div. 109; forn. 6; lewd. 1.
Carpenter v. Bowen, 42 M. 28—execution, 36, 38; mtg. 136; princ. & s. 147.
Carpenter v. Booker, 33 M. 45—wills, 283.
Carpenter v. Bridges, 32 M. 265—chat. m. 235; mtg. 319.
Carpenter v. Brownlee, 38 M. 200—exemp. 30.
Carpenter v. Edwards, 64 M. 595—eq. 345.
Carpenter v. Reynolds, 42 M. 807—bills & n. 393, 422.
Carpenter v. Savage, 93 M. 233—app. & e. 287; tresp. 20.
Carpenter v. State, 4 H. 163—crim. l. 1088; gr. jury, 5, 32; ind. 23, 25; perj. 4.
Carpenter, Cartwright v.—7 H. 328.
Carpenter, Tegarden v.—36 M. 404.
Carpenter, Tegarden v.—38 M. 401.
Carper v. Carper, 94 M. 598—div. 290.
Carprew v. Canavan, 4 H. 370—excep. 11, 27; paymt. 17; plead. 384; set-off, 51; trial, 267.
Carquett, Laraussini v.—24 M. 151.
Carr v. Anderson, 24 M. 188—judgm. 232.
Carr v. Coopwood, 24 M. 256—app. & e. 96; land. & t. 273.
Carradine v. Carradine, 33 M. 698—deeds, 152; estop. 3; trusts, 114, 139.
Carradine v. Carradine, 58 M. 286—eq. 376; garn. 62; jury, 13.
Carradine v. Collins, 7 S. & M. 428—garn. 50; gifts, 17.
Carradine v. Wilson, 61 M. 573—mtg. 82; paymt. 39.
Carr, Andrews v.—26 M. 577.
Carr, Ashby v.—40 M. 64.
Carraway v. McNeice, W. 538—app. & e. 248; det. 14, 20.
Carraway v. Odneal, 56 M. 223—accd. 8, 9; inj. 167, 170; princ. & s. 128.
Carraway v. Wallace, 17 So. 930—chat. m. 138; hus. & w. 231; replev. 47, 80; trial, 252.
Carraway v. Yazoo County, 1 H. 21—app. & e. 18, 671.
Carraway, Brown v.—47 M. 668.
Carraway, Massingill v.—13 S. & M. 324.
Carraway, Perkins v.—59 M. 222.
Carr, Coleman v.—W. 258.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Carr, Gibson v.—91 M. 773.
Carrier v. Poulas, 87 M. 595—app. & e. 181, 223; attch. 339; corp. 522.
Carrier, Panola v.—89 M. 277.
Carrier, Panola County v.—92 M. 148.
Carrington Shoe Co. Cocke v.—18 So. 683.
Carr, Kirkland v.—35 M. 584.
Carr, Newton Oil &c. Co. v.—52 So. 353.
Carroll v. Botsai, 65 M. 350—wills, 820.
Carroll v. McPike, 53 M. 569—ex. & ad. 2, 518.
Carroll v. Renich, 7 S. & M. 798—hus. & w. 27a, 31a; marr. 3.
Carroll v. State, 74 M. 688—crim. l. 415; seduct. 29, 38, 42, 47.
Carroll v. State, 80 M. 349—crim. l. 200; int. liq. 224, 231.
Carroll v. Tishomingo County, 28 M. 38—counties, 47, 57; judgm. 870b; lim. of act. 12; mand. 3, 114, 143, 179, 181.
Carroll, Cohea v.—5 S. & M. 545.
Carroll County v. Estes, 72 M. 171—adv. pos. 7.
Carroll County v. Georgia Pac. R. Co. 11 So. 471—counties, 154.
Carroll County v. Jones, 71 M. 947—pub. lands, 124.
Carroll County, Hawkins v.—50 M. 735.
Carroll County, Hughston v.—68 M. 660.
Carroll County, Leflore County v.—61 M. 220.
Carroll County, Sutton v.—41 M. 236.
Carron, Heirn v.—11 S. & M. 361.
Carr, Patrick v.—50 M. 199.
Carr, Tishomingo Sav. Inst. v.—1 Miss. Dec. 364.
Carruth Co. Flowers v.—95 M. 174.
Carson v. Alexander, 34 M. 528—bills & n. 422, 440; interest, 56; usury, 2.
Carson v. Carson, 40 M. 349—const. l. 186; div. 4, 13; marr. 1; statut. 263.
Carson v. Doe, 6 S. & M. 111—eject. 90.
Carson v. Flowers, 7 S. & M. 99—disc. 27.
Carson v. Leathers, 57 M. 650—mast. & s. 302; ship. 165; trial, 178.
Carson v. Percy, 57 M. 97—spec. perf. 18, 22, 27, 51.
Carson v. Robson, 29 M. 97—mtg. 249.
Carson v. Vicksburg Bank, 75 M. 167; ins. 777, 779.
Carson, Erwin v.—54 M. 282.
Carson, French v.—6 So. 613.
Carson, Keirn v.—12 S. & M. 431.
Carter v. Blanton, 33 M. 291—eject. 11; excep. 11; pub. lands, 114, 115.
Carter v. Brandy, 71 M. 240—attch. 291; jud. s. 53.
Carter v. Burris, 10 S. & M. 527—chat. m. 5, 34.
Carter v. Bustamente, 59 M. 559—tax. 674.
Carter v. Carter, 14 S. & M. 59—hus. & w. 12, 110½, 111, 277, 281.
Carter v. Carter, 28 M. 326—eq. 400.
Carter v. Catchings, 48 So. 515—app. & e. 1009; ev. 354.
Carter v. Cox, 44 M. 148—paymt. 10, 12.
Carter v. Daizy, 42 M. 501—judgm. 120; proc. 134.
Carter v. Eastman Garner & Co. 95 M. 651—exch. of prop. 13; fraud, 50.
Carter v. Graves, 6 H. 9—fraud. conv. 131; witn. 91, 105, 121.
Carter v. Hadley, 59 M. 130—tax. 734.
Carter v. Harvey, 77 M. 1—wills, 778, 785.
Carter v. Harvey, 7 So. 286—eq. 195.
Carter v. Henry, 87 M. 411—statut. 25; time, 7, 11.
Carter v. Holloway, 28 So. 941—usury, 10.
Carter v. Lyman, 33 M. 171—eq. 143; new tr. 91.
Carter v. Preston, 51 M. 423—bills & n. 489.
Carter v. Probate Judge, 2 S. & M. 42—ex. & ad. 230; gifts, 47; parent & c. 3.
Carter v. Saunders, 2 H. 851—bills & n. 455; ex. & ad. 427.
Carter v. Spencer, 4 H. 42—pub. lands, 34, 115.
Carter v. State, 60 M. 456—licens. 36; inn. 4.
Carter v. State, 78 M. 348—crim. l. 848.
Carter v. State, 24 So. 307—crim. l. 532, 602.
Carter v. State, 54 So. 734—crim. l. 635, 705, 1163, 1166, 1170½; hom. 338d, 340c.
Carter v. State, 54 So. 805—seduct. 46.
Carter v. Taylor, 6 S. & M. 367—princ. & a. 190.
Carter, Adams v.—25 So. 669.
Carter, Adams v.—92 M. 578.
Carter, Adams v.—92 M. 579.
Carter, Alabama &c. R. Co. v.—77 M. 511.
Carter, Barrett v.—69 M. 593.
Carter, Bowdre v.—64 M. 221.
Carter, Brantley v.—26 M. 482.
Carter, Cohn v.—92 M. 627.
Carter, Dilworth v.—32 M. 206.
Carter Dry Goods Co. Yerger v.—27 So. 989.
Carter, Henry v.—88 M. 21.
Carter, McLemore v.—7 So. 357.
Carter, Reily v.—75 M. 798.
Carter, Reinhardt v.—49 M. 315.
Carter, Terry v.—25 M. 168.
Carter, Thurmond v.—59 M. 127.
Carter, Whitworth v.—41 M. 639.
Carter, Whitworth v.—43 M. 61.

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Cartledge, Crow v.—54 So. 947.
Cartwright v. Carpenter, 7 H. 328—app. & e. 1063; assign. 95, 139; assump. 3; fraud, 13; judgm. 650, 951; new tr. 41; plead. 433.
Cartwright v. State, 71 M. 82—crim. l. 925½, 927, 1037; hom. 338d.
Caruth v. Anderson, 24 M. 60—execution, 3.
Caruthers v. Dean, 11 S. & M. 178—princ. & s. 121, 124.
Caruthers v. McLaran, 56 M. 371—ack. 35; tax. 656, 671, 696, 699, 731.
Caruthers v. Wilson, 1 S. & M. 527—dower, 7, 63, 70.
Caruthers, Insurance Co. of North America v.—16 So. 911.
Caruthers, McGee v.—2 S. & M. 443.
Caruthers, Prewett v.—7 H. 304.
Caruthers, Prewett v.—12 S. & M. 491.
Carver v. Jackson, 82 M. 583—dam. 129; mun. corp. 787.
Carver Gin &c. Co. v. Gaddy, 62 M. 201—sales, 121, 122, 364.
Carver &c. Co. v. Wilmoth, 1 Miss. Dec. 468—brok. 47, 88.
Cary v. Dixon, 51 M. 593—hus. & w. 228.
Cary, Letchford v.—52 M. 791.
Caryth, Miss. Cent. R. Co. v.—51 M. 77.
Case v. Hawkins, 53 M. 702—atty. & c. 92; banks, 105; bills & n. 256; corp. 406; judgm. 314.
Case v. State, 17 So. 379—hom. 340, 350c.
Case, Gillum v.—67 M. 588.
Case, Gillum v.—71 M. 848.
Case, Lundy v.—44 M. 669.
Casey v. State, 96 M. 427—crim. l. 649.
Casey, Meyer v.—57 M. 618.
Casey, Morrison v.—82 M. 522.
Cash, Cotton v.—85 M. 29.
Cason v. Cason, 31 M. 578—app. & e. 934; courts, 31, 33; ex. & ad. 104, 106, 471, 478, 509; inf. 89; judgm. 17a, 639, 957; statut. 187.
Cason v. Cason, 31 M. 597—names, 1.
Cason v. Hubbard, 38 M. 35—hus. & w. 133, 194; inf. 91.
Cason v. Robson, 29 M. 97—witn. 101, 105.
Cason, Moore v.—1 H. 53.
Caspar, Stone v.—2 So. 74.
Casper v. Thigpen, 48 M. 635—set-off, 35, 51.
Casper, Porter v.—54 M. 359.
Cass, Davis v.—72 M. 985.
Cassedy v. Hartman, 93 M. 94—tax. 734a.
Cassedy v. Jackson, 45 M. 397—champ. 7; ex. & ad. 26; plead. 218.
Cassedy v. Mayer, 64 M. 356—land. & t. 229f; oath, 2.
Cassedy v. Pullman Palace Car Co. 17 So. 373—carr. 411.
Cassedy, Cumberland Tel. &c. Co. v.—78 M. 666.
Cassedy, Hall v.—25 M. 48.
Cassedy, Smith v.—75 M. 916.
Cassell v. Backrack, 42 M. 56—int. law. 3; sales, 1, 193; states, 17, 18.
Cassell, Tupper v.—45 M. 352.
Cassidy, Demain v.—55 M. 320.
Cassity v. New Orleans &c. Ins. Association, 65 M. 49—ins. 604.
Caster, Louisville &c. R. Co. v.—5 So. 388.
Castleman v. State, 94 M. 609—inj. 148, 150, 217.
Caston v. Caston, 54 M. 512—app. & e. 14; estop. 68; judgm. 534.
Caston v. Caston, 60 M. 475—tax. 656, 771.
Caston v. Turner, 95 M. 303—interpl. 26.
Caston, Lazar v.—67 M. 275.
Caston, Merchants' &c. Bank v.—52 So. 633.
Caston, State v.—96 M. 183.
Caston, Tatum v.—65 M. 488.
Caswell, Lee v.—92 M. 357.
Catchings v. Manlove, 39 M. 655—fraud. conv. 2, 9, 63, 102, 258.
Catching, Devane v.—2 H. 884.
Catching, Magee v.—33 M. 672.
Catchings, Bankston v.—1 Miss. Dec. 198.
Catchings, Carter v.—48 So. 515.
Catchings, Hamilton v.—58 M. 92.
Catchings, Warren County v.—46 So. 709.
Catchot v. Ocean Springs, 78 M. 509—tresp. 22, 45.
Catchot v. Ocean Springs, 34 So. 145—quiet. t. 41.
Catchot v. Zeigler, 92 M. 191—quiet t. 2.
Cathey, Illinois Cent. R. Co. v.—70 M. 332.
Catlett v. Alexander, 4 H. 404—execution, 348; ev. 408.
Catlett v. Bacon, 33 M. 269—frds. st. of, 114, 129; mtg. 414, 433; ven. & pur. 16, 19.
Catlett v. Brookhaven Lumber Co. 38 So. 320—sales, 361.
Catlett, Bank of Mississippi v.—5 H. 175.
Catlett, Boarman v.—13 S. & M. 149.
Cato v. Gordon, 63 M. 320—tax. 431, 688.
Cato v. Hardin, 1 Miss. Dec. 274—frds. st. of, 84.
Cavanah v. State, 56 M. 299—app. & e. 1051; crim. l. 135, 699, 829, 1168, 1169, 1171; jury, 70; witn. 388.
Caughlin, Joslin v.—26 M. 134.
Caughlin, Joslin v.—30 M. 502.
Caughlin, Joslin v.—32 M. 104.
Causey, Hodges v.—77 M. 353.

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Causey, McMillan v.—43 M. 227.
Cauthen, Smith v.—54 So. 844.
Cavett, State v.—78 M. 851.
Cawthorn, Liles v.—78 M. 559.
Cayce v. Stovall, 50 M. 396—agric. 10; chat. m. 12, 138; judgm. 786; liens, 11; plgs. 5; statut. 158.
Cayce, Champion v.—54 M. 695.
Cazeneuve v. Curell, 70 M. 521—app. & e. 41, 1166, 1167; eq. 2; judgm. 473; sheriffs, 164.
Cazeneuve v. Martinez, 28 So. 788—app. & e. 204, 1002.
C. C. Kelly Banking Co. v. Robinson Norton Co. 71 M. 141—garn. 95.
Cedar Rapids Nat. Bank v. Berry, 53 So. 393—judgm. 570.
Cedar Rapids Bank v. Lundy, 51 So. 4—bills & n. 517.
Cedar Rapids Nat. Bank v. Rhodes, 51 So. 717—bills & n. 372.
Central Bank, Antignance v.—26 M. 110.
Central Hardware Co. Flake v.—96 M. 838.
Cerniglia, Ham v.—73 M. 290.
Chace v. East, W. 439—judgm. 94, 128a.
Chace v. State, W. 384—libel, 152.
Chaffe v. Aaron, 62 M. 29—statut. 264.
Chaffe v. Benoit, 60 M. 34—frds. st. of, 48, 139; hus. & w. 37.
Chaffe v. Halpin, 62 M. 1—deeds, 191; fraud. conv. 154, 164, 194, 317; hus. & w. 149.
Chaffe v. Hughes, 57 M. 256—mtg. 116; paymt. 39; usury, 61.
Chaffe v. Mississippi &c. R. Co. 59 M. 182—carr. 73, 74.
Chaffe v. Patterson, 61 M. 28—hus. & w. 228; lis. pens. 3, 23.
Chaffe v. Railroad Co. 59 M. 182—fact. 18.
Chaffe v. Taliaferro, 58 M. 544—princ. & s. 114, 154.
Chaffe v. Wilson, 59 M. 42—usury, 82, 130.
Chaffe, Aron v.—72 M. 159.
Chaffe, Bennett v.—69 M. 279.
Chaffe, Morehead v.—52 M. 161.
Chaffe, Murdock v.—67 M. 740.
Chaffe, Scharff v.—68 M. 641.
Chalmers, Myers v.—60 M. 772.
Chamberlain v. Lawrence County, 71 M. 949—counties, 47; pub. lands, 9, 51; tax. 688, 787.
Chamberlain, Maxwell v.—23 So. 266.
Chamberlain, Pfeifer v.—52 M. 89.
Chamberlain, Phillips v.—61 M. 740.
Chamberlin-Hunt Academy v. Port Gibson Brick &c. Co. 80 M. 517—app. & e. 187; eq. 325; mech. liens, 278; partners. 162; plead. 129.
Chambers v. Meaut, 66 M. 625—app. & e. 1063, 1064; assign. f. b. c. 161; trial, 205.
Chambers v. Myrick, 61 M. 459—tax. 688, 693, 734.
Chambers v. State, 62 M. 108—ev. 315; larc. 51.
Chambers, Bowers v.—53 M. 259.
Chambers, Commercial Bank v.—8 S. & M. 9.
Chambers, Currie v.—3 So. 412.
Chambers, Garland v.—11 S. & M. 337.
Chambers, Hoover v.—27 M. 606.
Chambers, Moore v.—11 S. & M. 408.
Chambers, Thompson v.—12 S. & M. 488.
Chambers, Turner v.—10 S. & M. 308.
Chambless v. Robertson, 23 M. 302—banks, 181.
Chambless v. Vick, 34 M. 109—guard. & w. 116.
Chambless, Shanks v.—W. 249.
Chambliss v. Matthews, 57 M. 306—bills & n. 384; set-off, 50.
Chambliss v. Person, 77 M. 806—ref. of inst. 36, 48.
Chambliss v. Wood, 84 M. 209—app. & e. 626.
Chambliss, Hunt v.—7 S. & M. 532.
Chambliss, Person v.—38 So. 286.
Champenois v. Collins, 36 So. 72—lost inst. 23, 24.
Champenois v. Fort, 45 M. 355—chat. m. 277; eq. 33; marshaling, 11; paymt. 38.
Champenois v. Tinsley, 90 M. 38—sales, 313, 477.
Champenois, Chiles v.—69 M. 603.
Champion v. Cayce, 54 M. 695—ex. & ad. 323, 330, 437; lim. of act. 38, 171; judgm. 678, 870b, 872.
Champion v. Memphis &c. R. Co. 35 M. 692—corp. 84, 90.
Champlin v. Dotson, 13 S. & M. 553—inj. 29; ven. & pur. 190.
Champlin v. McLeod, 53 M. 484—hus. & w. 86; parties, 80, 85; ven. & pur. 266a.
Champlin, Cobb v.—33 M. 406.
Champlin, Duggan v.—75 M. 441.
Chance v. Right, W. 156—bills & n. 399.
Chancellor v. State, 47 M. 278—adult. 1; incest. 3.
Chancellor, Gilliam v.—43 M. 437.
Chandler v. Bay St. Louis, 57 M. 326—alt. inst. 15; mun. corp. 745, 895.
Chandler v. Morgan, 60 M. 471—estop. 70; hus. & w. 87, 198.
Chandler v. White, 71 M. 161—exemp. 48.
Chandler, Brigins v.—60 M. 862.
Chandler, Dobbs v.—84 M. 372.

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Chandler, Richmond &c. R. Co. v.—13 So. 267.
Chaney, Phillips v.—7 H. 250.
Chaplain v. Briscoe, 5 S. & M. 198—ev. 178, 368; ven. & pur. 308.
Chaplain v. Briscoe, 11 S. & M. 372—cov. 53; deeds, 47, 198; ev. 70, 374; ven. & pur. 234.
Chapman v. Berry, 73 M. 437—exemp. 48.
Chapman v. Brown, 7 H. 636—wills, 438, 445.
Chapman v. Copeland, 55 M. 476—dam. 211; trial, 243; waters, 83.
Chapman v. Cutrer, 29 So. 467—banks, 77.
Chapman v. Evans, 44 M. 113—acct. 22; eq. 43; partit. 193.
Chapman v. Hughes, 61 M. 339—fraud. conv. 207; guard. & w. 21; inf. 10, 50.
Chapman v. Sims, 53 M. 154—deeds, 121; ex. & ad. 380, 381; trusts, 102.
Chapman v. White Sewing Machine Co. 76 M. 821—fraud. conv. 118.
Chapman v. White Sewing Mach. Co. 77 M. 890—home. 81.
Chapman v. White Sewing Mach. Co. 78 M. 438—app. & e. 1201; home. 84.
Chapman, Campbell v.—31 So. 101.
Chapman, Garnett v.—20 So. 863.
Chapman, Millsaps v.—76 M. 942.
Chapotel, Dufour v.—75 M. 656.
Charles, Smith v.—24 So. 968.
Charlotte Supply Co. v. Britton &c. Bank, 23 So. 630—fraud. conv. 138.
Charter v. State, 36 M. 75—dist. attys. 4.
Chase v. State, 46 M. 683—crim. l. 284, 375, 1144, 1174; gr. jury, 17; home. 163, 297; jury, 122.
Chase v. State, 75 M. 502—crim. l. 660.
Chase, Tuteur v.—66 M. 476.
Chastine, Memphis &c. R. Co. v.—54 M. 503.
Chatters v. Coahoma County, 73 M. 351—clks. of c. 10; mand. 1, 163.
Chatters, Armistead v.—71 M. 509.
Cheairs v. Cheairs, 81 M. 662—ex. & ad. 223, 227, 228, 328.
Cheairs v. Coats, 77 M. 846—land. & t. 211.
Cheairs v. Smith, 37 M. 646—wills, 473, 654, 658.
Cheatham v. State, 67 M. 335—app. & e. 838; crim. l. 754, 780, 807, 1144, 1150, 1171; witn. 333, 344.
Cheatham, Hardee v.—52 M. 41.
Cheatham, Russell v.—8 S. & M. 703.
Cheatham, Spears v.—44 M. 64.
Cheaves v. Southern Railroad Co. 82 M. 48—mast. & s. 182, 259.
Cheaves, Southern R. Co. v.—84 M. 565.
Chemical Charcoal Co. v. Smith, 38 So. 232—logs, 3.
Chemical Nat Bank, Hart v.—27 So. 926.
Chenault v. Adams, 52 So. 189—excep. 40.
Chenault v. Adams Mach. Co. 53 So. 629—sheriffs, 90.
Cherry v. Jarratt, 25 M. 221—ex. & ad. 482, 499, 505.
Cherry v. State, 20 So. 837—hom. 231.
Chesborough, Woods v.—95 M. 63.
Chesnut v. Elliott, 61 M. 569—tax. 431.
Chess &c. Co. Bower v.—83 M. 218.
Chevalier, Dunbar v.—28 M. 161.
Cheves, Davis v.—32 M. 317.
Chew v. Calvert, W. 54—estop. 94; ex. & ad. 137; int. law, 6, 9; pub. lands, 204; ven. & pur. 230.
Chew v. Peale, 12 S. & M. 700—abat. & r. 39, 72.
Chew v. Randolph, W. 1—attch. 217; judgm. 822.
Chew v. Read, 11 S. & M. 182—app. & e. 202; bills & n. 386, 410.
Chew, Hilliard v.—76 M. 763.
Chewning v. Cox, 1 H. 130—trial, 343.
Chewning v. Gatewood, 5 H. 552—bills & n. 288; notice, 4; trial, 156.
Chewning v. Nichols, Sm. & M. Ch. 122—eq. 127, 418.
Chewning v. Peck, 6 H. 524—ex. & ad. 415f; judgm. 342.
Chewning, Planters' Bank v.—5 H. 413.
Chewning, Vick v.—31 M. 201.
Chew, Smith v.—35 M. 153.
Chicago Bldg. &c. Co. v. Higginbotham, 29 So. 79—ev. 397; inf. 94; princ. & a. 156; subscrip. 15, 17, 20.
Chicago &c. R. Co. v. Ables, 60 M. 1017—carr. 107, 147, 161, 163, 218, 230.
Chicago &c. R. Co. v. Doyle, 60 M. 977—death, 8, 34, 35; mast. & s. 203; trial, 169.
Chicago &c. R. v. Hart, 2 Miss. Dec. 384—app. & e. 1040.
Chicago &c. R. Co. v. Jarrett, 59 M. 470—carr. 319; r. r. 451.
Chicago &c. R. Co. v. Jones, 59 M. 465—r. r. 405, 409, 419.
Chicago &c. R. Co. v. Moss, 60 M. 641—const. l. 249; costs, 222.
Chicago &c. R. Co. v. Moss, 60 M. 1003—carr. 137, 147, 161, 163.
Chicago &c. R. Co. v. Packwood, 59 M. 280—assign. 24; neg. 133, 135; r. r. 251, 437, 442, 443, 446.
Chicago &c. R. Co. v. Provine, 61 M. 288—

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carr. 126, 132, 134; ev. 376; plead. 313, 325, 373.
Chicago &c. R. Co. v. Scurr, 59 M. 456—carr. 272, 277, 277b, 278, 294, 319; dam. 91, 208.
Chicago &c. R. Co. v. Trotter, 60 M. 442—carr. 303, 316.
Chicago &c. R. Co. v. Trotter, 61 M. 417—carr. 287; r. r. 418.
Chicago &c. R. Co. Howard v.—61 M. 194.
Chicago &c. R. Co. Loeb v.—60 M. 933.
Chicago &c. R. Co. McLemore v.—58 M. 514.
Chicago &c. R. Co. Miss. Valley Co. v.—58 M. 846, 896.
Chicago &c. R. Co. Moore v.—59 M. 243.
Chicago &c. R. Co. Packwood v.—59 M. 280.
Chicago &c. R. Co. Perkins v.—60 M. 726.
Chichester v. Daggett, 2 H. 863—plead. 431.
Chickasaw County v. Clay County, 62 M. 325—counties, 16.
Chicasaw County v. Sumner County, 58 M. 619—counties, 9, 16.
Chickasaw County, Clay County v.—63 M. 289.
Chickasaw County, Clay County v.—64 M. 534.
Chickasaw County, Clay County v.—76 M. 418.
Chickasaw County, Gould v.—85 M. 123.
Chickasaw County, Taylor v.—16 So. 907.
Chickasaw County, Taylor v.—70 M. 87.
Chickasaw County, Taylor v.—74 M. 23.
Chickasaw County, Wood v.—85 M. 120.
Chidsey v. Scranton, 70 M. 449—statut. 162.
Child v. Rowell, 58 M. 512—app. & e. 364, 432, 785, 787.
Child, Dabney v.—95 M. 583.
Childers v. Ford, 10 S. & M. 25—jury, 97; new tr. 42; trial, 295.
Childress v. Carley, 92 M. 571—judgm. 504.
Childress, Williams v.—25 M. 78.
Childress, Williamson v.—26 M. 328.
Chiles v. Champenois, 69 M. 603—quiet. t. 30; mtg. 609; judgm. 645, 654.
Chiles v. Gallagher, 67 M. 413—des. & d. 93, 98, 108; quiet. t. 43; parent & c. 10; tax. 674a; trusts, 95.
Chiles, Gordon v.—12 So. 146.
Chiles, Kansas City &c. R. Co. v.—86 M. 361.
Chilton v. Cox, 7 S. & M. 791—execution, 154b; judgm. 778.
Chilton, Green v.—57 M. 598.
Chinault, Wimbush v.—58 M. 234.
Chisholm v. Andrews, 57 M. 636—execution, 40.
Chisholm, Commercial Bank v.—6 S. & M. 457.
Chisholm, Windham v.—35 M. 531.
Chism v. Alcorn, 71 M. 506—assum. 3; land. & t. 254.
Chism v. Bank of Friar's Point, 27 So. 610—bankr. 174, 285, 302.
Chism v. Citizens' Bank, 77 M. 599—bankr. 158, 277.
Chism v. State, 70 M. 742—crim. l. 921, 1169; hom. 338c; witn. 320, 323.
Chism v. Thompson, 73 M. 410—agric. 10; fact. 48, 65; land. & t. 328; princ. & s. 115.
Choat v. Billingsly, W. 420—venue, 44.
Choctaw County v. Hughes, 83 M. 195—courts, 73.
Choppin v. Harmon, 46 M. 304—hus. & w. 218, 228.
Chrestman v. Russell, 73 M. 452—mast. & s. 339.
Chrestman, Carlisle v.—69 M. 392.
Chrisman v. Brookhaven, 70 M. 477—civ. r. 9; const. l. 19; schools, 9, 22, 97, 99, 100; statut. 218; tax. 44.
Chrisman v. Currie, 60 M. 858—tax. 727, 790, 794, 809.
Chrisman v. Jackson, 84 M. 787—mun. corp. 110, 112, 634.
Chrisman, Hardie v.—60 M. 671.
Chrisman, Matthews v.—12 S. & M. 595.
Chrisman, Pittman v.—59 M. 124.
Christian v. Gibbs, 53 M. 314—judges, 3, 9; offic. 95.
Christian v. Green, 45 So. 425—can. of i. 47; mtg. 78, 307.
Christian v. Illinois Cent. R. Co. 71 M. 237—r. r. 273½, 282, 375.
Christian v. O'Neal, 46 M. 669—atty. & c. 125; bills & n. 540; ev. 386; execution, 202, 228, 250, 276; judgm. 372, 440, 508, 568; mech. liens, 260; quiet. t. 32; venue, 12.
Christian, Moore v.—56 M. 408.
Christian &c. Co. v. Dantzler Lumber Co. 78 M. 74—abat. & r. 76, 88; contin. 21.
Christman v. Russel, 73 M. 452—app. & e. 701.
Christmas, Nobles v.—2 H. 885.
Christmas, Yazoo &c. R. Co. v.—89 M. 686.
Christopher v. Cox, 25 M. 162—ex. & ad. 15.
Christ, Schiaffino v.—96 M. 801.
Church, Warren v.—50 M. 223.
Cicely v. State, 13 S. & M. 202—crim. l. 829, 834, 935; hom. 234.
Cincinnati Rubber Mfg. Co. Watkins Machine &c. Co. v.—52 So. 629.
Cincinnati &c. R. Co. Hewlett v.—65 M. 463.
Citizens' Bank v. Bank of Greenville, 71 M. 271—banks, 74, 80.

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Citizens' Bank v. Buddig, 65 M. 284—app. & e. 193; cred. s. 37.
Citizens' Bank v. Costanera, 62 M. 825—eject. 139.
Citizens' Bank v. Kretchmar, 91 M. 608—banks, 77; insolv. 111; paymt. 20.
Citizens' Bank v. Studebaker, 71 M. 544—attch. 63.
Citizens' Bank, Archibald v.—64 M. 523.
Citizens' Bank, Chism v.—77 M. 599.
Citizens' Bank, Day Lumber &c. Co. v.—94 M. 212.
Citizens' Bank, Hitchler v.—63 M. 403.
Citizens' Mutual Ins. Co. v. Foster, 1 Miss. Dec. 143—cred. s. 24.
Citizens' Mut. Ins. Co. v. Foster, 64 M. 288—fraud. conv. 269.
Citizens' Mut. Ins. Co. v. Ligon, 59 M. 305—ex. & ad. 94; fraud. conv. 254, 314; partners. 247.
Citizens' Tel. Co. Vicksburg &c. Tel. Co. v.—79 M. 341.
City Compress Co. Solomon v.—69 M. 319.
City of, see title of particular city.
Claiborne v. Holmes, 51 M. 146—deeds, 79, 200; fraud. conv. 154a; ven. & pur. 232.
Claiborne v. Planters' Bank, 2 H. 727—bills & n. 142; judgm. 110.
Claiborne, Commercial Bank v.—5 H. 301.
Claiborne, Williams v.—Sm. & M. Ch. 355.
Claiborne, Williams v.—7 S. & M. 488.
Claitor, Winters v.—54 M. 341.
Clampit, Stanwood v.—23 M. 372.
Clancey, Mayo v.—57 M. 674.
Clanton v. Laird, 12 S. & M. 568—attch. 129, 156; trial, 105.
Clapp v. Mandeville, 5 H. 197—stip. 14; witn. 92, 108.
Clardy, L. A. Becker Co. v.—96 M. 301.
Clark v. Adams, 80 M. 219—const. l. 306; crim. l. 402, 1169; ev. 387; int. liq. 179; penal. 39, 40.
Clark v. Anderson, 2 H. 852—costs, 211, 220; execution, 159.
Clark v. Bourgeois, 86 M. 1—forc. e. & d. 6; land. & t. 287.
Clark v. Clark, 58 M. 68—hus. & w. 155, 237; subrog. 23, 41.
Clark v. Clark, 1 So. 835—trusts, 325.
Clark v. Clark, 17 So. 510, 767—partners, 226.
Clark v. Clinton, 61 M. 337—execution, 189; replev. 118.
Clark v. Duke, 59 M. 575—eject. 121; ev. 82; judgm. 272, 771, 786, 846.
Clark v. Equitable Life Assur. Soc. 76 M. 22—can. of i. 9; eq. 23, 31; ins. 603; release, 15.
Clark v. Erwin, 72 M. 926—elect. rem. 13; judgm. 714; sales, 301.
Clark v. German Security Bank, 61 M. 611—corp. 113.
Clark v. German Security Bank, 61 M. 614—app. & e. 1139; inj. 185.
Clark v. Gregory, 5 H. 363—judgm. 134; plead. 433.
Clark v. Gresham, 67 M. 203—garn. 191.
Clark v. Hart, 3 So. 33—tresp. 62.
Clark v. Hornthall, 47 M. 434—ex. & ad. 138; wills, 670, 679.
Clark v. Hull, 31 M. 520—eq. 273, 295; ex. & ad. 475.
Clark v. Ingram Day Lumber Co. 90 M. 479—logs, 3.
Clark v. Jefferson College, 2 Miss. Dec. 198—eq. 417; hus. & w. 179; lim. of act. 202.
Clark v. Kingsland, 1 S. & M. 248—atty. & c. 97; trial, 376; witn. 67.
Clark v. Lopez, 75 M. 932—app. & e. 695; can. of i. 2; deeds, 70.
Clark v. McNeill, 46 So. 536—quiet. t. 34.
Clark v. McCreary, 12 S. & M. 347—const. l. 93; hus. & w. 10, 11, 12, 115, 134.
Clark v. Moyse, 48 So. 721—trial, 167.
Clark v. Niles, 42 M. 460—ex. & ad. 26, 32.
Clark v. Perry, 4 H. 285—ev. 272, 400.
Clark v. Pratt, 11 So. 631—int. liq. 75, 111.
Clark v. Rainey, 72 M. 151—tax. 674; ven. & pur. 239.
Clark v. Reed, 12 S. & M. 554—bills & n. 123; lost inst. 13; plead. 433.
Clark v. Rosedale, 70 M. 542—mun. corp. 355, 955.
Clark v. Slaughter, 34 M. 65—adv. pos. 5; hus. & w. 111, 193, 195.
Clark v. Slaughter, 38 M. 64—div. 57, 169; eq. 15.
Clark v. State, 9 So. 820—crim. l. 419; witn. 319.
Clark v. Tims, 2 Miss. Dec. 360—execution, 245.
Clark v. Wilson, 53 M. 119—bankr. 137; mtg. 342a, 342c; trusts, 157, 160.
Clark v. Wilson, 56 M. 753—eq. 203; subrog. 16.
Clark, Bell v.—71 M. 603.
Clark, Cabaniss v.—31 M. 423.
Clark, Clayton v.—74 M. 499.
Clark, Clifton v.—83 M. 446.
Clark, Duke v.—58 M. 465.

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Clarke v. Edwards, 44 M. 778—princ. & a. 160½; trial, 189, 230.
Clarke v. Edward Thompson Co. 25 So. 1036—app. & e. 1124.
Clarke v. Frank, 64 M. 827—tax. 663.
Clarke v. Goodrum, 61 M. 731—estop. 68; ex. & ad. 538, 539; lim. of act. 104, 105.
Clarke v. Kingsland, 1 S. & M. 248—atty. & c. 101.
Clarke v. Parker, 63 M. 549—app. & e. 1171; attch. 313, 315; dam. 197; execution, 203; replev. 96.
Clarke v. Pierce, 82 M. 462—trial, 257.
Clarke v. State, 23 M. 261—const. l. 200; crim. l. 151, 302, 1207; ind. 135; weap. 3.
Clarke, Adams v.—80 M. 134.
Clarke, Bluff City R. Co. v.—95 M. 689.
Clarke, Briggs v.—7 H. 457.
Clarke, Byrd v.—52 M. 623.
Clarke County v. Mississippi Lumber Co. 80 M. 535—waters, 99, 101.
Clark, Edgell v.—76 M. 66.
Clarke, Henderson v.—27 M. 436.
Clarke, McIver v.—69 M. 408.
Clarke, McIver v.—71 M. 444.
Clark, Equitable Assur. Soc. v.—28 M. 798.
Clark, Equitable Life Assur. Co. v.—80 M. 471.
Clark, Evans v.—24 So. 532.
Clarke, Western Union Tel. Co. v.—71 M. 157.
Clarke, Wilson v.—27 M. 270.
Clark, Farrer v.—29 M. 195.
Clark, Harvey v.—81 M. 166.
Clark, Hull v.—14 S. & M. 187.
Clark, Illinois Cent. R. Co. v.—85 M. 691.
Clark, Lyle v.—24 So. 966.
Clarksdale v. Broaddus, 77 M. 667—mun. corp. 918.
Clarksdale v. Yazoo &c. R. Co. 29 So. 93—tax. 407.
Clarksdale, Adams v.—95 M. 88.
Clarksdale Bank &c. Co. Lea v.—72 M. 317.
Clarksdale Compress &c. Co. v. Caldwell, 80 M. 343—garn. 17; mun. corp. 1016.
Clarksdale Ins. Agency v. Cole, 87 M. 637—corp. 636; licens. 2, 7; tax. 3, 41.
Clarksdale, Marco v.—94 M. 4.
Clark, Murphy v.—1 S. & M. 221.
Clark, Murphy v.—14 S. & M. 187.
Clark, Parker v.—61 M. 492.
Clark, Perry v.—5 H. 495.
Clark, Pounds v.—70 M. 263.
Clark, State v.—52 So. 691.
Clark, Toulme v.—64 M. 471.
Clark, Whittington v.—8 S. & M. 480.
Clark, Wooten v.—23 M. 75.
Clark, Wright v.—34 M. 116.
Clark, Yates v.—56 M. 212.
Clark, Yazoo Lumber Co. v.—86 M. 288.
Clark, Yazoo Lumber Co. v.—95 M. 244.
Clark &c. Co. Clifton v.—84 M. 795.
Clary v. Lowry, 51 M. 879—chat. m. 138, 134; plead. 34.
Claughton v. Black, 24 M. 185—execution, 180, 183; judgm. 220, 221, 232.
Claughton v. Claughton, 70 M. 384—adv. pos. 62; partit. 39.
Claughton, Middleton v.—77 M. 131.
Clay v. Allen, 63 M. 426—cncts. 153; gaming, 12.
Clay v. Freeman, 74 M. 816—princ. & s. 147.
Clay v. Moore, 65 M. 81—tax. 727, 787, 791.
Clay v. Postal Tel. &c. Co. 70 M. 406—mast. & s. 301, 302b, 330; tel. & t. 10; tresp. 22, 30.
Clay v. State, 22 So. 62—obst. just. 3.
Clay County v. Chickasaw County, 63 M. 289—app. & e. 69.
Clay County v. Chickasaw County, 64 M. 534—counties, 3, 9, 16, 198, 205, 214; eq. 372; judgm. 541, 570; statut. 164, 167; trial, 9.
Clay County v. Chickasaw County, 76 M. 418—counties, 16, 203, 204.
Clay County, Bridges v.—57 M. 252.
Clay County, Bridges v.—58 M. 817.
Clay County, Chickasaw County v.—62 M. 325.
Clay County Cotton Oil Co. Stokes Evans Co. v.—33 So. 283.
Clay, Dunlap v.—65 M. 454.
Clayton v. Boyce, 62 M. 390—acct. 15; acct. st. 11; ev. 97; ex. & ad. 307, 430; judgm. 747; partit. 83, 95, 96; wills, 823.
Clayton v. Clark, 74 M. 499—accd. 8.
Clayton v. Heidelberg, 9 S. & M. 623—prohib. 1, 16.
Clayton v. McWilliams, 49 M. 311—counties, 165, 168; mand. 13; paup. 39; states, 18c.
Clayton v. Merrett, 52 M. 353—eq. 115, 117; lim. of act. 80; princ. & a. 43; ven. & pur. 279.
Clayton v. State, 2 Miss. Dec. 690—crim. l. 361.
Clayton v. Tupelo, 29 So. 994—tax. 78.
Clayton, Harkreader v.—56 M. 383.
Clayton, Morse v.—13 S. & M. 373.
Clearman v. Cotton, 66 M. 467—fraud. conv. 263; frds. st. of, 62.
Cleary v. Morson, 94 M. 278—sales, 471.
Clemens v. State, 92 M. 244—crim. l. 1140; hom. 166.
Clement v. Hawkins, 8 S. & M. 339—courts, 200½; eq. 93; ex. & ad. 248; judgm. 911.

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Clement v. Reid, 9 S. & M. 535—eq. 65; execution, 250; judgm. 788; spec. perf. 8, 16, 18.
Clements v. Anderson, 46 M. 581—adv. pos. 4, 7; eq. 17; lim. of act. 11; lev. 34; pub. lands, 119; statut. 225.
Clements v. Brown, 31 M. 93—judgm. 934; lim. of act. 88.
Clements v. Western Union Tel. Co. 77 M. 747—tel. & t. 54.
Clements, Crossett v.—7 So. 207.
Clemmer, Jones v.—54 So. 4.
Cleveland, Nye v.—31 M. 440.
Cleveland, Scott v.—33 M. 447.
Clevenger, Mixon v.—74 M. 67.
Cliburne, Welch v.—94 M. 443.
Clifton v. Bank of Aberdeen, 75 M. 929—bills & n. 156.
Clifton v. Clark, 83 M. 446—atty. & c. 63, 76.
Clifton v. Clark &c. Co. 84 M. 795—app. & e. 1009; atty. & c. 144.
Clifton v. Galbraith, 23 M. 292—abate. & r. 75.
Clifton, Matthews v.—13 S. & M. 330.
Clifton, Western Union Tel. Co. v.—68 M. 307.
Cline, Lewis v.—5 So. 112.
Clingan, Russell v.—33 M. 535.
Clinghan, Pattison v.—93 M. 310.
Clinton, Clark v.—61 M. 337.
Clisby v. Mobile &c. R. Co. 78 M. 937—app. & e. 1033; r. r. 454, 455, 463; trial, 116, 295.
Clogston, Illinois Cent. R. Co. v.—54 So. 75.
Clopton v. Bolton, 23 M. 78—cov. 26, 107.
Clopton v. Cozart, 13 S. & M. 363—fraud, 8, 13, 19; ven. & pur. 32.
Clopton v. Elkin, 49 M. 95—bills & n. 103, 125; cncts. 137; ev. 229; ex. & ad. 450; int. 39; princ. & s. 40.
Clopton v. Gholson, 53 M. 466—ex. & ad. 111; subrog. 1, 32, 41.
Clopton v. Hall, 51 M. 482—bills & n. 90, 493; princ. & s. 45.
Clopton v. Haughton, 57 M. 787—abate. & r. 73; ex. & ad. 464, 473.
Clopton v. Matheny, 48 M. 285—hus. & w. 151; lim. of act. 73, 114; nova. 5.
Clopton v. Spratt, 52 M. 251—eject. 68; plead. 99; princ. & s. 103, 114, 121, 124.
Clopton v. Sykes, 2 Miss. Dec. 515—inj. 261.
Clopton, Hall v.—56 M. 555.
Clopton, McAllister v.—51 M. 257.
Clopton, McAllister v.—60 M. 207.
Clopton, O'Conner v.—60 M. 349.
Clopton, Smith v.—48 M. 66.
Cloud v. State, 53 M. 662—agric. 15; execution, 39.
Cloud, Robertson v.—47 M. 208.
Clow v. Tharpe, 3 S. & M. 64—execution, 153a, 153d.
Clower v. Rawlings, 9 S. & M. 122—ven. & pur. 254, 257, 266a.
Clue v. State, 78 M. 661—ind. 125, 125b, 133.
Clymer v. Cameron, 55 M. 593—app. & e. 1064; tax. 679, 787, 810.
Clymer v. Powell, 56 M. 672—forc. e. & d. 8, 12, 15; ven. & pur. 298.
Coahoma County, Chatters v.—73 M. 351.
Coahoma County, Gray v.—72 M. 303.
Coahoma County, Jennings v.—79 M. 523.
Coahoma County, Lindsey v.—69 M. 815.
Coahoma County, Sexton v.—86 M. 380.
Coahoma County, State v.—3 So. 143.
Coahoma, State v.—64 M. 358.
Coates v. Worthy, 72 M. 575—exemp. 50.
Coates, Gaines v.—51 M. 335.
Coat Lumber Co. v. Pope, 43 So. 434—logs, 3.
Coats v. Bacon, 77 M. 320—cncts. 93; ev. 385, 400.
Coats, Bell v.—56 M. 776.
Coats, Cheairs v.—77 M. 846.
Coats, Moore v.—43 M. 225.
Cobb v. Champlin, 33 M. 406—assign. 51.
Cobb v. Duke, 36 M. 60—acct. 20; bills & n. 208, 272; eq. 43, 330; hus. & w. 85; mtg. 485, 559.
Cobb v. Lees, 60 M. 343—set-off, 25.
Cobb v. O'Neal, 1 H. 581—app. & e. 495, 920.
Cobb v. Pense, 16 So. 419—wills, 536.
Cobb, Handy v.—44 M. 699.
Cobb, Harding v.—47 M. 599.
Cobb, Hewett v.—40 M. 61.
Cobb, Lusby v.—80 M. 715.
Cobb, McKee v.—33 M. 533.
Cobb, Matlock v.—62 M. 43.
Cobb, Yazoo &c. R. Co. v.—94 M. 561.
Coca-Cola Co. v. Skillman, 91 M. 677—licens. 2, 7.
Cochran v. Baker, 60 M. 282—const. law, 139; tax. 688, 726.
Cochran v. Richberger, 70 M. 843—tax. 735, 809.
Cochran v. Wimberly, 44 M. 503—mech. liens, 199, 233.
Cochran, Baker v.—2 Miss. Dec. 96.
Cochran, Davis v.—76 M. 439.
Cochran, Day v.—24 M. 261.
Cochran, First Nat. Bank v.—71 M. 175.
Cochran, Liverpool &c. Co. v.—77 M. 348.
Cochran, Turner v.—89 M. 206.

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Cock v. Abernathy, 77 M. 872—death, 4; lim. of act. 23; witn. 133.
Cock v. Oakley, 50 M. 628—fraud. conv. 107.
Cocke v. Bailey, 42 M. 81—dower, 24, 27; ev. 400; ven. & pur. 260.
Cocke v. Blackbourn, 57 M. 689—ev. 419, 432.
Cocke v. Blackbourn, 58 M. 537—ev. 384, 432.
Cocke v. Brewer, 68 M. 775—courts, 3; judgm. 17b; proc. 86; venue, 26.
Cocke v. Carrington Shoe Co. 18 So. 683—fraud. conv. 285.
Cocke v. Copiah County, 38 M. 340—counties, 47, 136, 222; courts, 119; high. 157; princ. & a. 177; slaves, 16.
Cocke v. Finley, 29 M. 127—ex. & ad. 24.
Cocke v. Foote, 49 M. 181—ex. & ad. 418.
Cocke v. Hannum, 39 M. 423—hab. corp. 99; div. 296, 298.
Cocke v. Kuykendall, 41 M. 65—attch. 96, 253; estop. 68.
Cocke v. Lane, 3 S. & M. 763—corp. 372; execution, 222, 263.
Cocke v. Maynard, 16 So. 908—land. & t. 231.
Cocke v. Rucks, 34 M. 105—guard. & w. 73, 108, 116.
Cocke v. Weathersby, 5 S. & M. 333—libel, 7, 100, 125.
Cocke v. Western Union Tel. Co. 84 M. 380—tel. & t. 69, 78.
Cocke, Armistead v.—62 M. 198.
Cocke, Maynard v.—71 M. 493.
Cocke, Maynard v.—18 So. 374.
Cocke, Memphis &c. R. Co. v.—64 M. 713.
Cocke, Nabours v.—24 M. 44.
Cocke, Newsom v.—44 M. 352.
Cockerel v. Wynn, 12 S. & M. 117—execution, 270; ev. 334; judgm. 951.
Cockerell, Estill v.—26 M. 127.
Cockerell, Ruff v.—31 M. 57.
Cocke, Tucker v.—32 M. 184.
Cocke, Weisinger v.—67 M. 511.
Cocke, Williams v.—6 So. 774.
Cockrell v. Cockrell, 79 M. 569—ins. 209, 216.
Cockrell v. Cockrell, 83 M. 385—witn. 150.
Cockrell v. Mitchell, 15 So. 41—witn. 144.
Cockrell v. Seasongood, 33 So. 76—ex. & ad. 222.
Cockrell, Swinney v.—86 M. 318.
Cockrell, Swinney v.—38 So. 360.
Cockrum, Bias v.—37 M. 509.
Cocks v. Simmons, 57 M. 183—estop. 2; inf. 22, 31, 87, 112; inj. 179, 230; judgm. 490, 747; jud. s. 47, 61; partit. 39.
Cocks, Penrice v.—1 H. 227.
Cody v. State, 3 H. 27—crim. l. 923, 1116; gr. jury, 5, 40; ind. 33.
Coen, Berkson v.—71 M. 650.
Coffee v. Coffee, 24 So. 262—app. & e. 934, 1009, 1011.
Coffee v. Coleman, 85 M. 14—tax. 809.
Coffee v. Louisville &c. Co. 76 M. 569—carr. 389.
Coffee v. Planters' Bank, 11 S. & M. 458—app. & e. 323; execution, 151b, 153c, 153e, 154b.
Coffee v. Ragsdale, 14 So. 454—ex. & ad. 508.
Coffee, Hodges v.—13 So. 878.
Coffee, McKee v.—58 M. 653.
Coffee, Selden v.—55 M. 41.
Coffeeville, Cohea v.—69 M. 561.
Coffey, Horner v.—25 M. 434.
Coffin v. Bramlitt, 42 M. 194—banks, 128; ex. & ad. 103, 508a; guard. & w. 53, 54, 56, 65, 147; rec. 100; trusts, 179, 216, 221, 351.
Coffin v. Murphy, 62 M. 542—app. & e. 902, 906.
Coffin, Joslin v.—5 H. 539.
Coffman v. Bank of Kentucky, 40 M. 29—const. law, 113, 169, 170.
Coffman v. Bank of Kentucky, 41 M. 212—bills & n. 375, 419, 421, 427; bonds, 95.
Coffman v. Brown, 7 S. & M. 125—dism. 29.
Coffman v. Devany, 2 H. 854—app. & e. 351.
Cogan v. Duncan, 23 M. 274—ex. & ad. 314g, 442, 537g; judgm. 914.
Cogan v. Frisby, 36 M. 178—app. & e. 1050; ev. 343; ex. & ad. 388b; new tr. 41.
Cogburn v. Hunt, 54 M. 675—tax. 419, 764.
Cogburn v. Hunt, 56 M. 718—tax. 769.
Cogburn v. Hunt, 57 M. 681—tax. 679a, 740, 819.
Cogburn v. Pollock, 54 M. 639—attch. 177, 225; fraud. conv. 222.
Coggins v. Stockard, 64 M. 301—paymt. 25.
Cohea v. Carroll, 5 S. & M. 545—fraud. conv. 154.
Cohea v. Coffeeville, 69 M. 561—bridges, 23, 44; mun. corp. 787, 789, 805.
Cohea v. Commissioners of Sinking Fund, 7 S. & M. 437—ex. & ad. 225; princ. & s. 124; states, 127.
Cohea v. Hemingway, 71 M. 22—ex. & ad. 138, 145; ten. in c. 20.
Cohea v. Hunt, 2 S. & M. 227—bills & n. 393, 400, 404; trial, 228.
Cohea v. Jemison, 68 M. 510—trusts, 133; eject. 40; ex. & ad. 93, 129, 138.
Cohea v. Johnson, 69 M. 46—deeds, 45; ex. & ad. 121, 138, 145; judgm. 716, 747.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Cohea v. State, 34 M. 179—bonds, 144; ex. & ad. 351.
Cohea, Bacon v.—12 S. & M. 516.
Cohea, Smith v.—3 H. 35.
Cohen v. Carroll, 5 S. & M. 545—eq. 428; execution, 38.
Cohen v. Gamble, 71 M. 478—attch. 25; partners. 208.
Cohen, Mulvahill v.—1 Miss. Dec. 280.
Cohen, Roots v.—12 So. 593.
Cohn v. Beal, 61 M. 398—offic. 39.
Cohn v. Carter, 92 M. 627—ex. & ad. 223.
Cohn v. Pearl River Lumber Co. 80 M. 649—adv. pos. 112; pub. lands, 61, 124, 142.
Cohn v. Smith, 64 M. 816—land. & t. 252a, 253.
Cohn v. Smith, 94 M. 517—adv. pos. 24.
Cohn, Moyse v.—76 M. 590.
Coker v. Britt, 78 M. 583—land. & t. 255, 270.
Coker v. Brevard, 90 M. 64—dam. 75.
Coker, Adams v.—85 M. 222.
Coker, Jones v.—53 M. 195.
Coker, Riggs v.—69 M. 266.
Colbert v. Henley, 64 M. 374—eq. 326; home. 70.
Colbert v. Leake County, 60 M. 142—tax. 260.
Colbert v. State, 86 M. 769—const. law, 50; states, 113, 129, 146.
Coldwell, Kirby v.—26 M. 103.
Cole v. American Surety Co. 90 M. 782—ins. 12.
Cole v. Bryant, 73 M. 297—sales, 201.
Cole v. Cole, 54 So. 953—ev. 460; frds. st. of, 98.
Cole v. Coon, 70 M. 634—app. & e. 840; tax. 684, 688, 802.
Cole v. Dugger, 41 M. 557—proc. 164.
Cole v. Gardner, 67 M. 670—witn. 157, 164.
Cole v. Harman, 8 S. & M. 562—ev. 99; new tr. 85; pub. lands, 55; plead. 25, 115, 433; trial, 46, 60.
Cole v. Humphries, 78 M. 163—dist. attys. 4.
Cole v. Hundley, 8 S. & M. 473—eq. 327; ev. 463; judgm. 461; new tr. 85, 96.
Cole v. Johnson, 53 M. 94—app. & e. 266; appr. 7; eject. 140; eq. 119, 422; ex. & ad. 389d, 510; refer. 100; statut. 199.
Cole v. Leak, 31 M. 131—ex. & ad. 299, 315.
Cole v. Leake, 27 M. 767—des. & d. 108; ex. & ad. 314a, 380, 428, 475, 478.
Cole v. Miller, 32 M. 89—eq. 430, 442, 451.
Cole v. State, 75 M. 142—crim. l. 721½, 919; witn. 52a.
Cole v. State, 91 M. 628—ins. 138; mand. 72.
Cole v. State, 4 So. 577—crim. l. 59, 763, 834, 1036; larc. 81.
Cole v. Wineman, 80 M. 73—mand. 16, 85; pub. lands, 142.
Cole, Clarksdale Ins. Agency v.—87 M. 637.
Cole, Dogan v.—63 M. 153.
Cole, Farmers' Mut. Fire Ins. Co. v.—90 M. 508.
Cole, Goff v.—71 M. 46.
Cole, Green v.—54 So. 65.
Cole, Howe v.—16 So. 531.
Cole, Irion v.—78 M. 132.
Coleman v. Adair, 75 M. 660—ex. & ad. 451; trial, 139, 190, 194, 194b.
Coleman v. Brooke, 37 M. 71—ex. & ad. 183.
Coleman v. Carr, W. 258—const. l. 41, 75; ex. & ad. 136.
Coleman v. Doe, 4 S. & M. 40—Indians, 14; witn. 38.
Coleman v. Galbreath, 53 M. 303—dam. 125; mtg. 116.
Coleman v. Gordon, 16 So. 340—app. & e. 674; ev. 40; j. p. 164, 173.
Coleman v. Holden, 88 M. 798—land. & t. 131.
Coleman v. Hudspeth, 49 M. 562—inj. 175.
Coleman v. Lamar, 40 M. 775—guard. & w. 15, 177; plead. 213.
Coleman v. Low, 13 So. 227—chat. m. 173; replev. 91.
Coleman v. Mississippi &c. R. Co. 5 H. 419—motion, 18; sheriffs, 159.
Coleman v. Rives, 24 M. 634—cred. s. 7; eq. 61; judgm. 780.
Coleman v. Rowe, 5 H. 460—cncts. 329; cov. 26, 107; inj. 108; ven. & pur. 74, 112, 308a, 334, 344.
Coleman v. Rowe, 4 S. & M. 747—app. & e. 384.
Coleman v. Saunders, 5 H. 287—sheriffs, 159.
Coleman v. Semmes, 56 M. 321—estop. 94; hus. & w. 119.
Coleman v. State, 59 M. 484—crim. l. 765, 805, 1166½; jury, 75, 83, 104.
Coleman v. State, 83 M. 290—crim. l. 100; hom. 7, 142.
Coleman v. State, 94 M. 860—ind. 125; weap. 14.
Coleman v. State, 40 So. 230—crim. l. 1051, 1088, 1116; ind. 23, 25.
Coleman v. Temple, 25 So. 1036—app. & e. 1133.
Coleman v. Tidwell, 5 H. 12—app. & e. 404.
Coleman v. Tish-ho-mah, 4 S. & M. 40—Indians, 14, 27.
Coleman v. White, 38 So. 336—app. & e. 1009.
Coleman v. Yazoo &c. R. Co. 90 M. 629—carr. 283; r. r. 281; trial, 267.
Coleman, Alabama &c. R. Co. v.—78 M. 182.

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Coleman, Beason v.—92 M. 622.
Coleman, Bolivar County v.—71 M. 332.
Coleman, Coffee v.—85 M. 14.
Coleman, Deut v.—10 S. & M. 83.
Coleman, Feld v.—72 M. 545.
Coleman, Ford v.—41 M. 651.
Coleman, Hawkins v.—1 Miss. Dec. 478.
Coleman, Leftwitch v.—3 H. 167.
Coleman, Low v.—14 So. 267.
Coleman, Myers v.—93 M. 226.
Coleman, Perkins v.—51 M. 298.
Coleman, Quin v.—42 M. 386.
Coleman, Reed v.—51 M. 335.
Coleman, Shoemaker v.—94 M. 619.
Coleman, Tippin v.—59 M. 641.
Coleman, Tippin v.—61 M. 516.
Cole, State v.—31 M. 174.
Cole, Winn v.—W. 119.
Coley, Norton v.—45 M. 125.
Colfax County, Crump v.—52 M. 107.
Collier v. White, 67 M. 133—tender, 10, 21.
Collier, Ex parte, 12 So. 597—hab. corp. 30.
Collier, Madison County v.—79 M. 220.
Collier, Madison County v.—87 M. 204.
Collier, Skinner v.—4 H. 396.
Collins v. Barrier, 64 M. 21—int. liq. 62, 68, 75.
Collins v. Bounds, 82 M. 447—home. 124.
Collins v. Bounds, 36 So. 689—home. 118a; pub. lands, 135, 139.
Collins v. Collins, 51 M. 311—alt. inst. 1, 15; home. 118.
Collins v. Fife, 55 So. 484—crim. l. 778.
Collins v. Flowers, 1 H. 26—witn. 95.
Collins v. Illinois Cent. R. Co. 77 M. 855—r. r. 234, 387.
Collins v. McCargo, 6 S. & M. 128—bills & n. 106; cncts. 140; sales, 259, 355; slaves, 2, 7a.
Collins v. Melton, 40 M. 242—wills, 782.
Collins v. Money, 4 H. 11—cncts. 305, 316.
Collins v. Sherman, 31 M. 679—corp. 372; fran. 1, 4, 5; ferries, 9; turnpikes, 12.
Collins v. Southern R. Co. 89 M. 375—carr. 328.
Collins v. Spears, W. 310—inf. 6.
Collins v. State, 71 M. 691—trial, 189, 252.
Collins v. State, 54 So. 665—crim. l. 654, 1163; jury, 10.
Collins v. State, 54 So. 666—crim. l. 369, 730.
Collins v. Terrall, 2 S. & M. 383—proc. 164; sheriffs, 119.
Collins, Carradine v.—7 S. & M. 428.
Collins, Champenois v.—30 So. 72.
Collins, Covington County v.—92 M. 330.
Collins, Davenport v.—95 M. 358.
Collins, Davenport v.—96 M. 716.
Collins, Drake v.—5 H. 253.
Collins, Foster v.—5 S. & M. 259.
Collins, Garner v.—W. 518.
Collins, Green v.—38 So. 188.
Collins, Grubbs v.—54 M. 485.
Collins, Howcott v.—23 M. 398.
Collins, Lott v.—1 Miss. Dec. 311.
Collins, Ratliffe v.—35 M. 581.
Collins, Spaun v.—10 S. & M. 624.
Collins, Ware v.—35 M. 223.
Collins, Wesson v.—72 M. 844.
Collins, Wilkie v.—48 M. 496.
Colment, Mhoon v.—51 M. 60.
Cologere, Wilburn v.—52 So. 794.
Colonial & United States Mortg. Co. Adams v.—82 M. 263.
Colonial &c. Mortg. Co. Frank v.—86 M. 103.
Colored Grand Lodge of Knights of Honor of America, Woodson v.—52 So. 457.
Colored Knights of Pythias v. Tucker, 92 M. 501—marr. 50, 51; trial, 252.
Colson, Harwood v.—1 Miss. Dec. 514.
Colson, Spratlin v.—80 M. 278.
Colton, Bickell v.—41 M. 368.
Coltraine, Frank v.—61 M. 606.
Coltrane v. Cox, 60 M. 537—tax. 615.
Columbia Star Milling Co. v. A. G. Russell Co. 89 M. 437—ev. 397.
Columbus Banking Co. Moyers v.—64 M. 48.
Columbus Buggy Co. v. Turley, 73 M. 529—partners. 162; sales, 222.
Columbus Compress Co. Knoop v.—84 M. 239.
Columbus, Hand v.—4 S. & M. 203.
Columbus Ins. Co. v. Foster, 64 M. 288—fraud. conv. 103.
Columbus Ins. Co. v. Hirsh, 61 M. 74—garn. 141.
Columbus Ins. &c. Co. v. First Nat. Bank, see Sweetzer v. First Nat. Bank.
Columbus Ins. &c. Co. v. Humphries, 64 M. 258—eq. 148, 247; ex. & ad. 33, 81, 116, 124, 138.
Columbus Ins. &c. Co. Murdock v.—59 M. 152.
Columbus Ins. &c. Co. Robertson v.—85 M. 234.
Columbus Life Ins. Co. Saunders v.—43 M. 583.
Columbus, Mahon v.—58 M. 310.
Columbus, Street v.—75 M. 822.
Columbus, Sykes v.—55 M. 115.
Colvin, Garrett v.—77 M. 408.
Combs v. Black, 62 M. 831—witn. 133, 144, 157.
Combs v. Mobile &c. R. Co. 92 M. 532—r. r. 251, 397.

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Combs, Monken v.—2 Miss. Dec. 644.
Combs, Tomlon v.—21 So. 782.
Comenitz v. Bank of Commerce, 85 M. 662—j. p. 118; judgm. 234.
Comfort v. Kosciusko, 88 M. 611—mun. corp. 604.
Comfort, Beauchamp v.—42 M. 94.
Comfort, Illinois Cent. R. Co. v.—53 So. 422.
Comfort, Planters' Ins. Co. v.—50 M. 662.
Comfort, Pressgrove v.—58 M. 644.
Comfort, Whitaker v.—W. 421.
Commander v. Brazil, 88 M. 668—inf. 56.
Commercial Bank v. Atherton, 1 S. & M. 641—banks, 183.
Commercial Bank v. Auze, 74 M. 609—cncts. 144; lim. of act. 35; usury, 2, 95, 102.
Commercial Bank v. Bonner, 13 S. & M. 649—bills & n. 402; cncts. 265; corp. 383; nova. 69.
Commercial Bank v. Chambers, 8 S. & M. 9—abat. & r. 39; banks, 63, 70, 72, 77; const. l. 92, 93, 169; statut. 159, 160, 223.
Commercial Bank v. Chisholm, 6 S. & M. 457—banks, 185, 227; ev. 271; plgs. 52.
Commercial Bank v. Claiborne, 5 H. 301—bills & n. 255, 310.
Commercial Bank v. Galloway, 6 H. 515—courts, 64, 78.
Commercial Bank v. Hardy, 53 So. 395—banks, 80.
Commercial Bank v. Helderburn, 6 H. 536—judgm. 775, 778, 784.
Commercial Bank v. Kendall, 13 S. & M. 278—judgm. 870, 870a.
Commercial Bank v. Lewis, 13 S. & M. 226—bills & n. 329, 358, 359, 364, 415; eq. 430; partners. 146, 160; sales, 109.
Commercial Bank v. McCaa, 8 S. & M. 720—abat. & r. 4; quo. w. 23.
Commercial Bank v. Martin, 9 S. & M. 613—app. & e. 169, 204; eject. 90; ex. & ad. 333, 337, 358, 379; execution, 8; trial, 105.
Commercial Bank v. Nolan, 7 H. 508—banks, 179, 181; corp. 385; usury, 53, 146.
Commercial Bank v. State, 4 S. & M. 439—banks, 63; const. l. 51, 114, 169; corp. 596; quo. w. 1.
Commercial Bank v. State, 6 S. & M. 599—banks, 3, 68; const. l. 125; quo. w. 54.
Commercial Bank v. Thompson, 7 S. & M. 443—abat. & r. 85; banks, 98, 187.
Commercial Bank v. Ullman, 10 S. & M. 411—attch. 115, 156; j. p. 86; seals, 3.
Commercial Bank v. Waters, 10 S. & M. 559—execution, 37; inj. 230.
Commercial Bank v. Yazoo County, 6 H. 530—app. & e. 544, 672; judgm. 784, 785; ven. & pur. 213.
Commercial Bank, Abbey v.—31 M. 434.
Commercial Bank, Abbey v.—34 M. 571.
Commercial Bank, Agricultural Bank v.—7 S. & M. 592.
Commercial Bank, Bondurant v.—8 S. & M. 533.
Commercial Bank, Ellis v.—7 H. 294.
Commercial Bank, Jones v.—5 H. 43.
Commercial Bank, Killingsworth v.—9 S. & M. 628.
Commercial Bank, Loomis v.—4 H. 660.
Commercial Bank, Maury v.—5 S. & M. 41.
Commercial Bank, Montgomery v.—Sm. & M. Ch. 632.
Commercial Bank, Payne v.—6 S. & M. 24.
Commercial Bank, Phillips v.—1 S. & M. 636.
Commercial Bank, Smith v.—6 S. & M. 83.
Commercial Bank, State v.—6 S. & M. 218.
Commercial Bank, State v.—12 S. & M. 276.
Commercial Bank, State v.—13 S. & M. 569.
Commercial Bank, State v.—24 M. 144.
Commercial Bank, State v.—33 M. 474.
Commercial Bank, Stephens v.—31 M. 438.
Commercial Bank, Tierman v.—7 H. 648.
Commercial Bank, Vaughan v.—18 So. 270.
Commercial Bank, Wilkins v.—6 H. 217.
Commercial State Bank &c. Co. v. Bates, 51 So. 599—banks, 158.
Commercial &c. Bank, Arthur v.—9 S. & M. 394.
Commercial &c. Bank, Bland v.—3 S. & M. 250.
Commercial &c. Bank v. Hamer, 7 H. 448—banks, 157—bills & n. 393, 400, 403.
Commercial &c. Bk. v. Lum, 7 H. 414—alt. of inst. 26, 30; trial, 4; witn. 101.
Commissioners of Homochitto River v. Withers, 29 M. 21—em. dom. 24; nav. wat. 39.
Commissioners of Sinking Fund v. Patrick, Sm. & M. Ch. 110—eq. 68; judgm. 452.
Commissioners of Sinking Fund v. Walker, 6 H. 143—const. l. 50; corp. 381; states, 89, 124, 127; trusts, 8, 155, 159, 216, 245.
Commissioners of Sinking Fund, Cohea v.—7 S. & M. 437.
Commissioners of Sinking Fund, Fall v.—3 S. & M. 127.
Commissioners of Sinking Fund, Lynch v.—4 H. 377.
Commissioners of Sinking Fund, Montgomery v.—7 H. 13.
Commissioners of Sinking Fund, Walker v.—1 S. & M. 372.
Commissioners, State v.—W. 368.

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Commodore, Phelps v.—1 So. 833.
Commonwealth Bank v. Martin, 9 S. & M. 613—app. & e. 914.
Como v. Pointer, 87 M. 712—adv. pos. 80; ded. 19; deeds, 101; ease. 18.
Compress Co. v. Potts, 68 M. 637—app. & e. 102.
Compress Co. Solomon v.—70 M. 822.
Compton v. Compton, 6 S. & M. 194—ex. & ad. 424.
Compton, Curll v.—14 S. & M. 56.
Compton, Dougherty v.—3 S. & M. 100.
Compton, Freeland v.—30 M. 424.
Compton, Southern Light &c. Co. v.—86 M. 269.
Comstock v. North, 88 M. 754—plead. 36; ven. & pur. 16, 18.
Comstock v. Rayford, 1 S. & M. 423—eq. 102.
Comstock v. Rayford, 12 S. & M. 369—fraud. conv. 13, 96, 131, 229; garn. 66.
Conch, Hoy v.—5 H. 188.
Condon v. Shehan, 46 M. 710—judgm. 439.
Conerly v. Lincoln County, 55 So. 963—j. p. 14.
Conerly v. State, 66 M. 96—dist. pub. a. 5.
Coney, Gaines v.—51 M. 323.
Coney, Stegall v.—49 M. 761.
Conger v. Robinson, 4 S. & M. 210—app. & e. 384, 1141; chat. m. 285; jud. s. 31, 61; mtg. 525.
Conger, Baldwin v.—9 S. & M. 516.
Conger, Grand Gulf &c. R. Co. v.—9 S. & M. 505.
Conger, Planters' Bank v.—12 S. & M. 527.
Conger, Watt v.—13 S. & M. 412.
Conger, Wharton v.—9 S. & M. 510.
Conithan v. Royal Ins. Co. 91 M. 386—ins. 138, 139.
Conklin v. Alabama &c. R. Co. 81 M. 152—des. & d. 90.
Conley, Brougher v.—62 M. 358.
Conley, Pearl v.—7 S. & M. 356.
Conn v. Bernheimer, 67 M. 498—judgm. 654, 748.
Conn v. Pender, 1 S. & M. 386—execution, 84, 154b; princ. & s. 66.
Conn, Bacon v.—Sm. & M. Ch. 348.
Connell v. Lewis, W. 251—execution, 154b; sheriffs, 125; statut. 244.
Connell v. Mobile &c. R. Co. 7 So. 344—carr. 267.
Connell v. Mulligan, 13 S. & M. 388—frds. st. of, 110; j. adv. 2; tender, 10.
Connell v. Woodard, 5 H. 665—parties, 75; pub. lands, 55; schools, 53, 113.
Connell, Elliot v.—5 S. & M. 91.
Connell, Vance v.—W. 254.
Connel, Perrin v.—2 Miss. Dec. 655.
Conner v. Gray, 88 M. 489—counties, 3, 9; inj. 80, 85.
Conner v. Hull, 36 M. 424—gifts, 17.
Conner v. McLaurin, 77 M. 373—quo. w. 49.
Conner v. State, 13 So. 934—crim. l. 834.
Conner v. Swain, 32 M. 245—app. & e. 1025, 1040; cncts. 346.
Conner, Adams v.—73 M. 425.
Conner, Pharis v.—3 S. & M. 87.
Conners v. Yazoo &c. R. Co. 86 M. 356—r. r. 74.
Conner, Stovall v.—58 M. 138.
Conner, Taylor v.—41 M. 722.
Connor v. Tippett, 57 M. 594—frds. st. of, 69; quiet. t. 7.
Connor, Wasson v.—54 M. 351.
Connor, Woodliffe v.—45 M. 552.
Connoway, Dillard v.—25 M. 230.
Conrad v. State, 70 M. 733—crim. l. 304, 935; int. liq. 39.
Conrad v. State, 80 M. 229—crim. l. 1168, 1169, 1170½; fish, 15.
Conrey, Bank of Augusta v.—28 M. 667.
Conroy, Louisville &c. R. Co. v.—63 M. 562.
Consumers' Ice Co. v. Cook Well Co. 71 M. 886—garn. 158.
Continental Casualty Co. Kelly v.—87 M. 438.
Continental Casualty Co. Sewell v.—92 M. 857.
Continental Ins. Co. v. Mansfield, 45 M. 311—corp. 672; ins. 26, 625, 628; judgm. 99.
Continental Nat. Bank v. First Nat. Bank, 84 M. 103—banks, 167.
Conway v. Strong, 24 M. 665—subrog. 5, 33.
Conway, Parchman v.—28 M. 85.
Conway, Shirley v.—44 M. 434.
Conwill v. Conwill, 61 M. 202—ex. & ad. 512; inf. 87.
Conwill v. Livingston, 61 M. 641—ex. & ad. 83, 89.
Conwill v. Schumpert, 2 Miss. Dec. 546—ex. & ad. 508.
Cook v. Abernathy, 77 M. 872—ex. & ad. 29.
Cook v. Armstrong, 25 M. 63—costs, 273; judgm. 577.
Cook v. Bank of Lexington, 8 S. & M. 543—banks, 181; usury, 19.
Cook v. Bay, 4 H. 485—eq. 376, 422, 429.
Cook v. Fisk, W. 423—dower, 10.
Cook v. Friley, 61 M. 1—quiet. t. 9, 35, 43; pub. lands, 124.
Cook v. Fultz, 10 S. & M. 369—mtg. 515.
Cook v. Guice, 28 M. 242—cov. 107.

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Cook v. Ligon, 54 M. 368—agric. 10; app. & e. 230, 1173; hus. & w. 151, 221, 231.
Cook v. Ligon, 54 M. 625—app. & e. 1234; fraud. conv. 103.
Cook v. Ligon, 54 M. 652—des. & d. 88; fraud. conv. 211, 212; hus. & w. 47; parties, 85.
Cook v. Lindsey, 34 M. 451—eq. 80; hus. & w. 10; lim. of act. 73, 100.
Cook v. Martin, 5 S. & M. 379—bills & n. 129, 393, 395, 397, 489; dep. 45, 102; partners. 213; plead. 291.
Cook v. Merchants' Nat. Bank, 72 M. 982—bills & n. 510; evid. 461.
Cook v. Reynolds, 58 M. 243—cov. 26; eq. 39; inf. 73; lim. of act. 82, 165; spec. perf. 3, 97, 126.
Cook v. Rives, 13 S. & M. 328—atty. & c. 45.
Cook v. Southern Columbian Climber Co. 75 M. 121—corp. 30.
Cook v. State, 49 M. 8—larc. 81.
Cook v. State, 57 M. 654—ind. 11c.
Cook v. State, 72 M. 517—crim. l. 1032; hom. 127; ind. 58, 74, 133.
Cook v. State, 77 M. 800—anim. 5; crim. l. 168.
Cook v. State, 81 M. 146—courts, 171; crim. l. 304, 375, 402, 1169—int. liq. 223, 225.
Cook v. State, 85 M. 738—crim. l. 815; hom. 157, 282, 305, 405; witn. 345.
Cook v. State, 90 M. 137—crim. l. 1166½; jury, 65, 66, 103, 116.
Cook v. State, 28 So. 833—burg. 42, 44; crim. l. 552, 823.
Cook v. State, 38 So. 113—crim. l. 855; jury, 134.
Cook v. Toumbs, 36 M. 685—estop. 26; execution, 69, 246, 286; judgm. 857; inf. 29, 31a, 32.
Cook v. Whitfield, 41 M. 541—cncts. 328; princ. & a. 150; subscrip. 6, 21; trial, 192.
Cook, Ackerman v.—34 M. 262.
Cook, Brady v.—68 M. 636.
Cook Carriage Co. First Nat. Bank v.—70 M. 587.
Cook, Dickson v.—47 M. 220.
Cook, Dillon v.—5 S. & M. 773.
Cook, Dixon v.—47 M. 220.
Cookerham v. State, 19 So. 195—obst. just. 3.
Cook, Frost v.—7 H. 357.
Cook, Holly v.—70 M. 590.
Cook, Leak v.—52 M. 799.
Cook, McDowell v.—5 S. & M. 420.
Cook, Miss. Mills v.—56 M. 40.
Cook, Natchez &c. R. Co. v.—63 M. 38.
Cook, Torry v.—3 S. & M. 60.
Cook Well Co. Consumers' Ice Co. v.—71 M. 886.
Cook, Whitney v.—53 M. 551.
Cook, Wilkinson v.—44 M. 367.
Cook, Young v.—30 M. 320.
Cooley, Leach v.—6 S. & M. 93.
Coon v. State, 13 S. & M. 246—crim. l. 517, 538, 564, 693, 698, 1144; ind. 165; larc. 10, 16, 54; slaves, 9.
Coon, Cole v.—70 M. 634.
Cooney, Brulie v.—12 So. 463.
Coon, Fox v.—64 M. 465.
Coon, Jones v.—5 S. & M. 751.
Cooper v. Allen, 57 M. 694—hus. & w. 220; lim. of act. 130.
Cooper v. Baker, 54 M. 637—chat. m. 173; land. & t. 248, 249, 252, 252a.
Cooper v. Benson, 28 M. 766—eject. 4, 65; wills, 613.
Cooper v. Cooper, 61 M. 676—lim. of act. 16, 36, 101, 103; trusts, 30½, 102.
Cooper v. Fox, 67 M. 237—partit. 15, 26, 45.
Cooper v. Frierson, 48 M. 300—agric. 12; j. adv. 6; land. & t. 249.
Cooper v. Granberry, 33 M. 117—dep. 96; eject. 76; ev. 368; execution, 318; plead. 252; witn. 112.
Cooper v. Ingraham, 45 M. 198—garn. 93.
Cooper v. Mobile &c. R. Co. 94 M. 413—r. r. 60.
Cooper v. Moore, 44 M. 386—judges, 9, 11; offic. 104; notaries, 2.
Cooper v. Newell, 36 M. 316—execution, 172.
Cooper v. Rivers, 95 M. 423—cncts. 138; sheriffs, 103.
Cooper v. State, 53 M. 393—crim. l. 937, 954; ev. 521.
Cooper v. State, 59 M. 267—ind. 34; jury, 58, 109; witn. 253.
Cooper v. State, 80 M. 175—crim. l. 814; hom. 300d.
Cooper v. State, 89 M. 351—hom. 215.
Cooper v. State, 89 M. 429—witn. 299.
Cooper v. State, 94 M. 480—witn. 381.
Cooper v. Turnage, 52 M. 431—chat. m. 138; judgm. 786.
Cooper v. Yazoo &c. R. Co. 82 M. 634—acct. 8, 11.
Cooperative Life Assn. v. Leflore, 53 M. 1—ev. 208, 332; ins. 146, 255, 263, 647.
Cooperative Life Assn. v. McConnico, 53 M. 233—ins. 78, 86, 94; princ. & a. 171; trial, 252.
Cooper, Baltimore Express Co. v.—66 M. 558.
Cooper, Bell v.—26 M. 650.
Cooper, Bush v.—26 M. 599.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Cooper, Cannon v.—39 M. 784.
Cooper, Dease v.—40 M. 114.
Cooper, Hamilton v.—W. 542.
Cooper, Holloday v.—1 S. & M. 633.
Cooper, Johnson v.—56 M. 608.
Cooper, King v.—W. 359.
Cooper, Louisville &c. R. Co. v.—68 M. 868.
Cooper, Phillips v.—50 M. 722.
Cooper, Phillips v.—59 M. 17.
Cooper, Powell v.—42 M. 221.
Cooper, Prestidge v.—54 M. 74.
Cooper, State v.—53 M. 615.
Cooper, Stricklin v.—55 M. 624.
Cooper, Wailes v.—24 M. 208.
Cooper, Ward v.—69 M. 789.
Coopwood v. Baldwin, 25 M. 129—atty. & c. 89, 126; judgm. 569.
Coopwood v. Bolton, 26 M. 212—ven. & pur. 121.
Coopwood v. Bottom, 26 M. 212—acct. st. 4.
Coopwood v. Foster, 12 S. & M. 718—app. & e. 202; dep. 42, 72; witn. 84, 107, 120.
Coopwood v. McCandless, 54 So. 1007—cov. 104, 114, 118; plead. 48.
Coopwood v. Morgan, 34 M. 368—execution, 338.
Coopwood v. Prewett, 30 M. 206—app. & e. 1153; clks. of c. 64; judges, 28, 31; new tr. 163.
Coopwood, Bankston v.—55 So. 48.
Coopwood, Carr v.—24 M. 256.
Coopwood, McAlexander v.—25 So. 488.
Coopwood, Prewett v.—30 M. 369.
Coopwood, Wilkes v.—39 M. 348.
Coor v. Grace, 10 S. & M. 434—assum. 25; mon. lent, 7.
Copeland v. Mears, 2 S. & M. 519—app. & e. 105, 154; dep. 39.
Copeland v. Pate, 6 H. 275—appr. 5; j. p. 203.
Copeland v. State, 23 M. 257—perj. 29.
Copeland, Chapman v.—55 M. 476.
Copes v. Fultz, 1 S. & M. 623—judgm. 870; partners. 258c.
Copes v. Matthews, 10 S. & M. 398—offic. 93, 114.
Copiah County v. Luck, 77 M. 136—em. dom. 270; high. 56.
Copiah County, Cocke v.—38 M. 340.
Copiah County, Illinois Cent. R. Co. v.—81 M. 685.
Copiah County, Martin v.—71 M. 407.
Copiah County, Matthews v.—53 M. 715.
Coppage v. Barnett, 34 M. 621—ev. 271; fraud. conv. 156; gifts, 17; parent & c. 9; princ. & a. 152, 161; trusts, 79.
Coppage v. Brown, 10 S. & M. 605—sales, 418.
Coppage v. Hall, 9 S. & M. 360—app. & e. 809.
Coppock v. Smith, 54 M. 640—affi. 2, 11; j. p. 157.
Corbett v. Duncan, 63 M. 84—int. liq. 62, 68.
Corbin v. Cannon, 31 M. 570—eject. 18, 40; new tr. 41; parties, 13.
Corbin v. State, 55 So. 43—crim. l. 592, 636, 1118.
Corbitt, Vincent v.—94 M. 46.
Corburn v. Crittenden, 62 M. 125—counties, 52, 53; eject. 87; tax. 411, 431, 546, 693, 734a, 754.
Corcoran, Sweatt v.—37 M. 513.
Cordts, Alsworth v.—31 M. 312.
Cord, Vannerson v.—Sm. & M. Ch. 345.
Corey v. State, 8 S. & M. 573—crim. l. 967.
Corinth v. Crittenden, 94 M. 41—const. l. 81; mun. corp. 592.
Corinth Engine &c. Works v. Mississippi Cent. R. Co. 95 M. 817—carr. 194.
Corinth, Hurley v.—52 So. 695.
Corley v. Board of Levee Com'rs of Yazoo-Mississippi Delta, 95 M. 617—app. & e. 1171; lev. 19.
Corley v. State, 56 So. 179—rape, 54, 59.
Corley, Learned v.—43 M. 687.
Cornelius, Phillips v.—28 So. 871.
Cornell v. Rulon, 3 H. 54—land. & t. 270.
Cornish, Hughston v.—59 M. 372.
Cornwell v. State, 53 M. 385—bail. 48; ind. 11b, 11c.
Corporation of Oxford, Smith v.—91 M. 651.
Corquette, Laurissini v.—25 M. 177.
Correro v. Wright, 47 So. 379—plead. 214; trade-marks, 92, 97.
Correro, Wright v.—93 M. 306.
Corry v. Buddendorff, 54 So. 64—judgm. 334; j. p. 160.
Cortright, Pearl v.—81 M. 309.
Costanera, Citizens' Bank v.—62 M. 825.
Cothern, Rayborn v.—43 So. 70.
Cothran v. State, 39 M. 541—crim. l. 805, 813, 815; perj. 35, 37.
Cothran, Ranson v.—6 S. & M. 167.
Cotten v. McGehee, 54 M. 510—ex. & ad. 432; ven. & pur. 267, 274.
Cotten v. McGehee, 54 M. 621—app. & e. 1146, 1221; judgm. 353, 471.
Cotten v. McKenzie, 57 M. 418—bills & n. 106; cncts. 137.
Cotten, Hiller v.—54 M. 551.
Cotten, Whitney v.—53 M. 689.
Cotton v. Cash, 85 M. 29—partit. 112.
Cotton v. Hiller, 52 M. 7—fact. 20, 23, 39; new tr. 85, 146.

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Cotton v. Leake County, 27 M. 367—counties, 204.
Cotton v. Parker, Sm. & M. Ch. 125—eq. 392.
Cotton v. Parker, Sm. & M. Ch. 191—bills & n. 452; ex. & ad. 368; set-off, 41.
Cotton v. State, 31 M. 504—gr. jury, 11; hom. 38, 112, 115, 145, 188; jury, 100, 103, 134.
Cotton v. State, 17 So. 372—crim. l. 371; hom. 169.
Cotton, Bates v.—32 M. 266.
Cotton, Clearman v.—66 M. 467.
Cotton, Hiller v.—48 M. 593.
Cotton, Huntington v.—31 M. 253.
Cotton, Matthews v.—83 M. 472.
Cotton, Mercier v.—34 M. 64.
Cotton Mills v. Duke, 71 M. 790—tax. 235.
Cotton States Lumber Co. v. James, 53 So. 410—ease. 12, 25.
Cottrell v. Southern R. Co. 80 M. 610—r. r. 350, 390.
Cottrell, Beasley v.—94 M. 253.
Cottrell, Mullins v.—41 M. 291.
Cottrell, Oktibbeha County v.—70 M. 117.
Coulson v. Harris, 43 M. 728—tax. 31, 60, 297, 303, 608, 611.
Coulson, Planters' Bank v.—6 H. 395.
Coulter v. Herrod, 27 M. 685—jud. s. 16, 21, 61; lis pens. 6; mtg. 244, 485, 518, 532.
Coulter v. Robertson, 14 S. & M. 18—app. & e. 171; bills & n. 140; cncts. 245; usury, 19, 29, 127.
Coulter v. Robertson, 24 M. 278—banks, 71, 72, 77, 81; corp. 617.
Coulter v. State, 75 M. 356—afft. 16; crim. l. 260c.
Coulter, McRaney v.—39 M. 390.
Countiss, Murphree v.—58 M. 712.
County of, see title of particular county.
Coursery, Hoel v.—26 M. 511.
Courtenay v. Courtenay, 90 M. 181—wills, 596.
Courtney v. Smylie, W. 497—bridges, 20.
Courtney, Planters' Bank v.—Sm. & M. 40.
Cousins v. State, 34 So. 323—crim. l. 941.
Cousins, Howard v.—7 H. 114.
Covel v. Smith, 68 M. 296—acct. acti. on, 15; app. & e. 701; judgm. 182.
Covel, Harvey v.—12 So. 462.
Covert, Baum v.—62 M. 113.
Covert, Wadlington v.—51 M. 631.
Covington v. Arrington, 32 M. 144—app. & e. 5; excep. 32; hab. corp. 24.
Covington v. Frank, 77 M. 606—witn. 140.
Covington v. Frank, 28 So. 20—witn. 136.
Covington v. Mayers, 62 M. 730—assign. f. b. c. 243; paymt. 31.
Covington v. Patrick, 1 Miss. Dec. 8—assign. f. b. c. 243, 342.
Covington, Andrews v.—69 M. 740.
Covington, Bonnell v.—7 H. 322.
Covington County v. Collins, 92 M. 330—high. 155, 167.
Covington County, Pine Lumber Co. v.—87 M. 706.
Covington County, Polk v.—77 M. 803.
Covington, Crosby v.—24 M. 619.
Covington, Haynes v.—9 S. & M. 470.
Covington, Haynes v.—13 S. & M. 408.
Covington, Shotwell v.—69 M. 735.
Cowan v. London Assurance Co. 73 M. 321—ins. 17, 24.
Cowan v. Stamps, 46 M. 435—slaves, 13.
Cowan, Alsop v.—66 M. 451.
Cowand, Tillman v.—12 S. & M. 262.
Cowan, Hardeman v.—10 S. & M. 486.
Cowan, London Assurance Co. v.—71 M. 928.
Cowan, Newberg v.—62 M. 570.
Cowan, Newell v.—30 M. 492.
Cowan, Payne v.—Sm. & M. Ch. 26.
Cowan, Warren County v.—60 M. 876.
Cowan, Whitney v.—55 M. 626.
Cowart v. Foxworth, 67 M. 322—counties, 192.
Cowden v. Cowden, 2 H. 806—wills, 247.
Cowden v. Dobyns, 5 S. & M. 82—courts, 200¼, 202; wills, 213, 222.
Cowden v. Dobyns, 24 M. 486—app. & e. 69.
Cowden v. Lockridge, 60 M. 385—chat. m. 47; replev. 80.
Cowen v. Alsop, 51 M. 158—eq. 192; fraud. conv. 272.
Cowen v. Boyce, 5 H. 769—cncts. 108; slaves, 2.
Cowen v. McCutchen, 43 M. 207—const. law, 145; judgm. 128a; paymt. 12a.
Cowgill &c. Milling Co. v. L. M. Nicholson Co. 24 So. 880—eq. 150; fraud. conv. 258.
Cowles v. Pointer, 26 M. 253—wareh. 24.
Cowles, Garnett v.—39 M. 60.
Cox v. American Freehold &c. Co. 88 M. 88—lim. of act. 127, 171; mtg. 339, 372, 597.
Cox v. Cox, 8 S. & M. 292—app. & e. 154, 723; wills, 262.
Cox v. Indiana Drug &c. Co. 37 So. 835—sales, 361.
Cox v. Kyle, 75 M. 667—partit. 12, 77, 83.
Cox v. Lincoln County, 2 Miss. Dec. 128—counties, 163; tax. 527, 557, 564.
Cox v. Martin, 75 M. 229—chat. m. 158; cncts. 215; ex. & ad. 440; exemp. 16; replev. 97.
Cox v. Menxing, 30 So. 41—lim. of act. 72b.

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Cox v. Palmer, 60 M. 793—assign. f. b. c. 238; garn. 122; judgm. 846; sales, 269.
Cox v. Ross, 56 M. 481—offic. 37; sheriffs, 123, 125, 135; venue, 46.
Cox v. State, 66 M. 14—forg. 14, 25, 29.
Cox v. Vogh, 33 M. 187—inj. 148.
Cox v. Wadlington, 3 H. 57—app. & e. 404; clks. of c. 64.
Cox v. Weed Sewing Machine Co. 57 M. 350—corp. 515; guar. 7; plead. 204; princ. & s. 141.
Cox, Adams v.—80 M. 561.
Cox, Baker v.—79 M. 306.
Cox, Berkson v.—73 M. 359.
Cox, Carter v.—44 M. 148.
Cox, Chewning v.—1 H. 130.
Cox, Chilton v.—7 S. & M. 791.
Cox, Christopher v.—25 M. 162.
Cox, Coltrane v.—60 M. 537.
Cox, Duvall v.—5 H. 12.
Cox, O'Harra v.—42 M. 496.
Cox, Sample-Carter Co. v.—22 So. 801.
Cox, State v.—62 M. 786.
Cox, Tarleton v.—45 M. 430.
Cox, Vaughn v.—27 M. 701.
Coxwell v. Prince, 19 So. 237—comp. 18; estop. 95.
Cox, Wilson v.—49 M. 538.
Cox, Wilson v.—50 M. 133.
Cox, Wray v.—86 M. 638.
Cox, Yazoo &c. R. Co. v.—40 So. 547.
Cozart, Clopton v.—13 S. & M. 363.
Cozart, Smith v.—45 M. 698.
Cozine v. Grimes, 76 M. 294—exemp. 50; ins. 583.
Cozzens, Wheelock v.—6 H. 279.
Craddock, Trueheart v.—23 So. 549.
Craft v. Bloom, 59 M. 69—app. & e. 1064; assign. f. b. c. 89, 157, 162.
Craft v. Bullard, Sm. & M. Ch. 366—chat. m. 34, 167, 227, 293.
Craft v. De Soto County, 79 M. 618—high. 29, 54.
Craft v. Germany, 34 M. 118—deeds, 109.
Craft v. Lott, 87 M. 590—frds. st. of, 21, 105, 153.
Craft, Bullard v.—Sm. & M. Ch. 366.
Craft, Cromwell v.—47 M. 44.
Craft, Green v.—28 M. 70.
Craft, Maxwell v.—32 M. 307.
Crafton v. New South B. & L. Ass'n, 77 M. 166—ref. of inst. 45.
Craft, Southern Express Co. v.—43 M. 508.
Craft, Southern Express Co. v.—49 M. 480.
Craft, State v.—W. 409.
Craft, State v.—W. 537.
Craig v. Doherty, 61 M. 96—disc. 14, 17; eq. 39; ex. & ad. 408.
Craig v. Pattison, 74 M. 881—licens. 15, 39.
Craig v. Phipps, 23 M. 240—guar. 36.
Craig v. Vicksburg, 31 M. 216—bills. & n. 208, 352, 497.
Craig, Butler v.—27 M. 628.
Craig, Ladd v.—94 M. 659.
Craig, Lowery v.—30 M. 19.
Craig, Smith v.—10 S. & M. 447.
Craig, Warren County v.—29 So. 821.
Craig, Wright v.—92 M. 218.
Cramer v. Sides, 87 M. 241—jud. s. 9.
Cramer, Planters' Ins. Co. v.—47 M. 200.
Cranch v. Illinois Cent. R. Co., 40 So. 1004—acc. & s. 11.
Crane v. Bedwell, 25 M. 507—execution, 348; princ. & a. 116, 161.
Crane v. Davis, 21 So. 17—contin. 37; inj. 121, 160, 175; plead. 229, 250; sales, 198.
Crane v. French, 38 M. 503—abat. & r. 48, 50; app. & e. 1025, 1040; cncts. 108; com. l. 10; judgm. 564; lim. of act. 5, 105, 130, 140.
Crane v. Richardson, 73 M. 254—judgm. 564.
Crane, Brown v.—69 M. 678.
Crane, Hunt v.—33 M. 669.
Crane, Robertson v.—27 M. 362.
Cranford, Headley Lumber Co. v.—38 So. 548.
Crapoo v. Grand Gulf, 9 S. & M. 205—courts, 119; j. p. 141.
Crawford v. Avery, 35 M. 205—sales, 169, 343, 345, 350, 352, 374.
Crawford v. McLauren, 83 M. 265—ev. 460; tax. 328, 413, 419.
Crawford v. Mellton, 12 S. & M. 328—libel, 7, 94.
Crawford v. Redus, 54 M. 700—eq. 430; ex. & ad. 509, 512; hus. & w. 138; judgm. 419; jud. s. 11; wills, 530.
Crawford v. Southern Railroad Association, 51 M. 222—carr. 172, 177.
Crawford v. State, 73 M. 172—big. 1.
Crawford v. Storms, 41 M. 540—cncts. 112; gaming, 19.
Crawford, Jackson v.—12 S. & M. 545.
Crawford, Miss. Cent. R. Co. v.—96 M. 401.
Crawford, Natchez &c. R. Co. v.—55 So. 596.
Crawford, Peteet v.—51 M. 43.
Crawford, Prince v.—50 M. 344.
Crawford, Wolfe v.—54 M. 514.
Crawford, York v.—42 M. 508.
Crawley v. Richmond &c. R. Co. 70 M. 340—drug. 7; r. r. 234.
Crawley, American Express Co. v.—88 M. 525.

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Crawley, State v.—75 M. 919.
Crayton, Louisville &c. R. Co. v.—69 M. 152.
Crayton, New Orleans &c. R. Co. v.—69 M. 152.
Creegan v. Hyman, 93 M. 481—app. & e. 1097; eq. 114, 271; judgm. 948; lev. 28, 28a, 28g; rec. 142; tax. 78, 688.
Creek Lumber Co. Littelle v.—54 So. 841.
Creek-Neal Coffee Co. v. Morrison-Hinton Grocery Co. 96 M. 835—ev. 440.
Creighton, Green v.—7 S. & M. 197.
Creighton, Green v.—10 S. & M. 159.
Crenshaw Oil Co. v. Johnson, 94 M. 773—licens. 18.
Crescent Ins. Co. v. Moore, 63 M. 419—garn. 34, 138, 187.
Crescent Ins. Co. v. Vicksburg &c. Packet Co. 69 M. 208—ins. 404, 416.
Creswell, Williams v.—51 M. 817.
Crider, Newell v.—59 M. 539.
Crippen, Johnson v.—62 M. 597.
Crisler v. Garland, 11 S. & M. 136—witn. 197.
Crisler v. McCoy, 33 M. 445—paymt. 25, 38.
Crisler v. Morrison, 57 M. 791—elec. 295, 300; prohib. 5, 23.
Crisler v. Ott, 72 M. 166—mast. & s. 315, 330; tresp. 30.
Crisler, Hester v.—36 M. 681.
Crisler, McRaven v.—53 M. 542.
Crisman v. Beasley, Sm. & M. Ch. 561—ex. & ad. 136, 146, 367; judgm. 433.
Crisp, Thornton v.—14 S. & M. 52.
Criswell, Britton v.—63 M. 349.
Critchlow, Peck v.—7 H. 243.
Crittenden v. Booneville, 92 M. 277—const. l. 295; prohib. 1, 3, 5, 8; mun. corp. 57, 58, 610.
Crittenden v. Leavenworth, 62 M. 32—counties, 47; forc. e. & d. 55; states, 192.
Crittenden v. Ragan, 89 M. 185—usury, 95, 111.
Crittenden, Burrowes Co. v.—37 So. 504.
Crittenden, Corburn v.—62 M. 125.
Crittenden, Corinth v.—94 M. 41.
Crittenden, Leavenworth v.—62 M. 573.
Crizer v. Gorren, 41 M. 563—attch. 217, 322, 325; garn. 90, 96.
Crocket v. Young, 1 S. & M. 241—banks, 96, 109; new tr. 67.
Crockett, Illinois Cent. R. Co. v.—78 M. 407.
Croft v. White, 36 M. 455—alt. inst. 11, 15, 26.
Crofton v. New South B. & L. Ass'n, 77 M. 166—b. & l. assn. 31, 33; usury, 10, 74, 96.
Cromer, Smith v.—66 M. 157.
Crominarity, Louisville &c. R. Co. v.—86 M. 464.
Cromwell v. Craft, 47 M. 44—adv. pos. 10, 59, 63; judgm. 217.
Cronch v. Illinois Cent. R. Co. 40 So. 1004—princ. & a. 89.
Crone, Price v.—44 M. 571.
Crook v. Haley, 23 So. 388—sales, 186.
Crook, John E. Hall Commission Co. v.—87 M. 445.
Crooks, Hunter v.—93 M. 812.
Crook, Williams v.—63 M. 9.
Cropper v. Illinois Mach. Co. 54 So. 849—partners. 371.
Crosby v. Covington, 24 M. 619—des. & d. 93, 118, 299.
Cross v. Hedrick, 66 M. 61—estop. 90.
Cross v. Levy, 57 M. 634—j. p. 73.
Cross v. Levy, 2 Miss. Dec. 116—app. & e. 270; cust. & u. 7; ev. 99.
Cross, Block v.—36 M. 549.
Crossett v. Clements, 7 So. 207—wills, 438, 440, 821.
Crossett, Illinois Cent. R. Co. v.—10 So. 473.
Cross, Key v.—23 M. 598.
Cross, Palmer v.—1 S. & M. 48.
Crow v. Burgin, 38 So. 625—land. & t. 229j; paymt. 76, 77; trial, 203.
Crow v. Cartledge, 54 So. 947—const. law, 120; statut. 276.
Crow v. Lemon, 69 M. 799—attch. 34.
Crow, Bates v.—57 M. 676.
Crowder v. Dick, 24 M. 39—cncts. 13, 83; guar. 36.
Crowder v. Nelson, 32 M. 280; ev. 591.
Crowder v. Shackelford, 35 M. 321—app. & e. 214; courts, 202e; ex. & ad. 104, 114, 129, 239, 296, 314g, 314i, 477, 478, 485, 495, 507.
Crowder, Benton v.—7 S. & M. 185.
Crowder, Dick v.—10 S. & M. 71.
Crowder, Harrison v.—6 S. & M. 464.
Crowell v. New Orleans &c. R. Co. 61 M. 631—land. & t. 140; r. r. 69, 103; tresp. 9.
Crowley v. Bosworth, 23 So. 585—partners. 218.
Crowson, Ferguson v.—25 M. 430.
Crudup, Illinois Cent. R. Co. v.—63 M. 291.
Crum v. Brown, 63 M. 495—ack. 55; deeds, 45; hus. & w. 70.
Crum v. Shoe Co., 72 M. 458—licens. 39.
Crum v. State, 64 M. 1—hom. 291.
Crum v. Wilson, 61 M. 233—guard. & w. 173, 182, 182e; judgm. 627.
Crum, Earle v.—42 M. 165.
Crum, Heard v.—73 M. 157.

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Crump v. Colfax County, 52 M. 107—app. & e. 3; counties, 87, 113, 125, 204; sheriffs, 77.
Crump v. Gerock, 40 M. 765—eq. 443; ev. 208; ex. & ad. 507—guard. & w. 54, 65, 147, 147a, 160, 163.
Crump v. Mitchel, 34 M. 449—adv. pos. 64; bailm. 24; trover, 10.
Crump v. Wooten, 41 M. 611—attch. 17; bills & n. 448, 460.
Crump, Beaver v.—76 M. 34.
Crump, Holder v.—56 So. 183.
Crumpler v. Vicksburg, 89 M. 214—crim. l. 198; mun. corp. 594, 595; waters, 212.
Crump, Moore v.—84 M. 612.
Crump, Osborne v.—57 M. 622.
Crump, Prewett v.—23 M. 574.
Crusoe v. Butter, 36 M. 150—ex. & ad. 518, 519; wills, 243, 303, 421, 434, 436.
Crutcher v. Crutcher, 86 M. 231—div. 27.
Crutcher, Houston v.—31 M. 51.
Crutcher, Smith v.—27 M. 455.
Crutcher, Williams v.—5 H. 71.
Cryer v. State, 71 M. 467—crim. l. 814; hom. 55, 296.
Cudabac v. Strong, 67 M. 705—attach. 210, 217; judgm. 17b; proc. 24.
Cudahy Packing Co. v. Hibou, 92 M. 234—partners. 1, 17.
Cue v. Breland, 78 M. 864—app. & e. 1067; bridges, 27; logs, 11.
Culbertson, Tooley v.—5 H. 267.
Culbertson, Vannerson v.—10 S. & M. 150.
Culp v. Wooten, 79 M. 503—fraud, 58; home. 162; mtg. 37.
Culpepper, North v.—53 So. 419.
Cumberland Telephone Co. v. Allen, 89 M. 832—tel. & t. 69.
Cumberland Tel. Co. v. Woodham, 54 So. 890—electr. 16.
Cumberland &c. Tel. Co. v. Anderson, 89 M. 732—death, 94, 102.
Cumberland Tel. &c. Co. v. Baker, 85 M. 486—dam. 87; tel. & t. 69.
Cumberland Tel. &c. Co. v. Cassedy, 78 M. 666—dam. 88, 92; mun. corp. 663, 682; tresp. 56, 58.
Cumberland Tel. &c. Co. v. Hicks, 89 M. 270—tel. & t. 66.
Cumberland Telegraph &c. Co. v. Hobart, 89 M. 252—tel. & t. 45, 71.
Cumberland Tel. &c. Co. v. Jackson, 95 M. 79—app. & e. 1068, 1170; tel. & t. 67; trial, 295, 296.
Cumberland Tel. &c. Co. v. Martin, 93 M. 505—tresp. 9.
Cumberland Tel. &c. Co. v. Morgan, 92 M. 478—em. dom. 168, 189.
Cumberland Tel. &c. Co. v. Odeneal, 26 So. 966—ev. 471; tresp. 62.
Cumberland Tel. &c. Co. v. Paine, 94 M. 883—tel. & t. 69.
Cumberland Tel. &c. Co. v. Pitchford, 30 So. 41—death, 99.
Cumberland Tel. &c. Co. v. Sanders, 83 M. 357—tel. & t. 78.
Cumberland Tel. &c. Co. v. State, 53 So. 489—corp. 636; dep. 64; witn. 304.
Cumberland Tel. &c. Co. v. State, 54 So. 670—monop. 11, 20; statut. 160; tel. & t. 33, 78.
Cumberland Tel. &c. Co. v. Yazoo &c. R. Co. 90 M. 686—em. dom. 10, 54.
Cumberland Tel. &c. Co. Alabama &c. R. Co. v.—88 M. 438.
Cumberland Tel. &c. Co. Anderson v.—86 M. 341.
Cumberland Tel. &c. Co. Farmer v.—86 M. 55.
Cumberland Tel. &c. Co. Haslehurst v.—83 M. 303.
Cumberland Tel. &c. Co. Magruder v.—92 M. 716.
Cummings v. Busby, 62 M. 195—home. 123.
Cummings v. Daughety, 73 M. 405—plead. 218.
Cummings v. Harrison, 57 M. 275—assum. 1; cov. 108; judgm. 713; mon. paid, 1.
Cummings v. Johnson, 65 M. 342—app. & e. 909; ex. & ad. 363.
Cummins v. Kilpatrick, 23 M. 106—forc. e. & d. 6, 14.
Cummings v. Moore, 61 M. 184—nova. 10; ven. & pur. 266a.
Cummings v. Oglesby, 50 M. 153—ven. & pur. 261.
Cummings v. Parish, 39 M. 412—partners. 128, 139.
Cummings v. Steele, 54 M. 647—ref. of inst. 10, 20.
Cummings, Byrne v.—41 M. 192.
Cunning v. State, 79 M. 284—crim. l. 547.
Cunningham v. Davis, 62 M. 366—deeds, 4; wills, 88.
Cunningham v. Dean, 33 M. 46—eject. 8.
Cunningham v. Dillard, 71 M. 61—cov. 12; deeds, 95, 123.
Cunningham v. Loan Association, 73 M. 516—chat. m. 256; liens, 39.
Cunningham v. State, 49 M. 685—crim. l. 44; forg. 19, 25.

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Cunningham v. State, 56 M. 269—crim. l. 47, 49, 50, 331, 336, 561, 570.
Cunningham v. State, 87 M. 417—crim. l. 761; hom. 86.
Cunningham v. State, 89 M. 356—hom. 263.
Cunningham v. State, 94 M. 228—crim. l. 855.
Cunningham v. State, 28 So. 750—rob. 16.
Cunningham, Brooks v.—49 M. 108.
Cunningham, Buckels v.—6 S. & M. 358.
Cunningham, Freeman v.—57 M. 67.
Cunningham, Nebbett v.—27 M. 292.
Cunningham, Poindexter v.—41 So. 3.
Cunningham, Smith v.—79 M. 425.
Curd &c. Mfg. Co. Terry v.—66 M. 394.
Curlee, Bradford v.—41 M. 558.
Curll v. Compton, 14 S. & M. 56—hus. & w. 72; lim. of act. 73.
Curphey v. Terrell, 39 So. 477—trade u. 9.
Curphey, Bishop v.—60 M. 22.
Curphy v. Terrell, 89 M. 624—costs, 247; inj. 188.
Currell, Cazeneuve v.—70 M. 521.
Currie v. Chambers, 3 So. 412—j. p. 174; prin. & a. 109.
Currie v. Natchez &c. R. Co. 61 M. 725—plead. 245; r. r. 58, 69; tresp. 9, 22, 25.
Currie v. Stewart, 26 M. 646—ex. & ad. 351; partit. 40.
Currie, Chrisman v.—60 M. 858.
Currie, Natchez &c. R. Co. v.—62 M. 506.
Currier, Gibson v.—83 M. 234.
Currie, Schmidlapp v.—55 M. 597.
Curry v. Kurtz, 33 M. 24—bills & n. 464, 527; ev. 249, 275; new tr. 89; plead. 384.
Curry v. Lampkin, 51 M. 91—judgm. 784.
Curry v. Murphy, 35 M. 473—wills, 454, 586, 732, 804.
Curry v. State, 39 M. 511—recogn. 2, 11.
Curry, Whitehead v.—67 M. 637.
Curtis v. Blair, 26 M. 309—frds. st. of, 116; princ. & a. 12, 117, 126; spec. perf. 4, 16; time, 6; ven. & pur. 37, 74, 228.
Curtis, Doe v.—3 H. 230.
Curtis, Kimbrough v.—50 M. 117.
Cushing v. Gibson, W. 87—ex. & ad. 153, 444.
Cutler v. Madison County, 56 M. 115—counties, 47; estop. 80; mun. corp. 918, 940.
Cutreer, Simmons v.—12 S. & M. 584.
Cutrer v. Tennessee, 54 So. 434—ex. & ad. 537d.
Cutrer, Chapman v.—29 So. 467.
Cutrer, Lea v.—51 So. 808.
Cutrer, Vaughan v.—49 M. 782.

D

Dabney v. Child, 95 M. 585—ease. 17, 46.
Dabney v. Hudson, 68 M. 292—offic. 39, 104; j. p. 6.
Dabney v. Natchez &c. R. Co. 2 Miss. Dec. 133—r. r. 117.
Dabney v. Stackhouse, 49 M. 513—execution, 112, 322.
Dabney v. State, 82 M. 252—crim. l. 369.
Dabney v. Stidger, 4 S. & M. 749—bills & n. 420, 526; partners. 159.
Dabney, Garrett v.—27 M. 335.
Dabney, Thornton v.—23 M. 559.
Dabney, Warren County v.—81 M. 273.
D. A. Davis Drug Co. L. A. Becker Co. v.—93 M. 803.
Dagenhard, Bull v.—55 M. 602.
Daggett, Chichester v.—2 H. 863.
Dahlgren v. Duncan, 7 S. & M. 280—ex. & ad. 416; judgm. 342; partners. 180.
Dahlgren v. Peale, 24 M. 142—banks, 207; ex. & ad. 38, 416.
Dahmer v. State, 56 M. 787—int. liq. 234, 236.
Dailey v. State, 56 M. 475—execution, 102; exemp. 148; sheriffs, 123, 125, 138; trial, 135.
Daily v. Johnson, 48 M. 246—dep. 56.
Daily v. Swope, 47 M. 367—const. l. 14, 18; counties, 189; lev. 2, 21; mun. corp. 407, 956; statut. 94, 176; tax. 39, 44.
Daingerfield v. State, 4 H. 658—sci. fa. 13.
Daizy, Carter v.—42 M. 501.
Dakin v. Watson, 59 M. 619—app. & e. 1040, 1169; des. & d. 71; interpl. 1, 13, 14, 21, 25; judgm. 627.
Dale v. Griffith, 93 M. 573—pub. lands, 135.
Dale v. Harrahan, 85 M. 49—partners. 43.
Dale, Mobile &c. R. Co. v.—61 M. 206.
Dale, Polk v.—93 M. 664.
Daley, Buckley v.—45 M. 338.
Dalrymple v. Buckingham, 23 M. 597—app. & e. 691.
Dalsheimer v. McDaniel, 69 M. 339—attch. 154, 156.
Dalton v. Jones, 51 M. 585—guard. & w. 30.
Dalton v. Murphy, 30 M. 59—cncts. 144; hus. & w. 79; slaves, 7c.
Dalton v. State, 91 M. 162—ind. 125d.
Dalton, Alabama &c. R. Co. v.—86 M. 299.
Dalton, Barnett v.—69 M. 611.
Dalton, Bynum v.—95 M. 429.
Dalton, Rowland v.—36 M. 702.
Dalton, State v.—69 M. 611.
Daly v. Johnson, 48 M. 246—dep. 87.

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Daly, Herrin v.—80 M. 340.
Damewood v. State, 1 H. 262—ind. 129; larc. 4, 28, 30.
Dampf v. Yazoo &c. R. Co. 95 M. 85—neg. 123, 136.
Dancey v. Sugg, 46 M. 606—bills & n. 98; slaves, 7a; partners. 258b.
Dancey, Jeffries v.—44 M. 693.
Dancy, Board of Levee Commissioners v.—65 M. 335.
Dancy, Yazoo—Miss. Delta Board v.—3 So. 568.
Dandridge v. Stevens, 12 S. & M. 723—attch. 2, 112, 321.
Dandridge, Dibrell v.—51 M. 55.
Dandridge, Wyse v.—35 M. 672.
Dangerfield, Wemple v.—2 S. & M. 445.
Daniel v. Daniel, 4 So. 95—assum. 3; trial, 194.
Daniel v. Daniels, 62 M. 352—garn. 174, 234.
Daniel v. Frazer, 40 M. 507—sales, 1; spec. perf. 8, 51.
Daniel v. Jacoway, Freem. Ch. 59—counties, 31.
Daniel v. Purvis, 50 M. 261—pub. lands, 58, 60.
Daniel, Heard v.—26 M. 451.
Daniel, Hughes v.—W. 488.
Daniel, Murdock v.—58 M. 411.
Daniels, Daniel v.—62 M. 352.
Daniels, Illinois Cent. R. Co. v.—73 M. 258.
Daniels, Illinois Cent. R. Co. v.—50 So. 721.
Daniels, Nichols v.—W. 224.
Daniel, Shattuck v.—52 M. 834.
Dantzler Lumber Co. v. State, 53 So. 1—const. l. 12, 17, 20; pub. lands, 142; statut. 45.
Dantzler Lumber Co. Christian &c. Co. v.—78 M. 74.
Dantzler, Rupert v.—12 S. & M. 697.
Darcey v. Shotwell, 49 M. 631—paymt. 12a.
Darcy v. Lake, 46 M. 109—eq. 146, 148, 233, 234, 261; fraud. conv. 241.
Darcy v. Spivey, 57 M. 527—attch. 362; bankr. 145, 277.
Darden, Hodges v.—51 M. 199.
Darden, Levy v.—38 M. 57.
Darden, Yazoo &c. R. Co. v.—34 So. 386.
Darrill v. Dodds, 78 M. 912—comp. 7; parties, 80; tresp. 20, 46, 62.
Darter v. Speirs, 61 M. 148—guard. & w. 58.
Daughety, Cummings v.—73 M. 405.
Davany v. Koon, 45 M. 71—tresp. 45; trial, 59.
Davenport v. Collins, 95 M. 358—wills, 505, 604, 614.
Davenport v. Collins, 96 M. 716—wills, 439.
David & Jonathan Lodge, No. 1,976, G. U. O. O. F. in America, Ward v.—90 M. 116.
Davidge, W. C. Wood Lumber Co. v.—49 So. 610.
Davidson v. Allen, 36 M. 419—courts, 82; ven. & pur. 261, 275, 292.
Davidson v. Harrison, 33 M. 41—lim. of act. 152.
Davidson v. Jones, 26 M. 56—chat. m. 271.
Davidson v. Martin, 33 M. 530—attch. 125; names, 1.
Davidson v. Morris, 5 S. & M. 564—lim. of act. 143, 148.
Davidson v. Moss, 5 H. 673—cncts. 94; sales, 39; ven. & pur. 32, 35, 37, 108, 123b, 314.
Davidson v. Wallace, 53 M. 475—proc. 106; ten. in c. 36.
Davidson, Brain v.—25 M. 213.
Davidson, Minshew v.—86 M. 354.
Davidson, Moss v.—1 S. & M. 112.
Davidson, Stewart v.—10 S. & M. 351.
Davidson, Still v.—51 M. 153.
Davidson, Woods v.—57 M. 206.
Davie, Tennent-Stribling Shoe Co. v.—75 M. 447.
Davis v. Adams, 50 So. 568—counties, 68, 98.
Davis v. Bell, 57 M. 320—costs, 232, 279; execution, 256; trusts, 95.
Davis v. Bellows, 56 So. 174—logs, 3.
Davis v. Black, 5 S. & M. 226—app. & e. 1025, 1050, 1051; bills & n. 496; ev. 180; lost inst. 23; new tr. 104.
Davis v. Blanton, 71 M. 821—bills & n. 370; land. & t. 229j.
Davis v. Bowmar, 55 M. 671—adv. pos. 1, 41, 60, 69, 112, 113, 114; estop. 52, 55, 58; ex. & ad. 486; gifts, 48; trusts, 231.
Davis v. Brandon, 1 H. 154—deeds, 46; ex. & ad. 120.
Davis v. Brown, 27 M. 265—app. & e. 701.
Davis v. Brown, 29 So. 172—land. & t. 231.
Davis v. Cass, 72 M. 985—judgm. 17a, 486; tax. 808; ten. in c. 20.
Davis v. Cheves, 32 M. 317—ex. & ad. 469.
Davis v. Cochran, 76 M. 439—bills & n. 126.
Davis v. Davis, 60 M. 615—eq. 232; partners. 313, 327.
Davis v. Davis, 62 M. 818—eq. 245, 276.
Davis v. Davis, 1 Miss. Dec. 248—judgm. 570; partners. 327, 333.
Davis v. Davis, 65 M. 498—action, 38; adv. pos. 64, 69, 100; frds. st. of, 56; inj. 165; judgm. 563, 713.

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Davis v. Delpit, 25 M. 445—eject. 128; statut. 180.
Davis v. Dixon, 1 H. 64—execution, 154, 154b; inj. 148.
Davis v. Farrington, W. 304—libel, 6.
Davis v. Foley, W. 43—refer. 55.
Davis v. Foy, 7 S. & M. 64—hus. & w. 79, 111, 156.
Davis v. Freeland, 32 M. 645—ev. 335, 366.
Davis v. Gibbs, 1 Miss. Dec. 89—adv. pos. 66; tax. 808.
Davis v. Hamilton, 50 M. 213—execution, 263, 268; ven. & pur. 274.
Davis v. Harris, 13 S. & M. 9—guard. & w. 35, 53.
Davis v. Hart, 66 M. 642—eq. 338; inj. 175, 176; judgm. 714.
Davis v. Heard, 44 M. 50—cncts. 94; ven. & pur. 32, 34, 35, 108, 119, 123d, 124, 343.
Davis v. Helm, 3 S. & M. 17—execution, 69; judgm. 860.
Davis v. Henderson, 25 M. 549—bills & n. 123, 342.
Davis v. Henry, 63 M. 110—land. & t. 265.
Davis v. Herndon, 39 M. 484—champ. 4, 6; det. 3; ev. 343; trial, 77.
Davis v. Holberg, 59 M. 362—app. & e. 46, 65; courts, 88; j. p. 145; statut. 225¾.
Davis v. Hoopes, 33 M. 173—eq. 117; execution, 154b; ex. & ad. 430, 527; judgm. 307, 457, 854, 890; princ. & s. 61, 83.
Davis v. Jordon, 5 H. 295—app. & e. 5, 165, 398; judgm. 17d.
Davis v. Kriger, 69 M. 39—estop. 54; wills, 710, 780, 786, 825.
Davis v. Lee, 26 M. 505—bills & n. 60, 358, 368.
Davis v. Louisville &c. R. Co. 69 M. 136—carr. 332.
Davis v. Lumpkin, 57 M. 506—bankr. 20, 193, 291, 420; eq. 186; fraud. conv. 23, 206, 316; gifts, 17; hus. & w. 221; marshaling, 10.
Davis v. Mahorner, 41 M. 552—dism. 23; ex. & ad. 453.
Davis v. Marx, 55 M. 376—chat. m. 13, 126.
Davis v. Mikell, Freem. Ch. 548—princ. & s. 9, 16½, 110.
Davis v. Miller, 12 So. 27—app. & e. 205; mast. & s. 82; sales, 201; trial, 412.
Davis v. Minor, 1 H. 183—const. l. 92, 106; lim. of act. 7; statut. 267.
Davis v. Mississippi Cent. R. Co. 69 M. 136—mast. & s. 245; neg. 136; paymt. 12a.
Davis v. Netterville, 68 M. 429—execution, 146.
Davis v. O'Connell, 92 M. 348—mtg. 349, 356.
Davis v. Patty, 42 M. 509—judgm. 119; proc. 167; sci. fa. 9, 13.
Davis v. Patty, 76 M. 753—partit. 14.
Davis v. Pearson, 44 M. 508—ven. & pur. 266a.
Davis v. Pressler, 5 S. & M. 459—new tr. 83, 89, 95.
Davis v. Pryor, 6 S. & M. 114—banks, 207; execution, 237, 348; mand. 71.
Davis v. Rhodes, 39 M. 152—ack. 49; deeds, 201; ev. 343, 345; trusts, 286.
Davis v. Richardson, 45 M. 499—app. & e. 1009, 1011; int. rev. 19; partners. 128, 145, 157.
Davis v. Roberts, Sm. & M. Ch. 543—eq. 391; ex. & ad. 510; guard. & w. 68, 148, 159.
Davis v. Schmidt, 68 M. 736—lev. 28b; tax. 623.
Davis v. Searcy, 79 M. 292—jury, 90; trial, 252, 343.
Davis v. Singleton, 2 H. 673—judgm. 195.
Davis v. State, 6 H. 399—bailm. 41.
Davis v. State, 50 M. 86—crim. l. 323, 763; larc. 41, 68, 77.
Davis v. State, 75 M. 637—crim. l. 793, 877.
Davis v. State, 80 M. 376—woods, 1, 2, 12.
Davis v. State, 81 M. 56—prisons, 13.
Davis v. State, 85 M. 416—crim. l. 418, 714; hom. 174, 338c; witn. 270, 405.
Davis v. State, 87 M. 337—witn. 348.
Davis v. State, 89 M. 21—ind. 190.
Davis v. State, 89 M. 119—crim. l. 763.
Davis v. State, 90 M. 56—crim. l. 399.
Davis v. State, 16 So. 377—dist. pub. a. 1.
Davis v. Tiernan, 2 H. 786—acct. acti. on, 1; dism. 23; trial, 182.
Davis v. Vanarsdale, 59 M. 367—tax. 435, 734b.
Davis v. Viener, 27 So. 877—witn. 140.
Davis v. Walker, 51 M. 659—marshaling, 4, 12.
Davis v. Watson, 54 M. 679—courts, 200¼; eq. 451; jud. s. 58.
Davis v. Wilkerson, 48 M. 585—hus. & w. 18.
Davis v. Williams, 57 M. 843—deeds, 55.
Davis v. Williams, 73 M. 708—hus. & w. 37.
Davis v. Wingfield, 42 M. 251—app. & e. 24; courts, 185.
Davis v. Woods, 95 M. 432—app. & e. 884; libel, 79, 123.
Davis v. Yazoo &c. R. Co. 95 M. 540—carr. 278.
Davis v. Yerby, Sm. & M. Ch. 503—ex. & ad. 118, 128, 442, 470.
Davis, Alabama &c. R. Co. v.—69 M. 444.
Davis, Anding v.—38 M. 574.

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Davis, Ballard v.—31 M. 525.
Davis, Blackwell v.—2 H. 812.
Davis, Boone v.—64 M. 133.
Davis, Camp v.—14 So. 438.
Davis, Campbell v.—94 M. 164.
Davis, Carmichael v.—W. 221.
Davis, Cunningham v.—62 M. 366.
Davis, Day v.—64 M. 253.
Davis, De France v.—W. 69.
Davis, French v.—38 M. 167, 218.
Davis, Fuller v.—63 M. 78.
Davis, Godwin v.—74 M. 742.
Davis, Henry v.—60 M. 212.
Davis, Herrod v.—43 M. 102.
Davis, Holden v.—57 M. 769.
Davis, Illinois Cent. R. Co. v.—43 So. 674.
Davis, Johnson v.—91 M. 708.
Davis, Kelly v.—37 M. 76.
Davis, Littlewort v.—50 M. 403.
Davis, Lovelady v.—33 M. 577.
Davis, McPherson v.—95 M. 215.
Davis, Marx v.—56 M. 745.
Davis, Mobile &c. R. Co. v.—62 M. 271.
Davis, Morgan v.—2 Miss. Dec. 467.
Davis, Muldrow v.—12 S. & M. 655.
Davis, Niles v.—60 M. 750.
Davis, Ouilette v.—69 M. 762.
Davis, Overstreet v.—24 M. 393.
Davis, Ratliff v.—38 M. 107.
Davis, Richardson v.—59 M. 15.
Davis, Richardson v.—70 M. 219.
Davis, Rimmer v.—2 Miss. Dec. 531.
Davis Sewing Mach. Co. v. Rosenbaum, 16 So. 340—guar. 50, 67.
Davis, Shannon v.—64 M. 717.
Davis, Spinks v.—32 M. 152.
Davis, Standifer v.—13 S. & M. 48.
Davis, Taylor v.—38 M. 493.
Davis, Tyler v.—63 M. 345.
Davis, Warren v.—90 M. 336.
Davis, Water Valley v.—73 M. 521.
Davis, Wilkinson v.—Freem. Ch. 53.
Davis, Winstead v.—40 M. 785.
Davis, Yazoo &c. R. Co. v.—73 M. 678.
Dawkins v. State, 42 M. 631—courts, 185; crim. l. 1018.
Dawson v. State, 62 M. 241—crim. l. 561, 775; hom. 286b.
Dawson v. Williams, Freem. Ch. 99—land. & t. 226.
Dawson, Guerrant v.—34 M. 149.
Day v. Cochran, 24 M. 261—adv. pos. 43, 62; curt. 3, 4, 10, 11; hus. & w. 11, 195; land. & t. 61; life est. 3.
Day v. Davis, 64 M. 253—deeds, 19; estop. 22; j. ten. 6; ten. in c. 15.
Day v. Day, 59 M. 318—tax. 754.
Day v. Goodbar, 69 M. 687—fraud. conv. 154.
Day v. Hartman, 74 M. 489—app. & e. 707, 1167; eq. 430; sequest. 15.
Day v. Louisville &c. R. Co. 69 M. 589—eq. 427; estop. 427.
Day v. Oatis, 85 M. 128—app. & e. 837; rem. of c. 11, 39, 47.
Day v. Old, 2 Miss. Dec. 593—fraud. conv. 46.
Day v. Smith, 87 M. 395—ev. 11, 88; tax. 622, 734.
Day v. State, 91 M. 239—crim. l. 954, 1064, 1171.
Day v. State, 7 So. 326—larc. 54.
Day v. Tucker, 94 M. 222—app. & e. 363.
Day, Brabham v.—75 M. 923.
Day, Hassam v.—39 M. 392.
Day, Havard v.—62 M. 748.
Day, Jackson v.—80 M. 800.
Day, Louisville &c. R. Co. v.—67 M. 227.
Day Lumber &c. Co. v. Citizens' Bank, 94 M. 212—judgm. 17.
Day, Mead v.—54 M. 58.
Day, Nunnery v.—64 M. 457.
Day, Winton v.—96 M. 1.
Deal v. State, 96 M. 82—forg. 44.
Dean v. Boyd, 86 M. 204—app. & e. 1170; chat. m. 136, 151, 175; paymt. 58; sequest. 5.
Dean v. De Lezardi, 24 M. 424—jud. s. 3; mtg. 50, 515.
Dean v. McKinstry, 2 S. & M. 213—appr. 5; plead. 91.
Dean v. Nunnally, 36 M. 358—ex. & ad. 291; life est. 3; powers, 24; wills, 470, 602, 613.
Dean v. Ridgway, 6 So. 226—judgm. 570.
Dean v. State, 2 S. & M. 200—app. & e. 1134; bail, 46; crim. l. 1115, 1137; recogn. 2, 9.
Dean v. State, 78 M. 360—witn. 379.
Dean v. State, 85 M. 40—crim. l. 59, 761, 1172; hom. 30, 171.
Dean v. Stephenson, 61 M. 175—app. & e. 3; attch. 215, 367.
Dean v. Tucker, 58 M. 487—adv. pos. 59; app. & e. 1140; assum. 3; eject. 68, 87; lim. of act. 32, 181; tresp. 17, 35, 71; trial, 189; use and o. 6.
Dean v. Young, 13 S. & M. 118—new tr. 102; states, 122; witn. 105, 107.
Dean, Bechet v.—57 M. 232.
Dean, Biles v.—14 So. 536.
Dean, Bowles v.—84 M. 376.
Dean, Caruthers v.—11 S. & M. 179.
Dean, Cunningham v.—33 M. 46.
Dean, Parker v.—45 M. 408.

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Deans v. McLendon, 30 M. 343—courts, 97; cncts. 108, 138; slaves, 10; statut. 176.

Deans v. Robertson, 64 M. 195—bills & n. 375; can. of i. 23; eq. 66; licens. 39.

Dean, Sweatman v.—86 M. 641.

Dean, Tucker v.—2 Miss. Dec. 660.

Dean, Vignand v.—77 M. 860.

Dear, Alabama &c. R. Co. v.—87 M. 339.

Dearing v. Ford, 13 S. & M. 269—det. 20; replev. 11.

Dearman, Puffer Mfg. Co. v.—54 So. 310.

Dease v. Cooper, 40 M. 114—ex. & ad. 183.

Dease v. Jones, 23 M. 133—lim. of act. 78.

Dease v. Moody, 31 M. 617—eq. 340, 427.

Dease v. Reed, 24 M. 239—assign. 47; bills & n. 208.

Deason v. Dixon, 54 M. 585—mun. corp. 968, 980; tax. 614.

Deason v. Taylor, 53 M. 697—mtg. 168, 171; ven. & pur. 230, 254, 266.

Deaton v. Burchart, 59 M. 144—chat. m. 145; notice, 4; statut. 160.

Deaton, Kansas City &c. R. Co. v.—9 So. 828.

Deberry v. Holly Springs, 35 M. 385—app. & e. 395, 1034; cert. 20; counties, 58; mun. corp. 244.

Debrill v. Bernheim, 12 So. 336—costs, 148.

Decell v. Hazlehurst Oil Mill &c. Co. 83 M. 346—princ. & a. 76, 78.

Decell v. Lewenthal, 57 M. 331—app. & e. 851; inf. 102; licens. 8; statut. 275; witn. 307.

Decell v. McRee, 83 M. 423—imp. 1; judgm. 736; schools, 5.

Decell, Gilruth v.—72 M. 232.

Decell, Hazlehurst Oil Mill &c. Co. v.—33 So. 412.

Decell, Moore v.—17 So. 681.

Decell, Rowan v.—83 M. 718.

Dedeaux v. King, 92 M. 38—libel, 79.

Dederick v. Wolfe, 68 M. 500—sales, 108, 242.

Dee v. State, 68 M. 601—ind. 107, 110; phys. 6.

Deere Plow Co. Marshall v.—54 So. 948.

Deering, Roach v.—9 S. & M. 316.

Dees v. Moss Point Baptist Church, 17 So. 1—relig. soc. 14, 31.

Dees v. State, 78 M. 250—courts, 64; crim. l. 575.

Dees v. State, 89 M. 754—crim. l. 814, 893.

Dees v. State, 7 So. 326—high. 151.

Dees, Adams v.—62 M. 354.

Deeson, Smith v.—14 So. 40.

De Ford v. Furniss, 43 M. 132—abat. & r. 76; app. & e. 223.

De France v. Davis, W. 69—assign. 120; bills & n. 120.

Dejarnett v. Haynes, 23 M. 600—const. l. 41; debt act. 16; tresp. 44, 45.

De Jean Mitchell Co. v. Mead, 92 M. 596—j. p. 174.

De Jet, Waddell v.—76 M. 104.

Delafield v. Anderson, 7 S. & M. 630—eq. 150; execution, 40, 250.

Delahuff v. Reed, W. 74—cert. 5, 6; plead. 206, 400, 431, 433.

Delano v. Holly-Matthews Mfg. Co., 47 So. 475—mast. & s. 258; plead. 214.

Delay, Richmond v.—34 M. 83.

De Lezardi, Dean v.—24 M. 424.

Delk v. State, 64 M. 77—larc. 3, 17.

Delmas v. Morrison, 61 M. 314—counties, 119; j. p. 141.

Deloach v. State, 77 M. 691—crim. l. 272.

Deloach, Higgins v.—54 M. 498.

Delome Land &c. Co. Johnson v.—77 M. 15.

Delpit, Davis v.—25 M. 445.

Delta Bank v. Goff, 12 So. 699—app. & e. 525, 553; excep. 32.

Delta Bank v. Oliver, 70 M. 868—fraud. conv. 161, 314.

Delta Bank, Greenwood v.—75 M. 162.

Delta Bank, Hentz v.—76 M. 429.

Delta Bank, Joiner v.—71 M. 382.

Delta Bank, Longino v.—75 M. 407.

Delta Bank, Longino v.—76 M. 395.

Delta Bank, Home Ins. Co. v.—71 M. 608.

Delta Bank, Montjoy v.—76 M. 402.

Delta Electric Light &c. Co. Bailey v.—86 M. 634.

Delta Pine Land Co. Perkins v.—66 M. 378.

Delta Southern R. Co. Matthews v.—90 M. 429.

Delta Trust &c. Co. v. Pearce, 92 M. 377—wills, 436.

Delta &c. Co. Miller v.—74 M. 110.

Delta &c. Land Co. v. Adams, 93 M. 340—app. & e. 187, 363; eq. 274, 343; tax. 362¼, 584.

Delta &c. Land Co. v. Wallace, 83 M. 656—brok. 47.

Delta & Pine Land Co. Adams v.—89 M. 817.

Demain v. Cassidy, 55 M. 320—partners. 210.

DeMarco v. State, 59 M. 355—crim. l. 942, 967; int. liq. 241; new tr. 104.

De Marco v. Williams, 12 So. 552—release, 26.

Dement v. Heth, 45 M. 388—ex. & ad. 120a, 508a.

Deminds v. Kirkman, 1 S. & M. 644—bills & n. 421.

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Demoss v. Brewster, 4 S. & M. 661—judgm. 17d; partners. 159, 204.
Demoss v. Camp, 5 H. 516—app. & e. 398, 404; judgm. 17, 17a, 236; sheriffs, 159.
Demoss, Harney v.—3 H. 174.
Demoss, Robertson v.—23 M. 298.
Demoss, Thornton v.—5 S. & M. 609.
Demourelle v. Piazza, 77 M. 433—eq. 74; subrog. 13.
Dempsey, Bennett v.—94 M. 406.
Dendy, Adams v.—82 M. 135.
Denham, Illinois Cent. R. Co. v.—82 M. 77.
Denio v. State, 60 M. 949—clks. of c. 73.
Denley v. State, 12 So. 698—crim. l. 974, 1032; false pret. 25.
Denney v. Wheelwright, 60 M. 733—cncts. 194, 213; parties, 28; princ. & a. 47, 85, 197; set-off, 43.
Denney, Gridley v.—2 H. 820.
Dennis v. Gillespie, 24 M. 581—princ. & s. 194.
Dennis v. Heath, 11 S. & M. 206—cov. 102; judgm. 232; ven. & pur. 308a.
Dennis v. McLaurin, 31 M. 606—app. & e. 1033; atty. & c. 76; paymt. 38; trial, 252, 260.
Dennis v. New Orleans &c. R. Co. 32 So. 914.—r. r. 350.
Dennis v. Spence, 80 M. 396—app. & e. 909.
Dennis v. State, 91 M. 221—crim. l. 1157.
Dennis v. State, 96 M. 96—jury, 149.
Dennis, Ex parte, 91 M. 857—bail, 49.
Dennis, Jennings v.—6 S. & M. 379.
Dennison v. Lewis, 6 H. 517—dism. 23.
Dennis, Reaves v.—6 S. & M. 89.
Denniston v. Potts, 11 S. & M. 36—hus. & w. 221; rem. of c. 26, 44.
Dennistoun v. Potts, 26 M. 13—ack. 19, 28; int. 32; land. & t. 65; mtg. 437; notaries, 1; oath, 2; seals, 3; ven. & pur. 9.
Denny, Nichols v.—37 M. 59.
Denny, Smith v.—90 M. 434.
Denson v. Denson, 33 M. 560—app. & e. 859; eq. 448, 454, 459; ex. & ad. 31, 469.
Denson, Russell v.—54 So. 439.
Denson, Smith v.—2 S. & M. 326.
Dent v. Jones, 50 M. 265—lim. of act. 85.
Dent v. Ross, 52 M. 188—anim. 89, 95; app. & e. 257; replev. 124.
Dent, Hambrick v.—70 M. 59.
Denton v. Denton, 77 M. 375—j. p. 159.
Denton v. Stephens, 32 M. 194—abat. & r. 59, 72; app. & e. 5; parties, 59, 62; plead. 420.
Denton, Harvin v.—87 M. 238.
Denton, Patterson v.—Sm. & M. Ch. 592.
Denver Commission Co. v. Taylor, 73 M. 702—fact. 43.
Depeder, State v.—65 M. 26.
Derby Lumber Co. George v.—81 M. 725.
Derdeyn v. Donovan, 81 M. 696—app. & e. 1009; inj. 241.
Desearn v. Babers, 62 M. 421—eq. 464; judgm. 439; set-off, 40.
De Silva v. State, 91 M. 776—assa. 86, 96.
De Silva v. State, 93 M. 635—crim. l. 761.
Deslonde, Theobald v.—93 M. 208.
Desmond v. Levy, 12 So. 26—attch. 260.
Desmond v. Levy, 12 So. 481—attch. 260.
De Soto County v. Dickson, 34 M. 150—bonds, 48; tax. 546.
De Soto County v. Westbrook, 64 M. 312—counties, 47; health, 7; offic. 70.
De Soto County, Craft v.—79 M. 618.
De Soto County, Jones v.—60 M. 409.
De Soto County, Tate County v.—51 M. 588.
De Soto County, Westbrook v.—1 Miss. Dec. 203.
Deterly, Porter v.—1 S. & M. 163.
Detterly v. Yeamans, 39 M. 475—marr. 25.
Deut v. Coleman, 10 S. & M. 83—accd. 25; bills & n. 483; judgm. 106; plead. 232.
Devane v. Calching, 2 H. 884—app. & e. 3, 785.
Devane, Doyle v.—Freem. Ch. 345.
Devaney, Miss. &c. R. Co. v.—42 M. 555.
Devany, Coffman v.—2 H. 854.
Develling v. State, 52 So. 484—crim. l. 260.
Devens, Johnson v.—60 M. 200.
Dever v. Steamboat Hope, 42 M. 715—mar. liens, 5, 16, 72, 73.
Devinal, Payne v.—11 S. & M. 400.
Devine, Ex parte, 74 M. 715—ev. 69; extrad. 39; hab. corp. 8, 85, 91.
Devine, Keystone Lumber &c. Co. v.—18 So. 925.
Devine, Williams v.—52 M. 139.
Deviny v. Planters Oil Mill, 33 So. 492—mast. & s. 279.
Dewees v. Bostick Lumber &c. Co. 96 M. 253—ev. 183, 408; lim. of act. 46; paymt. 35.
Dewees v. Dewees, 55 M. 315—div. 101, 243; eq. 15, 388; hus. & w. 283.
Dial, Lichtenstein v.—68 M. 54.
Dibble v. Norton, 44 M. 158—execution, 322; judgm. 870.
Dibrell v. Carlisle, 48 M. 691—est. 5; hus. & w. 167, 218, 239; mtg. 333, 372, 376, 411; trusts, 112, 146.
Dibrell v. Carlisle, 51 M. 785—eq. 431; hus. & w. 168, 221, 235; mtg. 497.

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Dibrell v. Dandridge, 51 M. 55—statut. 239; subrog. 4.
Dibrell v. Neely, 61 M. 218—garn. 44.
Dibrell, Bernheim v.—66 M. 199.
Dibrell, Bernheim v.—11 So. 795.
Dibrell, Holiman v.—51 M. 96.
Dick v. Crowder, 10 S. & M. 71—guar. 13, 36.
Dick v. Grissom, Freem. Ch. 428—fraud. conv. 107; inf. 9, 10; parent & c. 5, 16.
Dick v. Mawry, 9 S. & M. 448—atty. & c. 80; mtg. 315; partners. 241; princ. & s. 147.
Dick v. State, 30 M. 593—crim. l. 538, 693, 698; slaves, 18c.
Dick v. State, 30 M. 631—ind. 167; slaves, 18b.
Dick v. State, 53 M. 384—app. & e. 1176; ars. 18; crim. l. 1188.
Dick v. Truly, Sm. & M. Ch. 557—cred. s. 9.
Dick, Crowder v.—24 M. 39.
Dick, Duncan v.—W. 281.
Dicken, Allen v.—63 M. 91.
Dicken, Pender v.—27 M. 252.
Dickens, Wall v.—66 M. 655.
Dickens, Watson v.—12 S. & M. 608.
Dickerson v. Askew, 82 M. 436—eq. 351.
Dickerson v. Brown, 49 M. 357—bast. 9; marr. 26, 38; misceg. 1.
Dickerson v. Leslie, 94 M. 627—home. 143.
Dickerson v. Mays, 60 M. 388—frds. st. of, 145; trusts, 71.
Dickerson v. Thomas, 67 M. 777—acct. st. 11, 12, 15, 19; assist. 4; cust. & u. 5; ev. 97; usury, 102.
Dickerson v. Tishomingo County, 92 M. 223—anim. 47.
Dickerson, Ferrill v.—63 M. 210.
Dickerson, Mills Guy Co. v.—94 M. 874.
Dickerson, Nix v.—81 M. 632.
Dickerson, Rozelle v.—63 M. 538.
Dickerson, Weiner v.—82 M. 63.
Dickey v. State, 86 M. 525—crim. l. 310, 351, 854, 855, 1174, 1184; rape, 36, 41, 46, 48, 62.
Dickey v. Wilkins, 17 So. 374—ex. & ad. 42.
Dickey, Hall v.—32 M. 208.
Dickinson v. Brown, 9 S. & M. 130—eject. 11; ev. 158; pub. lands, 102.
Dickinson, State v.—12 S. & M. 579.
Dick, Johnston v.—27 M. 277.
Dick, Louisville &c. R. Co. v.—95 M. 111.
Dickman v. Williams, 50 M. 500—attch. 308; ev. 240, 243; execution, 194; fact. 65; princ. & a. 123.
Dickson v. Cook, 47 M. 220—app. & e. 1007.
Dickson v. Green, 24 M. 612—estop. 94; frds. st. of, 114.
Dickson v. Hamer, Freem. Ch. 284—execution, 153c.
Dickson v. Hoff, 3 H. 165—app. & e. 516; dam. 193; guard. & w. 30; judgm. 105, 299, 306, 321, 916.
Dickson v. Miller, 11 S. & M. 594—bankr. 420; hus. & w. 18, 78; lim. of act. 180.
Dickson v. Moody, 2 S. & M. 17—trial, 205, 261.
Dickson v. Parker, 3 H. 219—anim. 89, 95; app. & e. 1001; tresp. 9.
Dickson v. Poindexter, Freem. Ch. 721—eq. 268, 273.
Dickson v. Sledge, 38 So. 679—estop. 46, 77, 98; marshaling, 4; subrog. 5.
Dickson v. Wright, 52 M. 585—atty. & c. 79; paymt. 4.
Dickson, Bank of Port Gibson v.—4 S. & M. 689.
Dickson, De Soto County v.—34 M. 150.
Dickson, Ex parte, 89 M. 778—courts, 41.
Dickson, Louisville &c. R. Co. v.—63 M. 380.
Dickson, Jefferson College v.—Freem. Ch. 474.
Dickson, Pascagoula Boom Co. v.—77 M. 587.
Dickson, Sledge v.—81 M. 501.
Dick, Whitaker v.—5 H. 296.
Diebel v. State, 68 M. 725—gaming, 76.
Diem, Meridian News Co. v.—70 M. 695.
Dig, Ex parte, 86 M. 597—const. law, 83.
Diggs v. Ingersoll, 82 M. 493—acct. 22.
Diggs v. Ingersoll, 28 So. 825—proc. 96.
Dignowitty, Doe v.—4 S. & M. 57.
Dill v. State, 38 So. 37—hom. 234.
Dillahunty v. Smith, 7 H. 673—disc. 19.
Dillahunty, Brown v.—4 S. & M. 713.
Dillard v. Brenner, 73 M. 130—attch. 39.
Dillard v. Connoway, 25 M. 230—wills, 640.
Dillard v. State, 58 M. 368—crim. l. 126, 262, 448, 459, 475, 1035, 1144, 1153; hom. 216, 330.
Dillard v. Wright, 11 S. & M. 455—app. & e. 1011; witn. 91.
Dillard, Board of Levee Commissioners v.—76 M. 641.
Dillard, Cunningham v.—71 M. 61.
Dillard, Henry v.—68 M. 536.
Dillard, Heyman v.—1 Miss. Dec. 195.
Dillard, Lake v.—55 M. 63.
Dillard, Morris v.—4 S. & M. 636.
Dillard, Nixon v.—73 M. 803.
Dillard, Patrick v.—44 M. 384.
Dillard, Schumpert v.—55 M. 348.
Dill, Gex v.—86 M. 10.
Dillingham v. Jenkins, 7 S. & M. 479—estop. 86; ex. & ad. 337, 363, 454; princ. & s. 83.
Dillingham, Montgomery v.—3 S. & M. 647.
Dillon v. Bennett, 14 S. & M. 171—judgm. 793; marshaling, 4.

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Dillon v. Cook, 5 S. & M. 773—subrog. 10.
Dillon v. Patterson, 66 M. 204—frds. st. of, 84.
Dillon, Jayne v.—28 M. 283.
Dillon, Winn v.—27 M. 494.
Dilworth v. Carter, 32 M. 206—execution, 75; ex. & ad. 464.
Dilworth v. Foosbee, 34 M. 288—app. & e. 66, 69.
Dilworth v. Mayfield, 36 M. 40—app. & e. 1025; partners. 68, 246, 258a, 309.
Dilworth, Bailey v.—10 S. & M. 404.
Dilworth, Jackson v.—39 M. 772.
Dingey v. Paxton, 60 M. 1038—const. law, 282, 285; eject. 95; lev. 2; lim. of act. 1, 4; tax. 419, 679, 688.
Dinkins v. Bailey, 28 M. 284—ex. & ad. 537b.
Dinkins v. Bowers, 49 M. 219—mech. liens, 260.
Dinkins, State v.—77 M. 874.
Dinkins, Wetter v.—70 M. 835.
Dinsmore, Fretwell v.—W. 484.
Dismukes v. Noxubee County, 58 M. 612—atty. & c. 132; counties, 139.
Dismukes v. Stokes, 41 M. 430—app. & e. 24; counties, 58.
Dismukes v. Terry, W. 180—abat. & r. 62; eq. 5; ev. 390; fraud. conv. 113; hus. & w. 6.
Dismukes, Foote v.—71 M. 110.
Dismukes, Sovereign Camp Woodmen of the World v.—38 So. 351.
District Grand Lodge I. O. O. F. v. Leonard, 92 M. 777—eq. 202.
Dittman &c. Co. v. Meyer, 54 So. 441—mast. & s. 63.
Ditto v. State, 30 M. 126—recogn. 11; sci. fa. 13.
Dix v. Brown, 41 M. 131—dam. 62; neg. 67; trial, 189.
Dix, Martin v.—52 M. 53.
Dixon v. Cook, 47 M. 220—adv. pos. 1; deeds, 82, 109; ev. 460; lim. of act. 114.
Dixon v. Doe, 1 S. & M. 70—deeds, 79; fraud. conv. 154; notice, 1½; statut. 183, 207, 223.
Dixon v. Green, 24 M. 612—estop. 82.
Dixon v. Green County, 76 M. 794—counties, 115, 122, 207; inj. 163.
Dixon v. Houston, 35 M. 636—ex. & ad. 314b.
Dixon v. Lacoste, 1 S. & M. 70—mtg. 166; ven. & pur. 232.
Dixon v. Porter, 23 M. 84—app. & e. 208; eject. 11, 13, 22, 90; pub. lands, 114, 117; tax. 631.
Dixon v. Richards, 2 H. 771—jury, 32; plead. 433.
Dixon v. State, 74 M. 271—const. law, 1, 47, 221; elec. 12; gr. jury, 4, 5, 19; hom. 157; jury, 52; rem. of c. 70.
Dixon, Cary v.—51 M. 593.
Dixon, Davis v.—1 H. 64.
Dixon, Deason v.—54 M. 585.
Dixon, Vicksburg &c. R. Co. v.—61 M. 119.
Dixon, Wheeler v.—51 M. 550.
Dobbins v. Halfacre, 52 M. 561—ex. & ad. 453, 454, 533.
Dobbins, Halfacre v.—50 M. 766.
Dobbins, Miss. Fire Assn. v.—81 M. 630.
Dobbins, Miss. Home Ins. Co. v.—81 M. 623.
Dobbs v. Chandler, 84 M. 372—ins. 583.
Dobbs v. State, 96 M. 786—crim. l. 595.
Dobbs, Prewett v.—13 S. & M. 431.
Dobbs, Trotter v.—38 M. 198.
Dobson v. State, 67 M. 330—anim. 5; crim. l. 1184; new tr. 67.
Dobson, Berry v.—68 M. 483.
Dobson, Frantz v.—64 M. 631.
Dobyns, Cowden v.—5 S. & M. 82.
Dochterman v. Marshall, 92 M. 747—adv. pos. 111; deeds, 114.
Dockery, Wilkinson v.—2 Miss. Dec. 50.
Dockery, Wilkinson v.—12 So. 585.
Dodd v. State, 88 M. 50—crim. l. 1170½.
Dodd, Hyde v.—16 So. 491.
Dodds v. Chandler, 84 M. 372—exemp. 62.
Dodds v. Gregory, 61 M. 351—garn. 132, 200, 209.
Dodds v. Marx, 63 M. 443—tax. 446, 616.
Dodds v. Pratt, 64 M. 123—chat. m. 138; execution, 180; judgm. 786; partners. 162.
Dodds v. State, 45 So. 863—const. law, 223; witn. 345.
Dodds, Bank of Indianola v.—90 M. 767.
Dodds, Birdsong v.—2 Miss. Dec. 423.
Dodds, Darrill v.—78 M. 912.
Dodds, Gregory v.—60 M. 549.
Dodds, Illinois Cent. R. Co. v.—53 So. 409.
Dodd, Skipwith v.—24 M. 487.
Doden, State v.—88 M. 277.
Dodge v. Evans, 42 M. 570—eq. 427; ven. & pur. 188, 254, 280.
Dodge, Hancock v.—85 M. 228.
Dodge, Swett v.—4 S. & M. 667.
Dodson v. Homan, 2 Miss. Dec. 11—garn. 105; mtg. 529, 530, 579.
Dodson v. Western Union Tel. Co. 52 So. 693—tel. & t. 54.
Dodson, Planters' Bank v.—9 S. & M. 527.
Dodson, Western Union Tel. Co. v.—54 So. 844.
Doe v. Bernard, 7 S. & M. 319—app. & e. 909;

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concts. 164; deeds, 99; dower, 11; ev. 416; ex. & ad. 175.

Doe v. Curtis, 3 H. 230—deeds, 35, 38.

Doe v. Dignowitty, 4 S. & M. 57—deeds, 68; eject. 62; ev. 597; fraud. conv. 295.

Doe v. Gildart, 5 H. 606—jud. s. 3; paymt. 66.

Doe v. Ingersoll, 11 S. & M. 249—app. & e. 204; execution, 120, 133, 272, 326; judgm. 789, 791, 800, 800a, 890; proc. 141.

Doe v. Jackson, 1 S. & M. 494—ev. 460; witn. 105, 120.

Doe v. King, 3 H. 125—bound. 36; dep. 31, 70; ev. 160, 342; pub. lands, 22.

Doe v. Lane, 3 S. & M. 763—execution, 265, 341.

Doe v. McDonald, 27 M. 610—execution, 8.

Doe v. Natchez Ins. Co. 8 S. & M. 197—app. & e. 169, 231; eject. 15, 141, 215, 223, 276, 277; tax. 734a.

Doe v. Parker, 3 S. & M. 114—eject. 15, 90; execution, 153a, 228, 277; excep. 38; land. & t. 118.

Doe v. Pritchard, 11 S. & M. 327—bills & n. 541; eject. 8, 15; execution, 270, 277.

Doe v. Snyder, 3 H. 66—execution, 14, 175, 272, 275, 344.

Doe v. Tupper, 4 S. & M. 261—execution, 151b, 153c; partners. 139, 147, 161.

Doe v. Wynne, 23 M. 251—wills, 2, 482, 590.

Doe, Carson v.—6 S. & M. 111.

Doe, Coleman v.—4 S. & M. 40.

Doe, Dixon v.—1 S. & M. 70.

Doe, Ellis v.—11 S. & M. 422.

Doe, Pickett v.—5 S. & M. 470.

Doe, Wray v.—10 S. & M. 452.

Dogan v. Barnes, 76 M. 566—proc. 134.

Dogan v. Barnes, 23 So. 259—j. p. 161.

Dogan v. Bloodworth, 56 M. 419—agric. 15; excep. 11; land. & t. 229½, 262.

Dogan v. Brown, 44 M. 235—app. & e. 516; courts, 202a; ex. & ad. 314d, 471; judgm. 725, 951.

Dogan v. Cole, 63 M. 153—attch. 43, 233; partners. 208.

Dogan v. Griffin, 51 M. 782—tax. 622.

Dogan, Griffin v.—48 M. 11.

Dogan, Murphree v.—17 So. 321.

Dogget v. Tinsley, 2 Miss. Dec. 573—tax. 728; ven. & pur. 279.

Doggett, Campbell v.—23 So. 371.

Doggett, Kansas City &c. R. Co. v.—67 M. 250.

Doherty, Brody v.—30 M. 40.

Doherty, Craig v.—61 M. 96.

Doherty, Guion v.—43 M. 538.

Doherty, Watson v.—56 M. 628.

Dollahite v. Orme, 2 S. & M. 590—eq. 43; mtg. 559; spec. perf. 66.

Dollar v. Allen-West Com. Co. 78 M. 274—garn. 17.

Doll, Loyd v.—11 So. 608.

Dollman v. Moore, 70 M. 267—app. & e. 190, 877; attch. 25; cred. s. 11; garn. 17, 199.

Dominges v. State, 7 S. & M. 475—crim. l. 600, 662.

Donald v. Cardwell Mach. Co. 38 So. 1039—app. & e. 1009.

Donald v. First Nat. Bank, 54 So. 721—princ. & s. 16½.

Donald v. McWhorter, 40 M. 231—ex. & ad. 193, 510.

Donald v. McWhorter, 44 M. 124—ex. & ad. 215.

Donald v. State, 41 So. 4—int. liq. 225, 602, 977, 1144.

Donald v. Unger, 75 M. 294—wills, 136.

Donald Bros. Mercantile Co. v. Marsh, 48 So. 230—app. & e. 635.

Donald, Jones v.—26 M. 461.

Donald, McKenzie v.—61 M. 452.

Donaldson, Presly v.—33 M. 92.

Donald, Tucker v.—60 M. 460.

Donald, Whorter v.—39 M. 779.

Doniphan v. State, 50 M. 54—bail, 78.

Donly v. Ray, 6 So. 324—fraud. conv. 118, 291.

Donnaher v. State, 8 S. & M. 649—em. dom. 81, 117; licens. 5½; mun. corp. 71, 658, 679, 680; nuis. 61; r. r. 74, 234; tel. & t. 10.

Donnell v. State, 48 M. 661—civ. r. 4; const. law, 83; hab. corp. 59.

Donnell, Heaverin v.—7 S. & M. 244.

Donnelly v. Scarborough, 91 M. 584—app. & e. 1107.

Donnelly, Seal v.—60 M. 658.

Donoghue v. Shull, 85 M. 404—fraud. conv. 118, 207.

Donoho v. Petit, W. 440—dep. 67.

Donovan v. Vicksburg, 29 M. 247; jury, 10; prohib. 6.

Donovan, Derdeyn v.—81 M. 696.

Dooley v. Mobile &c. R. Co. 69 M. 648—r. r. 357, 359, 381, 382.

Doolittle v. Adams, 43 So. 951—stip. 15.

Doolittle, Gore v.—77 M. 620.

Doolittle, Newton County v.—72 M. 929.

Dorcey v. Lake, 46 M. 109—fraud. conv. 212.

Dornes v. Supreme Lodge Knights of Pythias of the World, 75 M. 466—ins. 54, 693, 717.

Dorr v. Watson, 28 M. 383—app. & e. 933; new tr. 12, 82, 89.

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Dorr v. Yazoo-Miss. Delta, 28 So. 938—fran. 12.
Dorr, Cantzon v.—27 M. 245.
Dorrah v. Hill, 73 M. 787—princ. & a. 160½; subrog. 1, 23.
Dorrah v. Illinois Cent. R. Co. 65 M. 14—carr. 272, 277a, 294; dam. 47, 50.
Dorrah, Ames v.—76 M. 187.
Dorrance, Meyer v.—32 M. 263.
Dorroh v. Holberg, 25 So. 661—fraud. conv. 102, 240.
Dorroh, Hoole v.—75 M. 257.
Dorsey v. Maury, 10 S. & M. 298—judgm. 814, 829; new tr. 96; states, 5.
Dorsey v. Merritt, 6 H. 390—app. & e. 165; ev. 158.
Dorsey v. Pierce, 5 H. 173—judgm. 323; proc. 164.
Dorsey, Agricultural Bank v.—Freem. Ch. 338.
Dorsey, Bullard v.—7 S. & M. 9.
Dorsey, Money v.—7 S. & M. 15.
Dorsey, Pugh v.—8 S. & M. 379.
Dorsey, Washburn v.—8 S. & M. 214.
Dortch, Gibbs v.—62 M. 671.
Doss v. Armstrong, 6 H. 258—ven. & pur. 220.
Doss v. Jones, 5 H. 158—libel, 110; plead. 95; trial, 267.
Doss v. Wiley, 72 M. 179—schools, 129.
Doss, Merritt v.—31 M. 275.
Doss, Randolph v.—3 H. 205.
Doster, Pool v.—59 M. 258.
Dotson, Champlin v.—13 S. & M. 553.
Dotson, Rail v.—14 S. & M. 176.
Doty v. Heth, 52 M. 530—land. & t. 79, 242, 246, 319, 323; ten. in c. 3.
Doty v. Lucas, 43 M. 337—app. & e. 906.
Doty v. Mitchell, 9 S. & M. 435—hus. & w. 31a, 152, 164, 231.
Doty v. State, W. 230—crim. l. 999.
Dougherty v. Compton, 3 S. & M. 100—app. & e. 321.
Dougherty v. Vanderpool, 35 M. 165—app. & e. 1050; bailm. 31; depty. 11; ev. 99; trial, 190.
Dougherty v. Yazoo &c. R. Co. 84 M. 502—carr. 332, 347.
Dougherty, McCutchen v.—44 M. 419.
Dougherty, Ratcliffe v.—24 M. 181.
Doughty v. Owen, 24 M. 404—cncts. 108; escape, 5; slaves, 5.
Doughty, Godfrey, Frank & Co. v.—47 So. 643.
Douglas v. Bennett, 51 M. 680—guard. & w. 108.
Douglas v. Downing, 9 So. 297—schools, 91.
Douglas v. State, 2 Miss. Dec. 220—hom. 297, 340b.
Douglass v. Hendricks, W. 230—judgm. 195.
Douglass, Farmers' Bank v.—11 S. & M. 469.
Douglass, Louisville &c. R. Co. v.—69 M. 723.
Douglass, Phillips v.—53 M. 175.
Douglass, Sanders v.—3 S. & M. 454.
Douglass, Shackleford v.—31 M. 95.
Douthit v. State, 30 M. 133—recogn. 11.
Dove v. Martin, 23 M. 588—attch. 253; dism. 53.
Dowd v. Hunt, 10 S. & M. 414—execution, 154b; judgm. 296, 890.
Dowd v. Louisville &c. R. Co. 68 M. 159—eject. 92, 95; pub. lands, 115.
Dowd v. Morgan, 23 M. 587—ex. & ad. 472; guard. & w. 143.
Dowd v. Troup, 57 M. 204—atty. & c. 135, 145.
Dowd v. White, 34 M. 510—wills, 734.
Dowdle, Jeffries v.—61 M. 504.
Dowd, Savage v.—54 M. 728.
Dowdy v. Graham, 42 M. 451—ex. & ad. 32, 35, 62.
Dowell v. Boyd, 3 S. & M. 592—debt, act. of. 1; judgm. 195; plead. 204; slaves, 18, 18a.
Dowell v. Brown, 13 S. & M. 43—action, 13; parties, 3.
Dowell v. Vicksburg &c. R. Co., 61 M. 519—mast. & s. 87, 240, 265, 275.
Dowell v. Webber, 2 S. & M. 452—ex. & ad. 226, 437; lim. of act. 76.
Dowell, James v.—7 S. & M. 333.
Dowell, Sanders v.—7 S. & M. 206.
Dowell, Wolfe v.—13 S. & M. 103.
Dowling v. State, 5 S. & M. 664—gr. jury, 12; jury, 10, 84; slaves, 19.
Dowling, Reber v.—65 M. 259.
Downey v. Barnett, 27 M. 409—cncts. 103.
Downing v. Hinds County, 84 M. 29—clks. of c. 10.
Downing, Douglas v.—9 So. 297.
Downing, Henderson v.—24 M. 106.
Downs v. Downs, 2 H. 915—deeds, 198; ev. 374; pub. lands, 114.
Downs v. Ladd, 4 H. 40—bonds, 144.
Downs v. Planters' Bank, 1 S. & M. 261—bills & n. 421, 526.
Downs, Grand Court of Calanthe v.—53 So. 417.
Downs, Williamson v.—34 M. 402.
Doxey v. State, 29 So. 785—j. p. 118, 138.
Doxy, Miller v.—W. 329.
Doyle v. Devane, Freem. Ch. 345—eq. 360.

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Doyle v. Orr, 51 M. 229—set-off, 41, 43; ven. & pur. 254, 266a.
Doyle, Campbell v.—57 M. 292.
Doyle, Chicago &c. R. Co. v.—60 M. 977.
Doyle, Frost v.—7 S. & M. 68.
Dozier v. Anstill, 8 S. & M. 528—trial, 156.
Dozier v. Ellis, 28 M. 730—app. & e. 1025, 1028; lim. of act. 5, 98.
Dozier v. Freeman, 47 M. 647—hus. & w. 198; princ. & a. 147; slaves, 7; trusts, 64, 188.
Dozier v. Lewis, 27 M. 679—judgm. 752; subrog. 5.
Dozier v. Williams, 47 M. 605—eq. 45; penal. 16.
Dozier, Lee v.—40 M. 302.
Dozier, Lee v.—40 M. 581.
Dozier, McKnight v.—44 M. 606.
Dozier, Western Union Tel. Co. v.—67 M. 288.
Drainage Comrs. Haley v.—55 So, 353.
Drake v. Collins, 5 H. 253—attch. 322; execution, 69, 250, 258, 344; marshaling, 4, 5, 8.
Drake v. Henly, W 541—witn. 82.
Drake v. Surget, 36 M. 458—app. & e. 1003, 1057; assum. 23; cncts. 334, 346; new tr. 41; trial, 275; ware. 34.
Drake v. Yazoo &c. R. Co. 79 M. 84—r. r. 471.
Drake, Hopkins v.—44 M. 619.
Drake, Mitchell v.—57 M. 605.
Drake, New Orleans &c. R. Co. v.—60 M. 621.
Drane v. Board of Police, 42 M. 264—judgm. 195; plead. 221.
Drane v. Hilzheim, 13 S. & M. 336—det. 19, 20; replev. 96.
Drane v. Lamb, 56 M. 757—hus. & w. 221.
Drane v. Newsom, 73 M. 422—mtg. 171; statut. 267.
Drane v. State, 92 M. 180—crim. l. 423, 721, 1171.
Drane v. Winter, 41 M. 517—inj. 179.
Drane, Hilzheim v.—10 S. & M. 556.
Drane, Hunt v.—32 M. 243.
Draper v. Perkins, 57 M. 277—chat. m. 48; deeds, 111.
Draughn v. State, 76 M. 574—burg. 19, 28; crim. l. 520, 531.
Drennan, Pilcher v.—51 M. 873.
Drennen, Heard v.—93 M. 236.
Drew, James v.—68 M. 518.
Dreyfus v. Barton, 54 So. 254—bankr. 394; exemp. 4.
Dreyfus v. Cage, 62 M. 605—app. & e. 647; excep. 59.
Dreyfus v. Cage, 62 M. 733—action, 32; chat. m. 172; replev. 8.
Dreyfus v. Gage, 79 M. 402—app. & e. 852; inj. 26.
Dreyfus v. Gage, 84 M. 219—land. & t. 254.
Dreyfus v. Mayer, 69 M. 282—attch. 301, 307; carr. 74; j. p. 141, 161; sales, 289.
Dreyfus, Baldwin v.—92 M. 94.
Dreyfus, Burns v.—69 M. 211.
Dreyfus, Williams v.—79 M. 245.
Drewry v. Hopper, 77 M. 744—dep. 97.
Driver v. Southern Ry. Co. 93 M. 190—mast. & s. 137, 232, 240.
Drummond, Alabama &c. R. Co. v.—73 M. 813.
Drysdale v. Biloxi Canning Co. 67 M. 409—judgm. 419.
Drysdale v. Biloxi Canning Co. 67 M. 534—attch. 209, 217, 327; can. of i. 4; quiet. t. 7; j. p. 44.
Drysdale v. Pradat, 45 M. 445—int. liq. 9.
Dubuisson v. Folkes, 30 M. 432—cncts. 70; princ. & s. 103, 108.
Ducas, Miss. Cent. R. Co. v.—53 So. 398.
Ducate, Adams v.—86 M. 276.
Ducker, Whitehead v.—11 S. & M. 98.
Dudley v. Harvey, 59 M. 34—land. & t. 229f, 229k.
Duff v. Snider, 54 M. 245—app. & e. 879, 1064; cncts. 54; fixt. 13, 27, 30; frds. st. of, 48, 61; mech. liens, 276; trial, 29; witn. 261.
Duffy, Tierney v.—59 M. 364.
Dufour v. Chapotel, 75 M. 656—app. & e. 187; j. p. 141; trial, 412.
Dugan, Rimer v.—39 M. 477.
Duggan v. Champlin, 75 M. 441—bills & n. 110; eq. 278; plead. 245; Sunday, 13.
Dugger, Cole v.—41 M. 557.
Duglass, Porter v.—27 M. 379.
Duke v. Clark, 58 M. 465—bills & n. 347; eject. 86; execution, 243, 263, 272, 275; fraud. conv. 154; judgm. 786, 788, 846.
Duke v. Shackleford, 56 M. 552—fixt. 9, 27; replev. 3; sales, 242, 319, 471, 478.
Duke v. State, 57 M. 229—courts, 198; ex. & ad. 537h; guard. & w. 8.
Duke, Anderson v.—28 M. 87.
Duke, Clark v.—59 M. 575.
Duke, Cobb v.—36 M. 60.
Duke, Cotton Mills v.—71 M. 790.
Duke, Richie v.—70 M. 66.
Dukes v. State, 80 M. 353—crim. l. 540; hom. 142.
Duke, Tisomingo Sav. Inst. v.—1 So. 165.
Dulaney v. Rankin, 47 M. 391—app. & e. 976.

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Dulaney v. Starke, 7 S. & M. 375—turnpikes, 37.
Dulaney, Alexander v.—16 So. 355.
Dulaney, Jamison v.—74 M. 890.
Dulaney, Rankin v.—43 M. 197.
Dulaney, Ward v.—23 M. 410.
Dulion v. Harkness, 80 M. 8—eq. 62; fraud. conv. 226; home. 177, 184.
Dulion, Boone v.—80 M. 584.
Duly, Melline v.—88 M. 219.
Dunbar v. Aldrich, 77 M. 698—adv. pos. 76; deeds, 97.
Dunbar v. Chevalier, 28 M. 161—witn. 91, 140.
Dunbar v. Meyer &c. Co. 43 M. 679—hus. & w. 19, 79, 85, 164, 228.
Dunbar v. Newman, 46 M. 231—eq. 347; ref. of inst. 3, 5, 26, 35, 44, 45, 47.
Dunbar v. Tyler, 44 M. 1—bills & n. 397, 414.
Dunbar, Fant v.—71 M. 576.
Dunbar, Hart v.—4 S. & M. 273.
Dunbar, Jackson v.—68 M. 288.
Dunbar, Sulphine v.—55 M. 255.
Duncan v. Board of Mississippi Levee Com'rs, 74 M. 125—em. dom. 89, 94; lev. 19.
Duncan v. Dick, W. 281—des. & d. 2; dower, 2.
Duncan v. Gerdine, 59 M. 550—execution, 344; judgm. 17, 419, 521, 957; proc. 148.
Duncan v. Jayne, 76 M. 133—land. & t. 248, 322.
Duncan v. Johnson, 23 M. 130—dower, 54; hus. & w. 11, 115; wills, 720.
Duncan v. Lane, 8 S. & M. 744—cov. 94, 102; ex. & ad. 368, 377; ven. & pur. 308, 308a.
Duncan v. McNeill, 31 M. 704—abate. & r. 27; bills & n. 458, 460; dism. 23, 28; judgm. 470; plead. 110, 252.
Duncan v. Moore, 67 M. 136—eq. 66; home. 123, 132.
Duncan v. Robertson, 57 M. 820—dism. 75; hus. & w. 228, 237, 242.
Duncan v. Robertson, 58 M. 390—hus. & w. 91, 228.
Duncan v. Scott County, 64 M. 38—app. & e. 267; judgm. 107; j. p. 98.
Duncan v. State, 49 M. 331—anim. 43; crim. l. 881.
Duncan v. State Nat. Bank, 85 M. 681—assign. f. b. c. 297.
Duncan v. Watson, 2 S. & M. 121—bills & n. 510; ev. 200, 203, 402; witn. 234.
Duncan v. Watson, 28 M. 187—bills & n. 399, 403, 510; ev. 597; ex. & ad. 74, 120.
Duncan v. Western Union Telegraph Co. 93 M. 500—tel. & t. 53, 68.
Duncan, Bank of Mississippi v.—52 M. 740.
Duncan, Bank of Mississippi v.—56 M. 166.
Duncan, Bolls v.—W. 161.
Duncan, Bowen v.—1 Miss. Dec. 400.
Duncan, Broome v.—29 So. 394.
Duncan, Cogan v.—23 M. 274.
Duncan, Corbett v.—63 M. 84.
Duncan, Dahlgren v.—7 S. & M. 280.
Duncan, Gerard v.—84 M. 731.
Duncan, Gridley v.—8 S. & M. 456.
Duncan, Loeb v.—63 M. 89.
Duncan, Robertson v.—2 Miss. Dec. 148.
Duncan, Ross v.—Freem. Ch. 587.
Duncan, Toof v.—45 M. 48.
Duncan, Union &c. Bank v.—84 M. 467.
Duncan, Watson v.—84 M. 763.
Duncan, Williams v.—44 M. 375.
Duncan, Wilson v.—44 M. 642.
Dundee Land Co. Payne v.—14 So. 269.
Dunk v. State, 84 M. 452—witn. 399.
Dunkley, Pringle v.—14 S. & M. 16.
Dunlap v. Burnett, 5 S. & M. 702—ven. & pur. 257, 260, 262, 266b.
Dunlap v. Clay, 65 M. 454—attch. 91; j. p. 86; oath, 3.
Dunlap v. Edwards, 29 M. 41—judgm. 730.
Dunlap v. Fant, 74 M. 197—des. & d. 16; execution, 10, 265; judgm. 291; wills, 590, 630.
Dunlap v. Fox, 2 So. 169—app. & e. 688; attch. 47, 355; fraud, 50.
Dunlap v. Hand, 26 M. 460—mast. & s. 73.
Dunlap v. Hearn, 37 M. 471—ev. 114, 472; trial, 190, 194; witn. 53.
Dunlap v. Petrie, 35 M. 590—cncts. 262, 273; des. & d. 72; guard. & w. 135.
Dunlap v. Richardson, 63 M. 447—witn. 388.
Dunlap, Gully v.—24 M. 410.
Dunlap, Parkhurst v.—6 H. 577.
Dunlap, State v.—21 So. 242.
Dunlop, Lewis v.—57 M. 130.
Dunmore v. State, 86 M. 788—crim. l. 517.
Dunn v. Clinghan—see Pattison v. Clinghan.
Dunn v. Kelly, 57 M. 825—land. & t. 252a.
Dunn v. Newman, 7 H. 582—atty. & c. 100, 101, 182; sheriffs, 122, 125.
Dunn v. Smith, 12 S. & M. 602—princ. & s. 39.
Dunn v. Vannerson, 7 H. 579—atty. & c. 128.
Dunn v. Winston, 31 M. 135—tax. 728.
Dunn, Buckley v.—67 M. 710.
Dunn, Goodbar v.—61 M. 618, 624.
Dunn, Lemmon v.—61 M. 210.
Dunn, Masters v.—30 M. 264.
Dunn, Moore v.—50 M. 32.
Dunnigan, Illinois Cent. R. Co. v.—95 M. 749.

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Dunton v. Sharpe, 1 Miss. Dec. 231—land. & t. 184, 231; mtg. 128.
Dunton v. Sharpe, 70 M. 850—estop. 91; mtg. 339, 360, 369, 372.
Durbridge, Rodd v.—53 M. 694.
Durfee, Fondren v.—39 M. 324.
Durfey, Jackson Bank v.—72 M. 971.
Durfey, Patterson v.—68 M. 779.
Durfree, Louisville &c. R. Co. v.—69 M. 439.
Durfrey, Ohlson v.—82 M. 213.
Durham v. Slidell Liquor Co. 94 M. 140—execution, 50; princ. & a. 145.
Durham v. State, 47 So. 545—crim. l. 519.
Durham v. State, 52 So. 627—cmpt. 37, 53, 66.
Durham, Trimble v.—70 M. 295.
Durr v. State, 53 M. 425—crim. l. 277, 927; gr. jury, 34, 39; ind. 137.
Durrah v. State, 44 M. 789—crim. l. 588, 813, 829, 897, 1172; gr. jury, 9, 19; jury, 46, 116.
Durr Co. v. Mitchell, 52 So. 583—eq. 66.
Durrett, Stevens v.—49 M. 411.
Dutton v. Shaw, 38 So. 638—bailm. 18; cncts. 212; estop. 63.
Dutton, Vicksburg Waterworks Co. v.—53 So. 537.
Duvall v. Cox, 5 H. 12—app. & e. 323, 324.
Duvall v. Neal, 70 M. 288—usury, 87.
Duvall, Watkins v.—69 M. 364.
Duvie, Thames v.—89 M. 9.
Dwight v. Richardson, 12 S. & M. 325—bills & n. 408; statut. 61.
Dwyer, Virden v.—78 M. 763.
Dyche v. Vicksburg &c. R. Co. 79 M. 361—phys. 16; r. r. 358.
Dyche, Marye v.—42 M. 347.
Dyche, Riggs v.—2 S. & M. 606.
Dye v. Bartlett, 7 H. 224—ex. & ad. 416; judgm. 775.
Dye, Kilpatrick v.—4 S. & M. 289.
Dyer v. Britton, 53 M. 270—assum. 1; courts, 88; cov. acti. of, 11; cov. 67, 104, 107, 123; deeds, 123; mon. paid, 1.
Dyer v. Williams, 62 M. 302—eq. 340; hus. & w. 49¾.
Dyer, Ford v.—26 M. 243.
Dyer, Rucker v.—44 M. 591.
Dyess, Levey v.—51 M. 501.
Dykes, Luckey v.—2 S. & M. 60.
Dyson v. Baker, 54 M. 24—abate. & r. 50, 51; attch. 160, 174, 217; ev. 157, 166, 354; garn. 105, 188; trial, 158.
Dyson v. State, 26 M. 362—app. & e. 926; crim. l. 1029, 1039, 1053, 1085, 1089, 1091, 1142, 1144; ev. 99; hom. 115; trial, 46.
Dyson, Ex parte, 25 M. 356—bail, 41, 45.

E

Eades, McGaughey v.—78 M. 853.
Eakin v. Gwin, 1 Miss. Dec. 30—costs, 127; j. p. 174; witn. 140.
Eakin v. Vance, 10 S. & M. 549—ev. 386; judgm. 916; records, 17.
Eakin, Yazoo &c. R. Co. v.—79 M. 735.
Earhart v. State, 67 M. 325—statut. 212, 232; weap. 3.
Earhart, Eltringham v.—67 M. 488.
Earhart, Kaiser v.—64 M. 492.
Earle v. Crum, 42 M. 165—guard. & w. 17, 139, 144.
Early v. Long, 89 M. 285—deeds, 38, 113; plead. 329.
Earp v. State, 38 So. 288—crim. l. 474, 485.
Easley v. Alabama &c. R. Co.—50 So. 491; carr. 318; trial, 252.
Easly v. Badenhausen, 59 M. 580—elec. 269.
Eason v. Johnson, 69 M. 371—land. & t. 252a.
Eason, Parker v.—68 M. 290.
Eason, White v.—15 So. 66.
East v. King, 77 M. 738—hus. & w. 19, 20.
East v. New Orleans Ins. Assn. 76 M. 697—ins. 311.
Eastabutchie Lumber Co. Sanford v.—83 M. 478.
East, Chase v.—W. 439.
Easter v. Riley, 79 M. 625—lim. of act. 127.
Easterling v. Shaifer, 38 So. 230—mech. liens, 269, 277, 288.
Easterling v. State, 35 M. 210—crim. l. 990, 996, 1138; gr. jury, 5, 12; ind. 34; int. liq. 223; judgm. 273.
Eastin v. VanDorn, W. 214—interest, 3; judgm. 872; statut. 263.
Eastland v. Yazoo Delta Lumber Co. 90 M. 330—tax. 615, 735.
Eastland, Alexander v.—37 M. 554.
Eastman v. Barnes, 95 M. 715—pub. lands, 142.
Eastman Gardner & Co. Carter v.—95 M. 651.
Eastman, Hall v.—89 M. 588.
East Miss. Mills Co. Lauderdale County v.—16 So. 210.
East Mississippi Mills, Lauderdale County v.—18 So. 94.
East Tennessee &c. R. Co. Powell v.—8 So. 738.
East Union Lumber Co. Kennedy v.—92 M. 405.
Eaton v. Barnhill, 68 M. 305—j. p. 189; replev. 92, 96, 116.
Eaton v. Kola Lumber Co. 46 So. 70—eq. 141, 239.

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Eaton v. State, 80 M. 588—fish, 7, 8.
Eaton, Barnett v.—62 M. 768.
Eaver v. Harris, 95 M. 607—sales, 411, 418.
Eaverson v. State, 73 M. 810—hom. 310.
Eaves, Long v.—56 So. 178.
Ebbing, Bodgett v.—24 M. 245.
Ebsom v. Boyd, 23 So. 586—land. & t. 270.
Echols v. Butler, 28 M. 114—spec. perf. 61.
Echols v. Hammond, 30 M. 177—attch. 69; eq. 45; garn. 69.
Echols v. Railroad Co. 52 M. 610—cncts. 215.
Echols v. State, 55 So. 485—hom. 112, 190, 250.
Echols, New Orleans &c. R. Co. v.—54 M. 264.
Eckerly v. Alcorn, 62 M. 228—partners. 291.
Eckford v. Evans, 56 M. 18—lim. of act. 72a, 150, 171.
Eckford v. Halbert, 30 M. 273—app. & e. 1178; cov. 107; spec. perf. 96, 97.
Eckford v. Hogan, 44 M. 398—action, 13; ev. 462; ex. & ad. 440; guard. & w. 73; parties, 3, 4.
Eckford, Pollard v.—50 M. 631.
Eckford, Stockard v.—2 Miss. Dec. 490.
Eckford, Taylor v.—11 S. & M. 21.
Edde, Johnson v.—58 M. 664.
E. D. Edwards Post No. 22, G. A. R. Traders' Ins. Co. v.—86 M. 135.
Edge v. Keith, 13 S. & M. 295—princ. & s. 190; trial, 76.
Edgell v. Clark, 76 M. 66—inj. 26.
Edgerton v. McRea, 5 H. 183—chat. m. 300.
Edington, Harvey v.—25 M. 22.
Edmondson v. Granberry, 73 M. 723—tax. 182, 679a.
Edmondson v. Ingram, 68 M. 32—tax. 528½.
Edmonson v. Meacham, 50 M. 34—cncts. 94; home. 18.
Edmondson v. Orr, 12 S. & M. 541—princ. & a. 103, 126; ven. & pur. 232.
Edmonson, Meacham v.—54 M. 746.
Edmunds v. Mister, 58 M. 765—app. & e. 1175; fraud. conv. 54, 207, 242, 270; inf. 47, 57, 58, 97.
Edmundson v. Roberts, 1 H. 322—ex. & ad. 14, 20.
Edmundson v. Roberts, 2 H. 822—eq. 22; ex. & ad. 62, 73, 234, 367, 469, 532.
Edmundson, Roberts v.—4 S. & M. 730.
Edrington, Botters v.—30 M. 580.
Edwards v. Butler, 89 M. 179—tax. 175, 815.
Edwards v. Gaulding, 38 M. 118—bast. 104; ex. & ad. 450; statut. 239; wills, 312, 433.
Edwards v. Gibbs, 39 M. 166—bankr. 417, 418; lim. of act. 98, 100.
Edwards v. Gulfport, 95 M. 148—crim. l. 824; int. liq. 236.
Edwards v. Hillier, 70 M. 803—deeds, 116; eq. 116, 196; estop. 35, 97; hus. & w. 129; princ. & a. 177; subrog. 13.
Edwards v. Ingraham, 31 M. 272—execution, 348; lim. of act. 36; sheriffs, 87, 94, 99.
Edwards v. Kelly, 83 M. 144—ex. & ad. 437; guard. & w. 11; wills, 529.
Edwards v. Kingston Lumber Co. 92 M. 598—app. & e. 1178; j. p. 78.
Edwards v. McGee, 31 M. 143—eq. 87; ex. & ad. 173, 180, 183.
Edwards v. Roberts, 7 S. & M. 544—ven. & pur. 42, 114.
Edwards v. Simmons, 27 M. 302—princ. & a. 109.
Edwards v. Smith, 35 M. 197—wills, 88.
Edwards v. State, 47 M. 581—crim. l. 640, 1088, 1119, 1142; excep. 11; hom. 190, 306.
Edwards v. State, 8 So. 464—land. & t. 253.
Edwards v. The Blacksmith, 33 M. 190—attch. 104; mar. liens, 73.
Edwards v. Toomer, 14 S. & M. 75—appr. 5; attch. 201, 202, 206, 209, 217; judgm. 529.
Edwards, Allen v.—93 M. 719.
Edwards, Carpenter v.—64 M. 595.
Edwards, Clark v.—44 M. 778.
Edwards, Dunlap v.—29 M. 41.
Edwards, Ex parte, 91 M. 621—extrad. 37, 39; hab. corp. 85.
Edwards, Gay v.—30 M. 163.
Edwards, Graves v.—32 M. 305.
Edwards, Gray v.—30 M. 218.
Edwards, Herring v.—29 So. 787.
Edwards, Hobson v.—57 M. 128.
Edwards Hotel &c. R. Co. v. Jackson, 96 M. 547; estop. 62; mun. corp. 60, 120, 226, 265, 281, 421; st. r. r. 18, 37.
Edwards Hotel &c. R. Co. Wells v.—50 So. 628.
Edwards House Co. v. Jackson, 91 M. 429—em. dom. 2; mun. corp. 283, 300, 304, 318, 408; tax. 47.
Edwards, Jones v.—57 M. 28.
Edwards, Lampton v.—54 So. 245.
Edwards, Meridian Fertilizer Factory v.—77 M. 697.
Edwards, Miller v.—75 M. 739.
Edwards, Miss. Packet Co. v.—62 M. 534.
Edwards, North British &c. Ins. Co. v.—85 M. 322.
Edwards, Patterson v.—29 M. 67.
Edwards, State v.—81 M. 399.
Edwards, State v.—93 M. 704.
Edwards, Yazoo &c. R. Co. v.—78 M. 950.

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Edward Thompson Co. Clarke v.—25 So. 1036.
Edyell, Union Planters' Bank v.—33 So. 409.
E. E. Forbes Piano Co. v. Henington, 48 So. 609—execution, 262.
Effinger v. Henderson, 33 M. 449—cust. & u. 15; lim. of act. 52; paymt. 45.
Effinger v. Richards, 35 M. 540—app. & e. 925; bills & n. 132; ex. & ad. 447, 485, 499, 506, 509; interest, 3.
Effingham v. Hamilton, 68 M. 523—mand. 7; schools, 77:
Eggleston v. Watson, 53 M. 339—eq. 152; lim. of act. 105, 167; mtg. 48, 424, 457.
Eggleston, Alsobrook v.—69 M. 833.
Eggleston, Magruder v.—41 M. 284.
Ehlers v. Elder, 51 M. 495—mech. liens, 1 165, 210, 260.
Ehnsley v. Georgia Pac. R. Co. 10 So. 41—r. r. 419.
Ehrman v. Hoskins, 67 M. 192—ev. 461, wills, 561.
Ehrman v. Whelan, 40 So. 430—acct. acti. on, 7; witn. 387.
Ehrman, Pullman Palace Car Co. v.—65 M. 383.
Eidson v. Southern R. Co. 23 So. 369—carr. 366.
Eiland, Phillips v.—52 M. 721.
Eiland, Sims v.—57 M. 83, 607.
Eiseman, Stephen v.—54 M. 535.
Elam, Barksdale v.—30 M. 694.
Elam, Barksdale v.—35 M. 172.
Elam, Newman v.—26 M. 474.
Elam, Newman v.—30 M. 507.
Elbert v. Picard, 4 So. 543—app. & e. 1028; assign. f. b. c. 163.
Elder v. Hitzheim, 35 M. 231—actions, 39; debt, act. 1; eject. 38; penal. 16; plead. 53; tresp. 17.
Elder, Bernard v.—50 M. 336.
Elder, Ehlers v.—51 M. 495.
Elder, James v.—23 M. 134.
Elder, Joor v.—1 Miss. Dec. 503.
Elder, Lambeth v.—44 M. 80.
Elder, Smith v.—7 S. & M. 507.
Elder, Smith v.—14 S. & M. 100.
Elder, W. F. Zimmerman Lumber Co. v.—29 So. 466.
Eldridge v. McMackin, 37 M. 72—ex. & ad. 336.
Eldridge v. Phillipson, 58 M. 270—attch. 39, 44.
Eldridge v. State, 76 M. 353—forg. 34, 44.
Eldridge, Addison v.—1 S. & M. 510.
Elgin, Young v.—27 So. 595.
Elkin v. Rives, 82 M. 744—mtg. 377; int. liq. 120.
Elkin, Clopton v.—49 M. 95.
Elkins, Arnold v.—67 M. 675.
Elledge v. Gray, 41 So. 2—trial, 143.
Elledge v. Polk, 48 So. 241—arb. & a. 64.
Ellerbe v. State, 75 M. 522—crim. l. 634.
Ellerbe v. State, 79 M. 10—crim. l. 761, 789, 796; hom. 115, 300d. 311.
Ellett, McComb v.—8 S. & M. 505.
Ellington v. Ellington, 47 M. 329—seduct. 3.
Elliott v. Connell, 5 S. & M. 91—ev. 461; ex. & ad. 368.
Elliott v. Topp, 63 M. 138—wills, 819.
Elliott, Buckingham v.—62 M. 296.
Elliott, Chesnut v.—61 M. 569.
Elliott, Land v.—1 S. & M. 608.
Elliott, King v.—5 S. & M. 428.
Elliott, Packwood v.—43 M. 504.
Elliott, Woods v.—49 M. 168.
Ellis v. Abercrombie, 10 S. & M. 474—execution, 185, 187.
Ellis v. Alford, 64 M. 8—inf. 30; witn. 146.
Ellis v. Carlisle, 8 S. & M. 552—ex. & ad. 222; witn. 85.
Ellis v. Commercial Bank, 7 H. 294—bills & n. 386, 397, 401, 421; trial, 260.
Ellis v. Doe, 11 S. & M. 422—champ. 7.
Ellis v. Greaves, 82 M. 36—quo w. 12; schools, 46, 53.
Ellis v. Jones, 70 M. 60—land. & t. 242.
Ellis v. Kelly, 33 M. 695—ev. 461; new. tr. 105; partners. 95.
Ellis v. McGee, 63 M. 168—ex. & ad. 423; guard. & w. 182c; lim. of act. 72.
Ellis v. Martin, 2 S. & M. 187—app. & e. 154; plead. 99; ven. & pur. 36.
Ellis v. Murray, 28 M. 129—adv. pos. 12; lim. of act. 19, 181; statut. 194.
Ellis v. Planters' Bank, 7 H. 235—dep. 86; ex. & ad. 442; plead. 291.
Ellis v. State, 65 M. 44—crim. l. 532, 538, 671, 830.
Ellis v. Ward, 7 S. & M. 651—ven. & pur. 105; witn. 91, 105.
Ellis v. Witty, 63 M. 117—ex. & ad. 26.
Ellis, Barber v.—68 M. 172.
Ellis, Birdsong v.—62 M. 418.
Ellis, Dozier v.—28 M. 730.
Ellis, Garrett v.—52 So. 451.
Ellis, Griffin v.—63 M. 348.
Ellis, Gulf &c. R. Co. v.—85 M. 586.
Ellis, Harvey v.—11 S. & M. 348.
Ellis, Hiller v.—72 M. 701.
Ellis, Holloway v.—25 M. 103.
Ellis, Miss. Cotton Oil Co. v.—72 M. 191.

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Ellison v. Lewis, 57 M. 588—replev. 19.
Ellison v. Mobile &c. R. R. Co. 36 M. 572—alt. inst. 26; corp. 80, 447; r. r. 15; statut. 184.
Ellis, Perry v.—62 M. 711.
Ellis, Pool v.—64 M. 555.
Ellis, Pressly v.—48 M. 574.
Ellis, Shotwell v.—42 M. 439.
Ellis, Therrell v.—83 M. 494.
Ellis, Turner v.—24 M. 173.
Ellis, Wagner v.—85 M. 422.
Ellis, Willis v.—53 So. 498.
Elizey v. State, 57 M. 827—consp. 32.
Elizey v. State, 37 So. 837—hom. 195.
Elmer, Scarborough v.—87 M. 508.
Elmore v. State, 81 M. 422—high. 108.
Elmslie v. Mayor, 35 So. 201—mtg. 369.
Elmslie v. Thurman, 87 M. 537—ack. 35; plead. 291; ven. & pur. 275, 280.
Eltringham v. Earhart, 67 M. 488—assa. 33; dam. 171.
Eltringham, Frank v.—65 M. 281.
Ely, Illinois Cent. R. Co. v.—83 M. 519.
Ely, Thrasher v.—2 S. & M. 139.
Ely &c. Dry Goods Co. Smith v.—79 M. 266.
Elzy v. Stone, 5 S. & M. 21—app. & e. 1003.
Emanuel v. Jones, 12 S. & M. 473—judgm. 784; statut. 160.
Emanuel v. Laughlin, 3 S. & M. 342—attch. 298; bonds, 125.
Emanuel v. Norcum, 7 H. 150—ex. & ad. 77, 108.
Emanuel v. White, 34 M. 56—bills & n. 67, 94, 328, 352, 497.
Emanuel, Bosbyshell v.—12 S. & M. 63.
Embrey, Salter v.—18 So. 373.
Embry, Robins v.—Sm. & M. Ch. 207.
Emerson, American Life Ins. &c. Co. v.—4 S. & M. 177.
Emerson, Illinois Cent. R. Co. v.—88 M. 598.
Emerson, Illinois Cent. R. Co. v.—91 M. 230.
Emrich v. Ireland, 55 M. 390—eject. 128; fixt. 2, 6, 30; judgm. 428; tresp. 9, 29.
Emmons v. Myers, 7 H. 375—comp. 1; parties, 4; tender, 23.
Endicott v. Penny, 14 S. & M. 144—eq. 53; execution, 229; ven. & pur. 35.
Endicott, Turnbull v.—3 S. & M. 302.
Enevoldsen, Rosenthal v.—61 M. 532.
Englehard v. Slater, 7 H. 538—witn. 112, 120.
Englehard v. Sutton, 7 H. 99—judgm. 951.
Englehard, White v.—2 S. & M. 38.
Englehard, Young v.—1 H. 19.
Englesing, Rea v.—56 M. 463.
English v. Benedict, 25 M. 167—ven. & pur. 32.
English v. Foote, 8 S. & M. 444—fixt. 21; mech. liens, 184, 187.
English v. Friedman, 70 M. 457—assign. f. b. c. 83, 160; attch. 47.
Enloe v. Miles, 12 S. & M. 147—execution, 223.
Enochs v. Harrelson, 57 M. 465—eq. 446, 449, 461, 463; inf. 111.
Enochs v. Miller, 60 M. 19—deeds, 37; mtg. 356.
Enochs v. Miss. Bank &c. Co. 87 M. 325—disc. 1, 7.
Enochs v. Newton, 65 M. 86—hus. & w. 171.
Enochs v. Paxton, 87 M. 660—brok. 45, 51, 88.
Enochs v. Therrell, 61 M. 178—bills & n. 118, 427; nova. 1.
Enochs-Havis Lumber Co. v. Newcomb, 79 M. 462—assign. 83.
Enochs Lumber & Mfg. Co. Bryant v.—94 M. 454.
Enochs, New Orleans &c. R. Co. v.—42 M. 603.
Enos v. Smith, 7 S. & M. 85—dower, 69; judgm. 17.
Enslie, Scottish &c. Ins. Co. v.—78 M. 157.
Epperson v. Nugent, 57 M. 45—inf. 50.
Epps v. Hinds, 27 M. 657—inn. 11; parent & c. 8.
Equitable Assur. Soc. v. Clark, 28 So. 798—app. & e. 92.
Equitable Fire Ins. Co. v. Wildberger, 74 M. 375—ins. 93; princ. & a. 48, 85.
Equitable Fire Ins. Co. Alexander v.—12 So. 706.
Equitable Life Assur. Soc. v. Clark, 80 M. 471—disc. 81, 97.
Equitable Life Assur. Soc. v. Hartfield, 87 M. 548—ins. 583.
Equitable Life Assn. Soc. Clark v.—76 M. 22.
Equitable Securities Co. v. Sheppard, 78 M. 217—princ. & a. 179; ven. & pur. 231, 238.
Erb v. West, 19 So. 829—partners. 177, 184.
Ermlick v. State, 28 So. 847—crim. l. 634, 1140.
Ernst, Moore v.—54 M. 642.
Erwin v. Carson, 54 M. 282—inf. 76, 89, 115.
Erwin v. Heath, 50 M. 795—app. & e. 671, 880; garn. 64, 124.
Erwin, Clark v.—72 M. 926.
Erwin, Saunders v.—2 H. 732.
Erwin, Trotter v.—27 M. 772.
Erwin &c. Co. v. Hill, 47 M. 675—hus. & w. 167.
Eskridge v. Eskridge, 51 M. 522—inj. 14, 38; spec. perf. 108; waste, 17.

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Eskridge v. Jones, 1 S. & M. 595—proc. 64, 135.
Eskridge v. McGruder, 45 M. 294—statut. 180, 225; tax. 653.
Eskridge v. Rutland, 77 M. 784—j. p. 173.
Eskridge, Pickens v.—42 M. 114.
Estell v. Myers, 54 M. 174—cov. 1; fraud, 32; lim. of act. 41; ven. & pur. 36, 108, 119, 120, 310, 342.
Estell v. Myers, 56 M. 800—ven. & pur. 310, 351.
Estell, Myers v.—47 M. 4.
Estell, Myers v.—48 M. 372.
Estell, Smith v.—34 M. 527.
Esterling, Barlow v.—W. 302.
Esters, Carroll County v.—72 M. 171.
Estes v. Rawlins, 5 H. 258—lim. of act. 84.
Estes, Thomas v.—2 S. & M. 439.
Estice v. Cockerell, 26 M. 127—arb. & a. 36; witn. 92.
Estill, Bass v.—50 M. 300.
Etheridge v. Gallagher, 55 M. 458—bills & n. 308, 329.
Ettringham v. Handy, 60 M. 334—replev. 24, 52, 101.
Eubanks v. State, 7 So. 462—crim. l. 721.
Eubanks, Harkreader v.—12 So. 210.
Eubanks, Smith v.—89 M. 838.
Eureka Lumber Co. v. Terrell, 48 So. 628—tax. 737.
Eustice v. Holmes, 52 M. 305—app. & e. 187; eq. 117; guard. & w. 62; mtg. 151; ven. & pur. 260.
Eustis v. Holmes, 48 M. 34—app. & e. 5, 359, 386.
Evans v. Clark, 24 So. 532—app. & e. 698.
Evans v. Evans, 10 S. & M. 402—wills, 303.
Evans v. Fields, 11 So. 224—mtg. 338.
Evans v. Fisher, 40 M. 643—ex. & ad. 318, 322, 325.
Evans v. Forstall, 58 M. 30—chat. m. 223; fraud. conv. 172; ven. & pur. 35; estop. 70.
Evans v. Green, 23 M. 294—frds. st. of, 74; trusts, 70.
Evans v. Ham, 54 So. 250—app. & e. 652, 791.
Evans v. Henley, 66 M. 148—hus. & w. 149; partners. 162; princ. & a. 145.
Evans v. Holmes County, 11 So. 652—eject. 141.
Evans v. Lilly, 95 M. 58—app. & e. 302, 1028; assn. 16.
Evans v. Miller, 58 M. 120—tresp. 17, 52.
Evans v. Morgan, 69 M. 328—conf. g. 11; inf. 31a, 58.
Evans v. Parks, 13 So. 240—replev. 34.
Evans v. Railway Co. 70 M. 527—mast. & s. 180.
Evans v. Robertson, 54 M. 683—subrog. 24, 131.
Evans v. Sharkey County, 89 M. 302—em. dom. 257.
Evans v. Southern R. Co. 74 M. 230—j. p. 206.
Evans v. State, 44 M. 762—app. & e. 1028, 1064; assa. 66; crim. l. 172, 813, 822, 829, 1170, 1172; hom. 115, 116; trial, 248.
Evans v. State, 61 M. 157—witn. 89.
Evans v. State, 1 Miss. Dec. 217—assa. 81.
Evans v. State, 87 M. 459—crim. l. 829, 1089; jury, 103.
Evans v. State, 92 M. 34—crim. l. 125, 260.
Evans v. State, 4 So. 344—ars. 138; crim. l. 786.
Evans v. State, 54 So. 154—crim. l. 714; jury, 135.
Evans v. White, 31 So. 833—partners, 102.
Evans, Adams v.—74 M. 886.
Evans, Adams v.—19 So. 834.
Evans, Arnett v.—W. 471.
Evans, Banks v.—10 S. & M. 35.
Evans, Beasley v.—35 M. 192.
Evans, Blewett v.—42 M. 804.
Evans, Chapman v.—44 M. 113.
Evans, Dodge v.—43 M. 570.
Evans, Eckford v.—56 M. 18.
Evans, Heard v.—Freem. Ch. 79.
Evans, Holmes v.—48 M. 247.
Evans, Hope v.—Sm. & M. Ch. 195.
Evans, Hope v.—4 S. & M. 321.
Evans, Hughes v.—4 S. & M. 737.
Evans, Mitchell v.—5 H. 548.
Evans, Montgomery v.—2 Miss. Dec. 348.
Evans, Moore v.—54 So. 438.
Evans, New Orleans &c. R. Co. v.—49 M. 785.
Evans, Reinhardt v.—48 M. 230.
Evans, Whitfield v.—56 M. 488.
Evans, Willis Bank v.—10 S. & M. 35.
Everett v. Winn, Sm. & M. Ch. 67—eq. 93, 290, 372; fraud. conv. 172; mtg. 338.
Everett, Smith v.—50 M. 575.
Everett, Tuttle v.—51 M. 27.
Everly, Smith v.—4 H. 178.
Everman v. Herndon, 71 M. 823—brok. 12, 14, 93; princ. & a. 103, 147; spec. perf. 25, 94.
Everman v. Herndon, 11 So. 652—frds. st. of, 118.
Everman v. Robb, 52 M. 653—alt. inst. 25; chat. m. 12, 17; land. & t. 229½, 248; trial, 139.
Everman, Hibernian Bank v.—52 M. 500.

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Everman, Webber v.—47 M. 540.
Everman, Witczinski v.—51 M. 841.
Ewing v. Burton, 5 H. 660—j. p. 202.
Ewing v. Cargill, 13 S. & M. 79—chat. m. 188; fraud. conv. 137, 138, 140, 201; witn. 107.
Ewing v. Glidwell, 3 H. 332—app. & e. 105, 154; dism. 44.
Ewing v. Railway Co. 68 M. 551—em. dom. 20, 59.
Ewing, Miller v.—8 S. & M. 421.
Ewing, Stuhlmuller v.—39 M. 447.
Excelsior Mfg. Co. v. Keyser, 62 M. 155—sales, 301; statut. 236.
Exchange Nat. Bank v. Russell, 81 M. 169—carr. 58.
Exporters' Cotton Oil Co. Knox v.—56 So. 185.
Express Co. Vicksburg Liquor Co. v.—68 M. 149.
Exum v. Brister, 35 M. 391—action, 39; app. & e. 287; excep. 8; mast. & s. 308, 330; pub. lands, 113.
Exum v. Canty, 34 M. 533—app. & e. 171; cncts. 171; deeds, 4, 24; wills, 88.
Eyrich v. Capital State Bank, 67 M. 60—banks, 130, 134, 137, 148; bills & n. 110, 126, 534; ex. & ad. 296, 432, 433, 434, 453; liens, 17; partners. 145, 174; set-off, 41, 43; usury, 62.
Ezelle v. Parker, 41 M. 520—costs, 232; hus. & w. 193; land. & t. 61, 118; quiet. t. 3, 43; trusts, 95; u. s. 90; ven. & pur. 190.
Ezelle v. Simpson, 42 M. 515—attch. 322; garn. 96.
Ezell, Haynes v.—25 M. 242.

F

Fahey v. State, 62 M. 402—int. liq. 182.
Fain Grocery Co. First Nat. Bank v.—87 M. 503.
Fairbanks Co. v. Briley, 25 So. 354—hus. & w. 150.
Fairbanks Co. v. Graves, 90 M. 453—sales, 466.
Fairchild v. Grand Gulf Bank, 5 H. 597—action, 50; bills & n. 460, 489, 539; partners. 173, 200, 213, 218, 219, 291; plead. 41.
Fairchild v. New Orleans &c. R. Co. 60 M. 931—mast. & s. 305; tresp. 30.
Fairchild v. New Orleans &c. R. Co. 62 M. 177—r. r. 103, 112, 114.
Fairchild, Bourgeois v.—81 M. 708.
Fairfield v. Louisville &c. R. Co. 94 M. 887—app. & e. 1068; carr. 255; trial, 249.
Fairley v. Fairley, 38 M. 280—action, 13; cncts. 176; deeds, 17; ev. 372; fraud. conv. 309; princ. & a. 69, 72, 79; sales, 18; trial, 135, 189, 194, 252; witn. 399.
Fairley v. Western Union Tel. Co. 73 M. 6—asyl. 4; tel. & t. 67.
Fairley, Farasworth Lumber Co. v.—27 So. 836.
Fairley, Farnsworth Lumber Co. v.—28 So. 569.
Fairly v. Fairly, 34 M. 18—deeds, 17, 123; estop. 15; excep. 17; garn. 62; gifts, 17; sales, 18.
Fairly v. Nash, 70 M. 193—partners. 17, 20; princ. & a. 109, 155.
Fairly v. State, 63 M. 333—crim. l. 763; int. liq. 223, 239.
Fairly v. Thompson, 34 M. 101—judgm. 372, 440.
Fairman, Foute v.—48 M. 536.
Faison v. Alabama &c. R. Co. 69 M. 569—carr. 185.
Faison v. Johnson, 70 M. 214—abat. & r. 68; execution, 69, 273; tax. 674; trusts, 95.
Faison v. Wolf, 63 M. 24—garn. 96; judgm. 17d.
Faison, Bell v.—53 M. 354.
Falconer v. Frazier, 7 S. & M. 235—judgm. 203; mech. liens, 187, 277, 291; proc. 86.
Falconer v. Holland, 5 S. & M. 689—gifts, 5, 46, 47; parent & c. 9; propty. 9; sales, 465.
Falconer, Anderson v.—34 M. 257.
Faler v. Jordan, 44 M. 283—partners. 128, 146, 152, 217; witn. 127.
Faler v. McRae, 56 M. 227—ex. & ad. 43; propty. 3; tax. 679a.
Faler, New Orleans &c. R. Co. v.—58 M. 911.
Falkner v. Adams, 33 So. 411—tax. 362½.
Falkner v. Thurmond, 23 So. 584—app. & e. 672; execution, 33; home. 102; ten. in c. 20.
Falkner v. Thurmond, 23 So. 877—courts, 103.
Fall v. Commissioners of Sinking Fund, 3 S. & M. 127—plead. 74; trial, 5.
Fall v. Hafter, 40 M. 606—eq. 228, 237.
Fall Back Plantong &c. Co. Musson v.—12 So. 587.
Falls v. Wilson, 24 M. 168—bills & n. 455.
Falls, Planters' Oil-Mill &c. Co. v.—29 So. 786.
Fancher, Palm v.—93 M. 785.
Fanning v. Farmers' Bank, 8 S. & M. 139—bills & n. 114, 240; judgm. 448.
Fanning v. Funches, 60 M. 541—tax. 434, 688.
Fant v. Dunbar, 71 M. 576—guard. & w. 35, 62, 70; trusts, 102.

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Fant v. Gibbs, 54 M. 396—dist. attys. 2; offic. 51; statut. 64.
Fant v. McGowan, 57 M. 779—guard. & w. 25, 108.
Fant, Apperson v.—42 M. 252.
Fant, Dunlap v.—74 M. 197.
Fant, Tyler v.—3 So. 374.
Farasworth Lumber Co. v. Fairley, 27 So. 836—tax. 435.
Fargason v. Oxford Mercantile Co. 78 M. 65—banks, 178; corp. 35, 448, 544; fraud. conv. 7, 85, 115, 171.
Fargason, Mechanics' Sav. Bank v.—79 M. 64.
Faris, Gaines v.—39 M. 403.
Farish v. State, 2 H. 826—eq. 2.
Farish v. State, 4 H. 170—eq. 2.
Farish, State v.—23 M. 483.
Farkas v. State, 60 M. 847—hom. 223.
Farley v. Hord, 45 M. 96—ex. & ad. 93, 108, 131, 296.
Farley, Adams v.—18 So. 390.
Farmer v. Allen, 85 M. 672—app. & e. 804; eq. 71, 303.
Farmer v. Cumberland Tel. &c. Co. 86 M. 55—mast. & s. 109, 278; trial, 167.
Farmer, Foote v.—71 M. 148.
Farmers' Bank v. Douglass, 11 S. & M. 469—fraud. conv. 7, 9, 77, 85, 115, 120, 128, 131, 137, 159, 285.
Farmers' Bank, Fanning v.—8 S. & M. 139.
Farmers' Loan &c. Co. v. Avera, 7 So. 358—trover, 24.
Farmers' Loan &c. Co. v. Rainer, 96 M. 65—sales, 176.
Farmers' Mut. Fire Ins. Co. v. Cole, 90 M. 508—ins. 4, 5, 690.
Farmers' Mut. Fire Ins. Co. Shivers v.—55 So. 965.
Farmers' &c. Bank v. Tappan, 5 S. & M. 112—courts, 200¼; dower, 69, 81.
Farmers' &c. Bank, Stovall v.—8 S. & M. 305.
Farmers' &c. Bank, Tanning v.—8 S. & M. 139.
Farned v. Harris, 11 S. & M. 366—cred. s. 11, 16; fraud. conv. 241.
Farnham, National Mut. B. & L. Assn. v.—81 M. 364.
Farnsworth, Liverpool &c. Ins. Co. v.—72 M. 555.
Farnsworth Lumber Co. v. Fairley, 28 So. 569—tax. 440, 446.
Farquhar v. Alabama &c. R. Co. 78 M. 193—mast. & s. 131, 198.
Farr v. Farr, 34 M. 597—div. 93; eq. 143.
Farrar v. Gaillard, W. 269—cncts. 278; tender, 10.
Farrar, Pipes v.—64 M. 514.
Farrar, Terrell v.—W. 417.
Farrell, Myers v.—47 M. 281.
Farrer v. Clark, 29 M. 195—guard. & w. 8, 10, 166; judgm. 474.
Farrington, Davis v.—W. 304.
Farrish, Kerr v.—52 M. 101.
Farrish, Lewis v.—1 H. 547.
Farr, Moody v.—6 S. & M. 100.
Farr, Moody v.—27 M. 788.
Farr, Moody v.—33 M. 192.
Farrow v. State, 91 M. 509—civ. r. 10; const. law, 221; gr. jury, 8.
Farr, Yazoo &c. R. Co. v.—94 M. 557.
Farve v. Graves, 4 S. & M. 707—ex. & ad. 314b, 420, 544.
Fast v. Canton &c. R. Co. 77 M. 498—carr. 220.
Fatheree v. Fatheree, W. 311—des. & d. 41.
Fatheree v. Fletcher, 31 M. 265—des. & d. 93; eq. 327; gifts, 5; hus. & w. 49½; lim. of act. 73; parent & c. 9; sales, 202; slaves, 5, 7; witn. 105.
Fatheree v. Lawrence, 30 M. 416—wills, 205.
Fatheree v. Lawrence, 33 M. 585—ev. 67; wills, 117, 260, 302, 438, 445.
Fatheree v. Long, 5 H. 661—proc. 64, 135.
Fatheree, Lang v.—7 S. & M. 404.
Faulconer, Anderson v.—30 M. 145.
Faulk-Christian Lumber Co. Forrester v.—56 So. 162.
Fauntleroy, Lum v.—80 M. 757.
Faust v. Murphy, 71 M. 120—eq. 2; guard. & w. 15; offic. 37.
Faust, Yazoo &c. R. Co. v.—32 So. 9.
Faust, Yazoo &c. R. Co. v.—34 So. 356.
Faut v. Buchanan, 17 So. 371—const. law, 304.
Fay &c. Co. Hazlehurst Lumber Co. v.—18 So. 485.
Feamster, Austin v.—1 S. & M. 166.
Fearing v. Shafner, 62 M. 791—attch. 301; garn. 57, 138, 209; jud. s. 21, 31.
Fearn v. Mayers, 53 M. 458—trusts, 209.
Fearn v. Shirley, 31 M. 301—eq. 230; lim. of act. 72a, 73.
Fearne, Shirley v.—33 M. 653.
Fears v. Sykes, 35 M. 633—adv. pos. 2, 39, 84; lim. of act. 2, 169; slaves, 5.
Featherstone, Lawrence v.—10 S. & M. 345.
Feazell v. Soltzfus, 54 So. 444—costs, 132; plead. 221.
Federal Ins. Co. Sutherland v.—52 So. 689.
Feemster v. May, 13 S. & M. 275—cov. 26, 91; ven. & pur. 129, 308a.

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Feld v. Borodofski, 87 M. 727—ex. & ad. 211; ins. p. 80.
Feld v. Borodofski, 88 M. 31—ins. p. 80.
Feld v. Coleman, 72 M. 545—attch. 382; judgm. 439; lim. of act. 170.
Feld v. Portwood, 7 So. 492—attch. 355.
Feld v. Stewart, 78 M. 187—ev. 440.
Feld, Borodofski v.—88 M. 31.
Felder v. Meredith, W. 447—proc. 39.
Felder v. Wall, 26 M. 595—acct. 20, 22.
Felder, Atkinson v.—78 M. 83.
Felder, Simmons v.—1 Miss. Dec. 484.
Feld, Portwood v.—72 M. 542.
Felhour, Gilmer v.—45 M. 627.
Fellows v. Brown, 38 M. 541—attch. 3.
Fellows v. Griffin, 9 S. & M. 362—app. & e. 5; execution, 154b; judgm. 334.
Fellows v. Harris, 12 S. & M. 462—bills & n. 117, 236, 255, 427; ev. 354.
Fellows, McKenzie v.—52 So. 628.
Felt, Garrett v.—32 M. 137.
Felton, State v.—59 M. 402.
Felts, Pender v.—2 S. & M. 535.
Feltus v. Swan, 62 M. 415—princ. & a. 159.
Fenn v. Harrington, 54 M. 733—chat. m. 153; courts, 119; j. p. 44.
Fennell v. McGowan, 58 M. 261—bills & n. 135, 427; paymt. 5; witn. 140.
Fenner v. Boutte, 72 M. 271—attch. 175, 239.
Fenner, Bonnafee v.—6 S. & M. 212.
Fennerty, Bishop v.—46 M. 570.
Fergurson v. Applewhite, 10 S. & M. 301; app. & e. 171; trusts, 257.
Ferguson v. Bobo, 54 M. 121—app. & e. 1178; execution, 41; fraud. conv. 103, 184, 212, 237, 241; inf. 2, 29, 47, 59.
Ferguson v. Brown, 75 M. 214—app. & e. 546, 779; ev. 387; int. liq. 61, 65, 66, 75; judges, 41; trial, 41.
Ferguson v. Crowson, 25 M. 430—cred. s. 8; judgm. 860; lim. of act. 83.
Ferguson v. Ferguson, 5 So. 514—home. 198.
Ferguson v. Monroe County, 71 M. 524—int. liq. 25, 27, 32.
Ferguson v. Oliver, 8 S. & M. 332—app. & e. 202; exch. of prop. 19; plead. 382; sales, 122, 346, 466.
Ferguson v. Scott, 49 M. 500—ex. & ad. 323, 324, 334.
Ferguson v. Shepherd, 58 M. 804—guard. & w. 108.
Ferguson v. State, 71 M. 805—seduct. 29, 43, 46, 52.
Ferguson v. White, 18 So. 124—alt. inst. 11.
Ferguson, Ex parte, 59 M. 13—licens. 5½; mun. corp. 956.
Ferguson, Buckner v.—44 M. 677.
Ferguson-McKinney Dry Goods Co. Gulf &c. R. Co. v.—52 So. 797.
Ferguson-McKinney Dry Goods Co. Holmes v.—86 M. 782.
Ferguson, Price v.—66 M. 404.
Ferguson, Yerger v.—55 M. 190.
Fernwood Lumber Co. v. Meehan-Rounds Lumber Co. 85 M. 54—lis pens. 6; proc. 111.
Ferrall, Hoggatt v.—41 M. 642.
Ferrell, Western Assur. Co. v.—40 So. 8.
Ferrell, Western Assur. Soc. v.—92 M. 103.
Ferriday v. Selcer, Freem. Ch. 258—execution, 146, 206; inj. 175; judgm. 428.
Ferriday v. Selser, 4 H. 506—app. & e. 692, 723, 906, 1025, 1027, 1045; chat. m. 202; ev. 269; fraud, 64; fraud. conv. 293; jury, 92, 97; new tr. 42; sales, 244; ven. & pur. 243; witn. 112.
Ferriday, Selser v.—13 S. & M. 698.
Ferriere, Hosey v.—1 S. & M. 663.
Ferrill v. Dickerson, 63 M. 210—tax. 679.
Ferrill, Plenny v.—11 So. 6.
Ferris v. Wellborn, 64 M. 29—nuis. 19; waters, 38, 51, 61.
Fewell v. American Surety Co. 80 M. 782—garn. 64, 133; partners. 15, 17; u. s. 111.
Fewell v. Meridian, 90 M. 380—mun. corp. 830, 831.
Fewell, Snell v.—64 M. 655.
Fidelity Mut. Life Ins. Co. v. Miazza, 93 M. 18—ins. 147, 252, 255, 655, 668.
Fidelity Mut. Life Ins. Co. v. Miazza, 93 M. 422—app. & e. 1195; ins. 291, 668, 669.
Fidelity Mut. Life Ins. Co. Adams v.—94 M. 433.
Fidelity Mut. Life Ins. Co. Boyd v.—88 M. 562.
Fidelity &c. Co. v. Johnson, 72 M. 333—dep. 90; ins. 455, 645.
Fidelity &c. Co. v. B. F. Sturtevant Co. 86 M. 509—chat. m. 18, 46; execution, 115, 154.
Field v. Hawley, 12 S. & M. 320—plead. 218.
Field v. McKinney, 60 M. 763—app. & e. 671; garn. 124, 132; inj. 171.
Field v. Middlesex Banking Co. 77 M. 180—eq. 267; trusts, 232.
Field v. Morse, 1 S. & M. 347—execution, 154b.
Field v. Newburn, 91 M. 861—land. & t. 22, 246.
Field v. State, 39 M. 509—recogn. 11.
Field v. State, 57 M. 474—hom. 171, 267.

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Field v. Weir, 28 M. 56—app. & e. 525, 1040; assign. 47; cncts. 54; judgm. 386, 551, 665; new tr. 11, 182; parties, 4; plead. 204, 212, 218, 252, 415.
Field, Gregory v.—63 M. 323.
Field, Hanson v.—41 M. 712.
Field, McGehee v.—2 Miss. Dec. 25.
Field, Middlesex Banking Co. v.—84 M. 646.
Field, New Orleans &c. R. Co. v.—46 M. 573.
Fields, Evans v.—11 So. 224.
Field, Tucker v.—51 M. 191.
Field, Weir v.—67 M. 292.
Fife, Collins v.—55 So. 484.
Fife, Marble v.—69 M. 596.
Fikes v. State, 87 M. 251—ins. 12, 20, 22, 30.
Files v. McWilliams, 49 M. 578—counties, 165, 168; mand. 109, 179; states, 18c.
Files v. State, 50 So. 979—blasph. 3.
Fillingame, Hand v.—92 M. 185.
Filmer, McDugle v.—79 M. 53.
Filmer, McDugle v.—82 M. 200.
Filmore, Lay v.—75 M. 493.
Finch v. State, 53 M. 363—crim. l. 181, 183, 636.
Finch v. State, 64 M. 461—breach of p. 3; dis. c. 6; ind. 110.
Finch v. Tanner, 2 Miss. Dec. 209—ack. 53; tax. 656; tresp. 20.
Finch, Jones v.—37 M. 461.
Finley, Cocke v.—29 M. 127.
Finley, Hyde v.—26 M. 468.
Fink v. Henderson, 74 M. 8—assign. 1, 21, 75.
Finklea v. State, 94 M. 777—crim. l. 385; witn. 52a.
Finlay v. Marshall, 20 So. 864—bills & n. 527.
Finley v. Hunt, 56 M. 221—trial, 187; witn. 317.
Finley, Steen v.—25 M. 535.
Finnall, Freeman v.—Sm. & M. Ch. 623.
Finnell, Baynton v.—4 S. & M. 193.
Finney v. Harris, 30 M. 36—eq. 68; execution, 153c.
Finney v. Speed, 71 M. 32—app. & e. 349; ins. p. 94; ins. 102.
Finney, Peters v.—12 S. & M. 449.
Finney, Pickens v.—12 S. & M. 468.
Finucane v. Kearney, Freem. Ch. 65—frds. st. of, 114, 124, 129.
Finucane, Green v.—5 H. 542.
Finucane, Mangum v.—38 M. 354.
Fire Ins. Companies v. State, 75 M. 24—ind. 70.
Firemen's Fund Fire Ins. Co. Globe & Rutgers Fire Ins. Co. v.—52 So. 454.
First Nat. Bank v. Bloch, 82 M. 197—courts, 66; judges, 29.
First Nat. Bank v. Caperton, 74 M. 857—chat. m. 188; fraud. conv. 138; plgs. 11.
First Nat. Bank v. Cochran, 71 M. 175—attch. 306.
First Nat. Bank v. Cook Carriage Co. 70 M. 587—replev. 16; sales, 203, 241.
First Nat. Bank v. Fain Grocery Co. 87 M. 503—j. p. 86.
First Nat. Bank v. First Nat. Bank, 72 M. 258—garn. 95.
First Nat. Bank v. Hancock, 17 So. 736—attch. 375.
First Nat. Bank v. Merkel, 53 So. 350—bills & n. 364, 378.
First Nat. Bank v. Montgomery, 70 M. 550—trover, 32, 34.
First Nat. Bank v. Phillips, 71 M. 51—disc. 17; eq. 106.
First Nat. Bank v. Solomon, 71 M. 889—attch. 14, 280, 292, 304, 306.
First Nat. Bank v. Strauss, 66 M. 479—banks, 75, 166; bills & n. 146, 327; sales, 234.
First Nat. Bank, American Fire Ins. Co. v.—73 M. 469.
First Nat. Bank, Armour-Cudahy Packing Co. v.—69 M. 700.
First Nat. Bank, Brahan v.—72 M. 266.
First Nat. Bank, Continental Nat. Bank v.—84 M. 103.
First Nat. Bank, Donald v.—54 So. 721.
First Nat. Bank, Hinton v.—53 So. 344.
First Nat. Bank, Isom v.—52 M. 902.
First Nat. Bank, Kohlman v.—71 M. 843.
First Nat. Bank, Kretschmar v.—90 M. 363.
First Nat. Bank, McLeod v.—42 M. 99.
First Nat. Bank, Perkins v.—81 M. 358.
First Nat. Bank, Roy v.—33 So. 494.
First Nat. Bank, Roy v.—37 So. 641.
First Nat. Bank, Solomon v.—72 M. 854.
First Nat. Bank, Stringer Grand Lodge v.—55 So. 408.
First Nat. Bank, Sweetzer v.—73 M. 96.
First Nat. Bank, Thompson v.—84 M. 54.
First Nat. Bank, Thompson v.—85 M. 261.
First State Bank v. Lincoln, 53 So. 387—jury, 13, 14.
Fischer & Burnett Lumber Co. Mason v.—21 So. 5.
Fiser v. Mississippi &c. R. Co. 32 M. 359—corp. 88, 90; plead. 180.
Fisher v. Allen, 2 H. 611—indians, 23.
Fisher v. Battaile, 31 M. 471—appr. 7; atty. & c. 77; judgm. 856.
Fisher v. Fisher, 43 M. 212—lim. of act. 84 85.

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Fisher v. Grimes, Sm. & M. Ch. 107—dower, 11.
Fisher v. Kuhn, 54 M. 480—frds. st. of, 98, 118, 129.
Fisher v. Leach, 10 S. & M. 313—app. & e. 1003; judgm. 645.
Fisher, Barringer v.—45 M. 200.
Fisher, Battaile v.—36 M. 321.
Fisher, Burrus v.—23 M. 228.
Fisher, Burrus v.—27 M. 418.
Fisher, Evans v.—40 M. 643.
Fisher, Garrison v.—26 M. 352.
Fisher, Gasquet v.—7 S. & M. 313.
Fisher, Harris v.—5 S. & M. 74.
Fisher, Heizer v.—13 S. & M. 672.
Fisher, Holman v.—49 M. 472.
Fisher, Hughes v.—W. 516.
Fisher, Newell v.—11 S. & M. 431.
Fisher, Newell v.—24 M. 392.
Fisher, Woodward v.—11 S. & M. 303.
Fish, Turner v.—28 M. 306.
Fisk v. McNiel, 1 H. 535—wills, 752.
Fisk, Bonnafee v.—13 S. & M. 682.
Fisk, Cook v.—W. 423.
Fisk, Fox v.—6 H. 328.
Fisk, James v.—9 S. & M. 144.
Fisk, Officers of Court v.—7 H. 403.
Fisk, Torrey v.—10 S. & M. 590.
Fitch v. Asher, 56 M. 571—plead. 115; sales, 355.
Fitch v. Lawton, 6 H. 371—corp. 468.
Fitch v. Scott, 3 H. 314—atty. & c. 101, 110, 116.
Fitch v. Stamps, 6 H. 487—assign. 49; atty. & c. 110; bills & n. 17, 493; eq. 344; partners. 14, 159.
Fitch, Swisher v.—1 S. & M. 541.
Fite, Kansas City &c. R. Co. v.—67 M. 373.
Fitts v. Huff, 63 M. 594—tax. 710.
Fitts, Graham v.—53 M. 307.
Fitts, McGehee v.—65 M. 357.
Fitz v. Lawson, 28 M. 790—banks, 78.
Fitzcox v. State, 52 M. 923—crim. l. 508, 509, 780; ind. 34.
Fitz-Gerald v. Bailey, 58 M. 658—guard. & w. 147a.
Fitzgerald v. Fowlkes, 60 M. 270—land. & t. 229b, 246, 248, 254, 260; liens, 1, 16.
Fitzgerald v. Reid, 9 S. & M. 94—cncts. 265; ins. p 73; ins. 100.
Fitzgerald v. Rees, 67 M. 473—home. 61; statut. 204.
Fitz-Gerald, Bailey v.—56 M. 578.
Fitzgerald, State v.—76 M. 502.
Fitzgerald, Yazoo &c. R. Co. v.—50 So. 631.
Fitzhugh, Thornton v.—10 S. & M. 438.
Fitzner, Southern Express Co. v.—59 M. 581.
Fitzpatrick v. Beal, 62 M. 244—guard. & w. 76, 87.
Fitzpatrick v. Ray, 4 S. & M. 645—j. p. 206.
Fitzpatrick, Kinley v.—4 H. 59.
Fitzpatrick, Trust Co. v.—71 M. 347.
Flaherty, Bell v.—45 M. 694.
Flaig, Northrop v.—57 M. 754.
Flake v. Central Hardware Co. 96 M. 838—mech. liens, 261.
Flanneken v. Wright, 64 M. 217—judgm. 407, 507; land. & t. 279; replev. 127.
Flanniken, Jonas v.—69 M. 577.
Flash, Baldwin v.—58 M. 593.
Flash, Baldwin v.—59 M. 61.
Flask, Starling &c. Co. v.—16 So. 875.
Flask, Van Vacter v.—1 S. & M. 393.
Fleeson v. Nicholson, W. 247—dower, 46.
Fleming v. Baily, 44 M. 132—attch. 375; land. & t. 129.
Fleming v. Fulton, 6 H. 473—bills & n. 130, 404, 510, 537; trial, 141.
Fleming v. Grafton, 54 M. 79—cred. s. 16; eq. 87; fraud. conv. 201, 212, 241, 248; lim. of act. 104; mtg. 255; quiet. t. 29.
Fleming v. Hughes, 6 So. 842—use & o. 9.
Fleming v. Nunn, 61 M. 603—judgm. 153, 409; j. p. 128.
Fleming v. State, 60 M. 434—app. & e. 701, hom. 314.
Fleming, Ex parte, 60 M. 910—crim. l. 1003, 1219; pardon, 4.
Fleming, Harman v.—25 M. 135.
Fleming, Jarnigan v.—43 M. 710.
Fletcher v. Benbrook, 5 S. & M. 619—assum. 1; costs, 21.
Fletcher v. Gillan, 62 M. 8—lim. of act. 148; paymt. 45.
Fletcher v. Rapp, Sm. & M. Ch. 374—judgm. 440, 854.
Fletcher v. Sovereign Camp Woodmen of the World, 81 M. 249—app. & e. 1049; ins. 659, 819.
Fletcher v. State, 60 M. 675—app. & e. 1051; crim. l. 605, 631, 1144, 1166½, 1169; hom. 338b; judges, 29; jury, 133.
Fletcher v. Trewalla, 60 M. 963—estop. 97; tax. 435.
Fletcher v. Wilson, Sm. & M. Ch. 376—eq. 17, 23, 195, 197; estop. 36; hus. & w. 137; ven. & pur. 114, 123c.
Fletcher, Fatheree v.—31 M. 265.
Fletcher, Johnson v.—54 M. 628.
Fletcher, Nash v.—44 M. 609.
Fletcher, Supreme Lodge v.—78 M. 377.

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Flint, Gates v.—39 M. 365.
Flint, Leek v.—33 So. 494.
Flippin, Williams v.—68 M. 680.
Flood, Alexander v.—77 M. 925.
Flora v. American Express Co. 92 M. 66—const. law, 46; int. liq. 178; trial, 169.
Flournoy v. Burke, 4 H. 337—app. & e. 824.
Flournoy v. Smith, 3 H. 62—app. & e. 398; execution, 249; motions, 2; tax. 816.
Flower v. State, W. 318—jury, 131.
Flowers v. State, 85 M. 591—crim. l. 396, 415, 684, 1169; hom. 250, 267.
Flowers, Albright v.—52 M. 246.
Flowers-Carruth Co. v. Moyse, 95 M. 174—land. & t. 200.
Flowers, Carson v.—7 S. & M. 99.
Flowers, Collins v.—1 H. 26.
Flowers, Gulf &c. R. Co. v.—85 M. 633.
Flowers, Hamilton v.—57 M. 14.
Flowers, Haring v.—91 M. 242.
Flowers, Hayes v.—25 M. 169.
Flowers, Stewart v.—44 M. 513.
Flower, State v.—W. 318.
Flowers, Wilkinson v.—37 M. 579.
Floyd v. Adler, 51 So. 897—inj. 103.
Floyd v. Arky, 89 M. 162—cncts. 171; sales, 371.
Floyd v. Calvert, 53 M. 37—marr. 20, 26, 38, 40, 41.
Floyd v. Pearce, 57 M. 140—lim. of act. 146.
Floyd, Ex parte, 60 M. 913—bail. 49.
Floyd, Southern R. Co. v.—55 So. 287.
Flurry, Moores v.—87 M. 707.
Fly v. King, 71 M. 537—app. & e. 1028.
Flynn, Gothard v.—25 M. 58.
Flynt v. Hubbard, 57 M. 471—mtg. 151; trusts, 103, 342; ven. & pur. 239.
Flynt, Hubbard v.—58 M. 266.
Fogg v. Bank of Friar's Point, 80 M. 750—banks, 80, 130, 154; eq. 54.
Foley v. McDonald, 46 M. 238—ex. & ad. 325, 340; proc. 63, 98, 102.
Foley, Carmichael v.—1 H. 591.
Foley, Davis v.—W. 43.
Folkes v. Berry, see Berry v. Folkes.
Folkes v. Hayden, 29 M. 123—action, 33; cred. s. 3, 8; marshaling, 8.
Folkes v. State, 63 M. 81—licens. 16.
Folkes v. Walter Pratt Co. 86 M. 254—cncts. 94; sales, 37, 40.
Folkes, Berry v.—60 M. 576.
Folkes, Dubuisson v.—30 M. 432.
Folsom, Fore v.—4 H. 282.
Fonda v. Jones, 42 M. 792—ven. & pur. 266a, 281.
Fonda, Scharff v.—71 M. 627.
Fonda, Smith v.—64 M. 551.
Fondren v. Durfee, 39 M. 324—ev. 117, 268; sales, 281; slaves, 7a.
Fonte v. Horton, 36 M. 350—ex. & ad. 125, 299, 463, 477.
Fonte v. McDonald, 27 M. 610—eq. 430.
Fonte, Grinstead v.—32 M. 120.
Fooshee v. State, 82 M. 509—crim. l. 594; seduct. 29.
Fooshee, Beeks v.—25 M. 55.
Fooshee, Dilworth v.—34 M. 288.
Foot v. Goldman, 68 M. 529—inf. 54.
Foote v. Brown, 60 M. 155—counties, 189, 192; mand. 104; tax. 527.
Foote v. Dismukes, 71 M. 110—excep. 26; tax. 697.
Foote v. Farmer, 71 M. 148—lim. of act. 26.
Foote v. Hambrick, 70 M. 157—alt. of inst. 11; home. 117; mtg. 452.
Foote v. John E. Hall Commission Co. 84 M. 445—attch. 155.
Foote v. Myers, 60 M. 790—lis pens. 22; mand. 15.
Foote v. Noxubee County, 67 M. 156—mand. 100, 101.
Foote v. Vanzandt, 34 M. 40—clks. of c. 73; statut. 241.
Foote, Bush v.—58 M. 5.
Foote, Cocke v.—49 M. 181.
Foote, English v.—8 S. & M. 444.
Foote, Gibson v.—40 M. 788.
Foote, Hall Commission Co. v.—90 M. 422.
Foote, Hendrick v.—57 M. 117.
Foote, Moore v.—32 M. 469.
Foote, Summers v.—28 M. 671.
Foote, Yerger v.—48 M. 62.
Forbes v. Meridian, 86 M. 243—const. law, 282; mun. corp. 26, 29, 34.
Forbes v. Navra, 63 M. 1—attch. 191, 332, 353.
Forbes, Brown v.—8 S. & M. 498.
Forbes, Hansell v.—33 M. 42.
Forbes, Hart v.—60 M. 745.
Forbes, McRaven v.—6 H. 569.
Forbes, Parvis v.—5 H. 518.
Forbes Piano Co. v. Hennington, 53 So. 777—j. p. 135.
Forbes, Simms v.—86 M. 412.
Forbes, Smith v.—89 M. 141.
Forcheimer, Mahorner v.—73 M. 302.
Ford v. Coleman, 41 M. 651—judgm. 17d; proc. 135.
Ford v. Dyer, 26 M. 243—attch. 302; proc. 50; replev. 5.
Ford v. Ford, W. 505—new tr. 94.

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Ford v. Hurd, 4 S. & M. 683—attch. 128, 145, 301; garn. 124, 177.
Ford v. McGehee, Freem. Ch. 460—trusts, 357.
Ford v. Russell, Freem. Ch. 42—ex. & ad. 98; mtg. 347.
Ford v. State, 73 M. 734—crim. l. 47, 50, 331.
Ford v. State, 75 M. 101—crim. l. 527.
Ford v. State, 86 M. 123—gaming, 64, 98, 99.
Ford v. State, 50 So. 497—breach of p. 15, 20, 21; crim. l. 1179.
Ford v. Surget, 46 M. 130—war, 9.
Ford v. Wilson, 35 M. 490—adv. pos. 11, 12, 30, 115.
Ford v. Woodward, 2 S. & M. 260—attch. 128, 139; garn. 71.
Ford, Calmes v.—6 S. & M. 190.
Ford, Childress v.—10 S. & M. 25.
Ford, Dearing v.—13 S. & M. 269.
Ford, Goodman v.—23 M. 592.
Ford, Grigsby v.—3 H. 184.
Ford, Kausler v.—47 M. 289.
Ford, McGee v.—5 S. & M. 769.
Ford, Nunnery v.—92 M. 263.
Ford, Packet v.—4 H. 246.
Ford, Page v.—2 S. & M. 266.
Ford, Shewalter v.—34 M. 417.
Ford, Vicksburg Waterworks Co. v.—52 So. 208.
Ford, Wood v.—29 M. 57.
Fore v. Alabama &c. R. Co. 87 M. 211—carr. 347; trial, 167.
Fore v. Folsom, 4 H. 282—judgm. 153.
Fore v. State, 75 M. 727—crim. l. 431, 761, 763, 815; hom. 276, 300g.
Fore v. Williams, 35 M. 533—app. & e. 1028, 1051; eject. 92; ev. 341; new tr. 41; pub. lands, 58, 60.
Fore, Puckett v.—77 M. 391.
Forehand, Grist v.—36 M. 69.
Foreman v. State, 95 M. 77—crim. l. 599.
Fore, Sam v.—12 S. & M. 413.
Forman, Stewart v.—90 M. 85.
Forniquet v. Forestall, 34 M. 87—eq. 150; ex. & ad. 120; ven. & pur. 334.
Forniquet v. Tegarden, 24 M. 96—excep. 56; sheriffs, 89.
Forniquet v. West Feliciana &c. R. Co. 6 H. 116—banks, 181; bills & n. 130; ev. 215, 240; statut. 192, 199.
Forrest County, Turner v.—see Turner v. Hattiesburg.
Forrester v. Faulk-Christian Lumber Co. 56 So. 162—sales, 173.
Forsdick v. Quitman County, 25 So. 294—tax. 362½, 459.
Forsdick v. Tallahatchie County, 76 M. 622—pub. lands, 55.
Forsdick, Hinson v.—25 So. 353.
Forsdick, Walton v.—25 So. 668.
Forsee v. Alabama &c. R. Co. 63 M. 66—carr. 256, 319, 381; ev. 243; neg. 119.
Forshee, Porter v.—41 M. 337.
Forstall, Evans v.—58 M. 30.
Forstall, Forniquet v.—34 M. 87.
Forsythe, Nutt v.—84 M. 211.
Fort v. Battle, 13 S. & M. 133—arb. & a. 3; ex. & ad. 296, 471, 486, 508, 515; hus. & w. 25; inf. 84.
Fort, Champenois v.—45 M. 355.
Fortenberry v. State, 55 M. 403—crim. l. 588, 829; hom. 115, 116; jury, 72, 104; trial, 252.
Fortenberry v. State, 56 M. 286—embez. 23; offic. 119, 120.
Fortenberry, ex parte, 53 M. 428—bail, 41.
Fortinberry v. Holmes, 89 M. 373—parent. & c. 15.
Fortinberry, State v.—54 M. 316.
Fort, Miss. Cent. R. Co. v.—44 M. 423.
Fortner v. Parham, 2 S. & M. 151—bills & n. 404, 416, 420.
Fortner, Hemphill v.—11 S. & M. 344.
"For use of," classified in name of nominal plaintiff.
Fosdick v. Board of Levee Commissioners, 76 M. 859—const. law, 137.
Fossett v. Wilson, 59 M. 1—lev. 37; paymt. 87.
Foster v. Alston, 6 H. 406—hab. corp. 99.
Foster v. Bisland, 23 M. 296—guard. & w. 15, 173, 177.
Foster v. Canning Co. 71 M. 624—lim. of act. 39.
Foster v. Collins, 5 S. & M. 259—plead. 111; proc. 35, 42, 155, 161.
Foster v. Hicks, 93 M. 219—death, 101, 107.
Foster v. Jones, 17 So. 893—eq. 93; judgm. 17; partit. 45, 95, 99, 109.
Foster v. Jordan, 54 M. 509—app. & e. 1186.
Foster v. Metts, 55 M. 77—bills & n. 91, 106; carr. 4; comp. 6; cncts. 74.
Foster v. Newton, 46 M. 661—partit. 45.
Foster v. Pinckard, 5 S. & M. 792—disc. 25.
Foster v. Pugh, 12 S. & M. 416—eq. 388; execution, 256; fraud. conv. 29b, 140.
Foster v. Yazoo &c. Co. 72 M. 886—death, 37; lim. of act. 72.
Foster v. Schaffer, 84 M. 197—ex. & ad. 227.
Foster v. Simmons, 40 M. 585—eq. 119; proc. 64, 135.
Foster v. State, 31 M. 421—gr. jury, 40.

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Foster v. State, 52 M. 695—larc. 41, 68, 85.
Foster v. State, 70 M. 755—crim. l. 475, 636, 662; hom. 189, 190; witn. 268.
Foster v. State, 92 M. 257—crim. l. 422.
Foster v. Sumner, 3 S. & M. 606—des. & d. 142; ex. & ad. 453b; judgm. 870.
Foster v. Walker, 34 M. 365—paymt. 64; release, 1, 54.
Foster v. Wootèn, 67 M. 540—attch. 345; Sunday, 10, 13.
Foster, Alston v.—Freem. Ch. 732.
Foster, Citizens' Mut. Insurance Co. v.—64 M. 288.
Foster, Citizens' Mut. Ins. Co. v.—1 Miss. Dec. 143.
Foster, Columbus Ins. Co. v.—64 M. 288.
Foster, Coopwood v.—12 S. & M. 718.
Foster, Guif Coast Canning Co. v.—17 So. 683.
Foster, Hamblin v.—4 S. & M. 139.
Foster, Jones v.—50 M. 47.
Foster, Kaufman v.—89 M. 388.
Foster, Ligon v.—63 M. 241.
Foster, Newman v.—3 H. 383.
Foster, Newman v.—1 So. 505.
Foster, Richardson v.—73 M. 12.
Foster, Scroggins v.—76 M. 318.
Foster, Yazoo &c. R. Co. v.—23 So. 581.
Fotheree v. Lawrence, 30 M. 416—ev. 82.
Fouche, Wallace v.—27 M. 266.
Foules v. Foules, 33 So. 972—fraud. conv. 172.
Foundry Co. v. Ice Co.—see Ross-Meehan &c. Co. v. Pascagoula Ice Co.
Foundry Co. Hart v.—72 M. 809.
Fountain, Moore v.—8 So. 509.
Fournier v. State, 96 M. 417—larc. 38.
Foute v. Bacon, 24 M. 156—lim. of act. 143, 150, 151.
Foute v. Campbell, 7 H. 377—execution, 158; judgm. 789, 800a.
Foute v. Fairman, 48 M. 536—execution, 272; judgm. 780, 785; mtg. 48.
Foute v. McDonald, 27 M. 610—eq. 22.
Foute, Grinstead v.—26 M. 476.
Fowler v. Austin, 1 H. 156—assum. 3, 23.
Fowler v. Kell, 14 S. & M. 68—ex. & ad. 17.
Fowler v. McCartney, 27 M. 509—fraud. conv. 237; judgm. 800a.
Fowler v. Payne, 49 M. 32—estop. 68; inj. 26, 207; land. & t. 152, 154, 223; set-off, 4; ten. in c. 49.
Fowler v. Payne, 52 M. 210—app. & e. 266; refer. 100; set-off, 4.
Fowler v. State, 95 M. 510—crim. l. 1170.
Fowler, Ross v.—42 M. 293.
Fowler, Springfield Fire &c. Ins. Co. v.—31 So. 810.
Fowlkes v. Lea, 84 M. 509—ev. 408, 419; lim. of act. 23.
Fowlkes v. Lombard, 11 So. 724—guard. & w. 160.
Fowlkes, Fitzgerald v.—60 M. 270.
Fox v. Coon, 64 M. 465—quiet. t. 9; partit. 12; tax. 729; ten. in c. 20.
Fox v. Fisk, 6 H. 328—acct. acti. on, 1; discov. 22; mon. recd. 6; princ. & a. 95, 184.
Fox v. Hilliard, 35 M. 160—bills & n. 208; ev. 91; plead. 88, 194.
Fox v. Matthews, 33 M. 433—app. & e. 171, 276, 995, 1133; witn. 318.
Fox v. Miller, 71 M. 598—inj. 185.
Fox v. Pearl River Lumber Co. 80 M. 1—est. 5; tax. 60, 111; woods, 1.
Fox v. Smith, 39 M. 350—cncts. 197; plead. 131.
Fox v. State, 7 So. 221—crim. l. 1085.
Fox v. Wallace, 31 M. 660—eq. 87; judgm. 403.
Fox. Cooper v.—67 M. 237.
Fox, Dunlap v.—2 So. 169.
Fox, Meek v.—42 M. 513.
Fox, Staples v.—45 M. 667.
Foxworth v. Bullock, 44 M. 457—hus. & w. 86, 90, 148, 156; ven. & pur. 100, 281.
Foxworth v. Magee, 44 M. 430—hus. & w. 85, 97, 171.
Foxworth v. Magee, 48 M. 532—app. & e. 171, 870.
Foxworth, Applewhite v.—79 M. 773.
Foxworth, Atkinson v.—53 M. 733, 741.
Foxworth, Cowart v.—67 M. 322.
Foxworth, Holcomb v.—34 M. 265.
Foxworth, Jordan v.—48 M. 607.
Foxworth, Marion County v.—83 M. 677.
Foxworth, Stewart v.—52 So. 354.
Foy v. Foy, 25 M. 207—eq. 392, 430, 442.
Foy, Davis v.—7 S. & M. 64.
Foy, Parker v.—43 M. 260.
Fragiacomo, State v.—71 M. 417.
France v. State, 83 M. 281—forg. 3, 29.
Francher, Hairston v.—7 S. & M. 249.
Francis v. State, 87 M. 493—larc. 54.
Francis, Boyce v.—56 M. 573.
Francis, Germania Fire Ins. Co. v.—52 M. 457.
Francis, Grigsbey v.—2 H. 845.
Francis, Mobile &c. R. Co. v.—9 So. 508.
Francis, Prescott v.—4 S. & M. 633.
Francis, Robinson v.—7 H. 458.
Francis, Smith v.—7 S. & M. 507.

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Frank v. Colonial &c. Mortg. Co. 86 M. 103—mtg. 334, 342.
Frank v. Coltraine, 61 M. 606—deeds, 109; ven. & pur. 80.
Frank v. Doughty, 47 So. 643—fraud. conv. 27.
Frank v. Eltringham, 65 M. 281—frds. st. of, 103, 107, 118.
Frank v. Memphis &c. Co. 52 M. 570—carr. 172, 174.
Frank v. State, 39 M. 705—burg. 9, 42; crim. l. 519, 520, 813, 815, 923, 937, 967; jury, 110; slaves, 18c.
Frank v. State, 67 M. 125—rec. s. goods, 1.
Frank v. Stephenson, 21 So. 778—fraud. conv. 294.
Frank v. Webb, 67 M. 462—ev. 240; inf. 61; partners. 83, 258, 258b.
Frank, Clarke v.—64 M. 827.
Frank, Covington v.—77 M. 606.
Frank, Covington v.—28 So. 20.
Frankenbush, Heckler v.—76 M. 780.
Frank Gardener Hardware &c. Co. Smith v.—83 M. 654.
Frank Gardner Hardware &c. Co. Warren v.—95 M. 284.
Frank, Harris v.—52 M. 155.
Frank, Jarnigan v.—59 M. 393.
Franklin Academy, Winston v.—28 M. 118.
Frank, Wright v.—61 M. 32.
Frank &c. Co. v. Robinson, 65 M. 162—exemp. 4; partners. 162; sales, 95, 301.
Franklin v. Beatty, 27 M. 347—hus. & w. 79, 168.
Franklin Fire Ins. Co. v. Taylor, 52 M. 441—ins. 128, 136.
Franklin, Hill v.—54 M. 632.
Franklin, Jameson v.—6 H. 376.
Franklin, Ragsdale v.—25 M. 143.
Frank, Menken v.—57 M. 732.
Frank, Menken v.—58 M. 283.
Frank, Purnell v.—68 M. 639.
Franks v. Wanzer, 25 M. 121—app. & e. 963; contin. 10; crim. l. 1151; ex. & ad. 48, 114, 475; princ. & a. 79.
Franks, Mobile &c. R. Co. v.—41 M. 494.
Franks, Shackelford v.—25 M. 49.
Frantz v. Dobson, 64 M. 631—tax. 225.
Fraser, Union Nat. Bank v.—63 M. 231.
Frazer v. Gervais, W. 72—cncts. 94; fraud, 15.
Frazer v. Robinson, 42 M. 121—cncts. 108; deeds, 48; ven. & pur. 53.
Frazer, Daniel v.—40 M. 507.
Frazier v. Warfield, 9 S. & M. 220—bills & n. 10, 67.
Frazier, Falconer v.—7 S. & M. 235.
Frazier, Howard v.—2 Miss. Dec. 578.
Frazier, Madison County v.—78 M. 880.
Frazier, Medford v.—58 M. 241.
Frazier, Murff v.—41 M. 408.
Frederick v. Mayers, 89 M. 127—ease. 7; estop. 89; licens. 57.
Frederick, Bias v.—65 M. 410.
Fredericks, Sproule v.—69 M. 898.
Frederic, New Orleans &c. R. Co. v.—46 M. 1.
Freed v. American Fire Ins. Co. 90 M. 72—ins. 605.
Freeland v. Compton, 30 M. 424—cncts. 35.
Freeland v. McCaleb, 2 H. 756—ev. 183.
Freeland v. Mann, 1 S. & M. 531—plead. 384.
Freeland, Brown v.—34 M. 181.
Freeland, Davis v.—32 M. 645.
Freeland, Scott v.—7 S. & M. 409.
Freeland, Whitney v.—26 M. 481.
Freeman v. Cunningham, 57 M. 67—eject. 13, 25; estop. 91; mtg. 187.
Freeman v. Finnall, Sm. & M. Ch. 623—eq. 43, 148; inj. 175.
Freeman v. Guion, 11 S. & M. 58—eq. 2; garn. 66, 69.
Freeman v. Keene, 49 So. 567—sales, 122.
Freeman v. Ledbetter, 43 M. 165—ven. & pur. 285.
Freeman v. Lee County, 66 M. 1—anim. 91; counties, 95, 210.
Freeman v. Malcom, 11 S. & M. 53—garn. 66, 164, 184.
Freeman v. Rhodes, 3 S. & M. 329—ex. & ad. 460, 509.
Freeman v. State, 29 So. 75—crim. l. 114, 116, 575.
Freeman v. Stewart, 41 M. 138—partners. 179, 180, 247.
Freeman v. Wilson, 51 M. 329—deeds, 71; mtg. 26, 31, 37.
Freeman v. Winchester, 10 S. & M. 577—corp. 90; rec. 167.
Freeman, Clay v.—74 M. 816.
Freeman, Dozier v.—47 M. 647.
Freeman, Kerr v.—33 M. 292.
Freeman, Kellogg v.—50 M. 127.
Freeman, Ryan v.—36 M. 175.
Freemans v. Ammons, 91 M. 672—inj. 36; tresp. 20.
Freeman, State v.—90 M. 315.
Free, Southern R. Co. v.—95 M. 739.
Frelick v. Turner, 26 M. 393—guard. & w. 58, 149, 162.
French v. Canton &c. R. Co. 74 M. 542—trial, 167, witn. 261.

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French v. Carson, 6 So. 613—new tr. 141; tax. 606, 608.
French v. Davis, 38 M. 167—des. & d. 108; elect. rem. 8; ex. & ad. 93, 314g, 315, 437; lim. of act. 85.
French v. Davis, 38 M. 218—debt, act. 17; ex. & ad. 453b.
French v. Ladd, 57 M. 678—ev. 345; tax. 679, 679a.
French v. McAndrew, 61 M. 187—dower, 49; inf. 31; tax. 771.
French v. Picard, 49 M. 320—agric. 12.
French v. Rogillio, 40 So. 68—judgm. 949.
French v. Sale, 60 M. 516—attch. 308; witn. 285.
French v. Sale, 63 M. 386—app. & e. 909, 926; crim. l. 636; excep. 11; trial, 41, 190, 194; witn. 353.
French v. State, 52 M. 759—sheriffs, 3; tax. 547.
French v. State, 53 M. 651—app. & e. 1173; judgm. 17d; statut. 151, 277; tax. 545, 570b.
French, Brasfield v.—59 M. 632.
French, Canton &c. R. Co. v.—68 M. 22.
French, Canton &c. R. Co. v.—75 M. 939.
French, Crane v.—38 M. 503.
French, Klein v.—57 M. 662.
French, Louisville &c. R. Co. v.—69 M. 121.
French, Sale v.—61 M. 170.
Fresno Pkg. Co. v. Lyon Co. 53 So. 585—ev. 440; sales, 414, 417.
Fretwell v. Dinsmore, W. 484—dam. 197; judgm. 128a.
Friar v. State, 3 H. 422—courts, 64; crim. l. 627, 631, 873, 956, 957; excep. 8; gr. jury, 21.
Fried, Alabama &c. R. Co. v.—81 M. 314.
Friedberg, Sheffield v.—84 M. 188.
Friedlander v. Pugh, 43 M. 111—auc. 11.
Friedlander, Lear v.—45 M. 559.
Friedman, English v.—70 M. 457.
Friedman, Locke v.—90 M. 3.
Frierson v. Williams, 57 M. 451—hus. & w. 110½, 117, 146½.
Frierson, Cooper v.—48 M. 300.
Frierson, Webb v.—15 So. 934.
Friley v. Hendricks, 27 M. 412—eq. 442, 457.
Friley v. White, 31 M. 442—hus. & w. 111.
Friley, Cook v.—61 M. 1.
Frisby v. Harrison, 30 M. 452—appr. 5; courts, 198; ex. & ad. 314d, 314g, 508a; hus. & w. 25; inf. 76.
Frisby, Cogan v.—36 M. 178.
Frith v. State, 52 So. 786—obst. just. 6.
Fritz v. Williams, 16 So. 359—libel, 40, 100, 101, 123.
Fritz, Ex parte, 86 M. 210—com. 15; const. law, 70, 278; crim. l. 84, 90; em. dom. 2; fish, 1, 8, 15; game, 9; statut. 77.
Frizell v. White, 27 M. 198—app. & e. 867; replev. 8; trial, 206.
Frost v. Cook, 7 H. 357—attch. 77, 129.
Frost v. Doyle, 7 S. & M. 68—hus. & w. 111, 156.
Frost v. Patrick, 3 S. & M. 783—garn. 143.
Frost v. State, 94 M. 104—rape, 34, 48.
Frost, Taylor v.—39 M. 328.
[illegible]ry v. Prewett, 56 M. 783—ev. 419; ven. & pur. 11, 254, 281.
Fryar v. Fryar, 62 M. 205—mtg. 376.
Fugate v. State, 82 M. 189—jury, 103, 133.
Fugate v. State, 85 M. 86—crim. l. 414, 823, 834; jury, 131.
Fugate v. State, 85 M. 94—crim. l. 997.
Fugler v. State, 58 M. 829—crim. l. 636, 662.
Fulcher v. State, 82 M. 630—hom. 300c; jury, 110.
Fulcord v. Hamberlin, 4 S. & M. 649—bills & n. 489; plead. 237.
Fulgham, Marshall v.—4 H. 216.
Fulgham, Tutt v.—5 H. 621.
Fuller v. Davis, 63 M. 78—mtg. 342c.
Fuller v. Jackson, 52 So. 873—int. liq. 122.
Fuller v. State, 83 M. 30—crim. l. 923, 956, 1177; gaming, 99.
Fuller v. State, 85 M. 199—crim. l. 654; gr. jury, 23.
Fuller, Seltzer v.—6 S. & M. 185.
Fullerton v. McBride, 90 M. 420—mtg. 373.
Fullerton, Henry v.—13 S. & M. 631.
Fullilove v. Banks, 62 M. 11—hab. corp. 99.
Fullwood v. State, 67 M. 554—crim. l. 935; elec. 227; int. liq. 36, 166.
Fulmer v. Illinois Cent. R. Co. 68 M. 355—r. r. 310, 350.
Fulmer, Carey v.—74 M. 729.
Fulmer, Hill v.—39 So. 53.
Fulton v. Fulton, 36 M. 517—app. & e. 339; div. 37, 47, 57, 110, 176; eq. 15; ev. 120.
Fulton v. Fulton, 30 M. 586—wills, 782.
Fulton v. Hughes, 63 M. 61—partners. 183; witn. 388.
Fulton v. McAfee, 5 H. 751—eject. 87; pub. lands, 34, 51, 96, 114, 115; ven. & pur. 161.
Fulton v. Woodman, 40 M. 593—eq. 23; j. adv. 5; trover, 46.
Fulton v. Woodman, 54 M. 158—eq. 340, 420; fraud. conv. 107, 196, 270; ven. & pur. 238.
Fulton, Bohannon v.—31 M. 348.
Fulton, Fleming v.—6 H. 473.
Fulton, Graves v.—7 H. 592.
Fulton, Pontotoc v.—79 M. 511.

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Fulton, Woodman v.—47 M. 682.
Fulton, Yazoo &c. R. Co. v.—71 M. 385.
Fultz v. House, 6 S. & M. 404—cncts. 335; execution, 36; release, 38.
Fultz v. Peterson, 78 M. 128—mtg. 34, 37.
Fultz, Cook v.—10 S. & M. 369.
Fultz, Copes v.—1 S. & M. 623.
Fultz, House v.—13 S. & M. 39.
Funchess v. Seibe, 26 M. 634—wills, 471.
Funches, Fanning v.—60 M. 541.
Funderburk v. State, 75 M. 20—crim. l. 877; ind. 91; jury, 81; mal. mis. 1, 3.
Funk v. McCullough, 24 M. 481—attch. 47.
Funston v. Metcalf, 40 M. 504—pub. lands, 58, 60.
Fuqua v. Tindall, 11 S. & M. 465—app. & e. 548; discov. 19; partners. 159.
Fuqua, Bailey v.—24 M. 497.
Fuqua, Gulf &c. R. Co. v.—84 M. 490.
Fuqua, Richards v.—28 M. 792.
Fuqua, Stewart v.—W. 175.
Fuqua, Walker v.—24 M. 640.
Furlong v. State, 58 M. 717—lim. of act. 11, 22, 48; sheriffs, 158.
Furlong, State v.—60 M. 839.
Furness v. Porter, W. 442—mal. pros. 71.
Furniss v. Meredith, 43 M. 302—app. & e. 923.
Furniss, Bird v.—33 M. 44.
Furniss, De Ford v.—43 M. 132.
Furr v. Morgan, 55 M. 389—ven. & pur. 278.
Furr v. Speed, 74 M. 423—libel 7, 100, 101, 123, 124.
Furr, Pearce v.—2 S. & M. 54.
Furr, Thompson v.—57 M. 478.
Furst v. Pease, 52 So. 257—estop. 32.
Fusz, Armstrong v.—16 So. 532.
Futch v. Jeffries, 59 M. 506—eq. 384; hus. & w. 110, 117.
Futch, Johnson v.—57 M. 73.
Futrell, Richardson v.—42 M. 525.
Fyler, Rabe v.—10 S. & M. 440.

G

Gabbart v. Bauer, 38 So. 548—app. & e. 494, 529.
Gabbert v. Wallace, 66 M. 618—app. & e. 169, 676; chat. m. 213; mtg. 243.
Gables v. State, 54 So. 833—crim. l. 785b; witn. 379.
Gadberry v. Perry, 27 M. 119—ex. & ad. 510a.
Gadberry v. Sheppard, 27 M. 203—deeds, 97, 155; counties, 36.
Gaddis v. Palmer, 60 M. 758—j. p. 159.
Gaddis, Blalack v.—33 M. 452.
Gaddis, Lepnick v.—72 M. 200.
Gaddis, Montague v.—37 M. 453.
Gaddy, Carver Gin &c. Co. v.—62 M. 201.
Gage v. Illinois Cent. R. Co. 75 M. 17—carr. 272.
Gage, Dreyfus v.—79 M. 403.
Gage, Dreyfus v.—84 M. 219.
Gage, Robinson &c. Lumber Co. v.—27 So. 999.
Gage, Williams v.—49 M. 777.
Gaillard v. Gaillard, 23 M. 152—div. 37.
Gaillard v. Thomas, 61 M. 166—ex. & ad. 516.
Gaillard, Farrar v.—W. 269.
Gaillard, Morrison v.—25 M. 194.
Gaines v. Coates, 51 M. 335—corp. 370, 372; monop. 1; statut. 212; weights, 2.
Gaines v. Coney, 51 M. 323—partners. 179; refer. 55.
Gaines v. Faris, 39 M. 403—schools, 18.
Gaines v. Keeton, 68 M. 473—land. & t. 252.
Gaines v. Kennedy, 53 M. 103—elect. rem. 8; estop. 92, 98; eject. 140, 141; ex. & ad. 386; inf. 29; judgm. 428; statut. 199.
Gaines v. Smiley, 7 S. & M. 53—courts, 198; ex. & ad. 314b.
Gaines v. State, 48 So. 182—crim. l. 785b, 1085.
Gaines, Kennedy v.—51 M. 625.
Gaines, Wilkinson v.—96 M. 688.
Galbraith, Clifton v.—23 M. 292.
Galbraith, Montgomery v.—11 S. & M. 555.
Galbreath, Coleman v.—53 M. 303.
Galbreath, Pendleton v.—45 M. 43.
Gale v. Green, W. 159—ven. & pur. 115.
Gale v. Lancaster, 44 M. 413—app. & e. 518; bills & n. 400, 488.
Gales v. State, 64 M. 105—bail, 75; crim. l. 636.
Galigher, Moody v.—1 Miss. Dec. 435.
Galigher, Moody v.—1 Miss. Dec. 463.
Gallagher, Chiles v.—67 M. 413.
Gallagher, Etheridge v.—55 M. 458.
Gallegly v. Kansas City &c. R. Co. 83 M. 171—carr. 283, 360, 394.
Gallman v. Perrie, 47 M. 131—fraud. conv. 113, 237, 241.
Galloway Coal Co. v. Hunter, 79 M. 559—guar. 4; princ. & s. 4.
Galloway, Commercial Bank v.—6 H. 515.
Galloway, Matheny v.—12 S. & M. 475.
Galloway, Rogers v.—3 H. 58.
Galmes, Merchants' &c. Bank v.—82 M. 603.
Gamble v. Hicks, 27 M. 781—ex. & ad. 227.
Gamble v. State, 35 M. 222—gaming, 94.
Gamble v. Trahern, 3 H. 32—process, 39.
Gamble v. Witty, 55 M. 26—counties, 189; ev. 341; tax. 301, 620, 622, 679, 688, 727, 734a.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Gamble, Cohen v.—71 M. 478.
Gamble, Redus v.—85 M. 165.
Gamblin v. State, 45 M. 658—crim. l. 829, 1159; ind. 158; new tr. 41; weap. 17a.
Gamblin v. State, 82 M. 73—crim. l. 547.
Gamblin v. State, 29 So. 764—crim. l. 761, 763; hom. 269, 286a.
Gamblin, Gentry v.—79 M. 437.
Gambrell v. State, 92 M. 728—crim. l. 385, 769; hom. 219.
Gambrell Lumber Co. v. Saratoga Lumber Co. 87 M. 773—quiet. t. 7, 13, 34.
Gammage v. Noble, 24 M. 156—ex. & ad. 296, 299, 314f; guard. & w. 38.
Gammons v. State, 85 M. 103—jury, 81, 103, 132.
Gandsi v. Seminary, 95 M. 315—mun. corp. 31.
Ganong v. Brown, 88 M. 53—cncts. 171.
Ganong, Apple v.—47 M. 189.
Ganong, Jonestown v.—52 So. 579, 692.
Ganong, Southern R. Co. v.—55 So. 355.
Gans, Warren County v.—80 M. 76.
Gardiner v. Hinton, 86 M. 604—adv. pos. 13, 31, 37, 44, 69.
Gardiner, Lee v.—26 M. 521.
Gardley, Bogard v.—4 S. & M. 302.
Gardner v. McManus, 57 M. 647—execution, 262; mtg. 274.
Gardner v. New Orleans &c. R. Co. 78 M. 640—app. & e. 512, 807; carr. 136.
Gardner v. Oden, 24 M. 382—arb. & a. 25, 82.
Gardner v. Smart, 23 So. 356—trial, 143.
Gardner, Bacon v.—23 M. 60.
Gardner, Blomquest v.—95 M. 307.
Gardner, Cole v.—67 M. 670.
Gardner, Hart v.—74 M. 153.
Gardner, Hart v.—81 M. 650.
Garland v. Chambers, 11 S. & M. 337—fraud. conv. 140.
Garland v. Garland, 50 M. 694—eq. 2, 15; hus. & w. 283, 285.
Garland v. Garland, 51 M. 16—hus. & w. 285.
Garland v. Norman, 50 M. 238—guard. & w. 54, 147a.
Garland v. Hull, 13 S. & M. 76—agric. 11; eq. 45, 420, 422.
Garland v. Rowan, 2 S. & M. 617—courts, 88; des. & d. 2; dower, 2.
Garland v. Stewart, 31 M. 314—new tr. 71; princ. & a. 184; sales, 1, 201.
Garland, Crisler v.—11 S. & M. 136.
Garland, Slaughter v.—40 M. 172.
Garland, Slaughter v.—6 So. 647.
Garman v. State, 66 M. 196—crim. l. 260c, 636; witn. 405.
Garmon, Swofford v.—51 M. 348.
Garner v. Collins, W. 518—app. & e. 1063; execution, 338.
Garner v. Jones, 34 M. 505—eject. 128.
Garner v. Lansford, 12 S. & M. 558—ex. & ad. 314b; wills, 209, 213, 221.
Garner v. Lyles, 35 M. 176—eq. 232; ex. & ad. 544; fraud. conv. 254.
Garner v. Myrick, 30 M. 448—ev. 212; witn. 95.
Garner v. State, 76 M. 515—jury, 90; witn. 106, 270.
Garner v. State, 93 M. 843—hom. 93.
Garner v. Webster County, 79 M. 565—anim. 47.
Garner, Hull v.—31 M. 145.
Garner, St. Louis &c. R. Co. v.—51 So. 273.
Garnett v. Chapman, 20 So. 863—chat. m. 263.
Garnett v. Cowles, 39 M. 60—courts, 103; wills, 851.
Garnett v. Kirkman, 33 M. 389—cncts. 70; new tr. 178; princ. & s. 106; trial, 189, 206.
Garnett v. Kirkman, 41 M. 94—new tr. 86, 87, 102.
Garnett, Woods v.—72 M. 78.
Garrard v. State, 25 M. 469—slaves, 19.
Garrard v. State, 50 M. 147—crim. l. 422, 427, 519, 532, 537, 671, 1169, 1173.
Garrett v. Beaumont, 24 M. 377—judgm. 934; lim. of act. 4; plead. 361; statut. 263.
Garrett v. Carlton, 65 M. 188—chat. m. 173; contin. 28.
Garrett v. Colvin, 77 M. 408—des. & d. 96; partit. 25.
Garrett v. Dabney, 27 M. 335—hus. & w. 179; statut. 225¾; wills, 27, 191.
Garrett v. Ellis, 52 So. 451—mtg. 609.
Garrett v. Felt, 32 M. 137—app. & e. 634; judgm. 106, 353; plead. 434.
Garrett v. Hamblin, 11 S. & M. 219—execution, 149; sheriffs, 100, 106, 119, 138, 158, 163, 166.
Garrett v. Mississippi &c. R. Co. Freem. Ch. 70—can. of i. 2; eq. 148.
Garrett v. Tiernin, 7 H. 465—attch. 128, 253, 261.
Garrett, Henderson v.—35 M. 554.
Garrett, Lewis v.—5 H. 434.
Garrett, Singleton v.—23 M. 195.
Garrett, Tinnin v.—4 S. & M. 207.
Garrison v. Fisher, 26 M. 352—hus. & w. 111, 127, 194, 231.
Garrison v. McInnis, 1 Miss. Dec. 129—adv. pos. 39; app. & e. 231; lev. 28c.
Garrison, Illinois Cent. R. Co. v.—81 M. 257.

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Garrison, Stauffer v.—61 M. 67.
Gartman v. Jones, 24 M. 234—eq. 324; judgm. 407; ven. & pur. 308.
Gartman v. Pouns, 12 S. & M. 290—ex. & ad. 438.
Gartman, Cannon v.—43 M. 581.
Gartman, Pouns v.—29 So. 133.
Gartrell, Bedford v.—88 M. 429.
Garvey, Bonds v.—87 M. 335.
Garvin v. Lowry, 7 S. & M. 24—atty. & c. 72, 101; princ. & a. 122, 166.
Garvin v. State, 52 M. 207—crim. l. 404; ind. 158; larc. 40.
Gary v. Jacobson, 55 M. 204—sales, 39, 346.
Gary, North Lumber Co. v.—83 M. 640.
Gary, Wadlington v.—7 S. & M. 522.
Gaskins v. Blake, 27 M. 675—tax. 674a.
Gaskins, Bailey v.—6 H. 519.
Gaskins, Miller v.—Sm. & M. Ch. 524.
Gasque v. Moody, 12 S. & M. 153—ex. & ad. 23, 32.
Gasquet v. Fisher, 7 S. & M. 313—abate. & r. 28.
Gasquet v. Warren, 2 S. & M. 514—ev. 408; execution, 348.
Gaston v. King, 63 M. 326—eject. 143; trusts, 103.
Gaston, Green v.—56 M. 748.
Gaston, Tyson v.—14 So. 458.
Gastrell v. Phillips, 64 M. 473—ev. 577; pub. lands, 117.
Gastrell, Phillips v.—61 M. 413.
Gastrell, Phillips v.—62 M. 362.
Gates v. Flint, 39 M. 365—attch. 164.
Gates v. State, 71 M. 874—crim. l. 1152; forg. 25; ind. 145, 147, 203.
Gates v. Union Naval Stores Co. 92 M. 227—app. & e. 187; ref. of inst. 33.
Gates, Brewer v.—31 So. 205.
Gates, Stewart v.—30 M. 100.
Gates, Wilkes v.—68 M. 263.
Gatewood, Chewning v.—5 H. 552.
Gathings v. Miller, 76 M. 651—adv. pos. 16; tresp. 20.
Gathings v. State, 44 M. 343—crim. l. 622, 877, 983; int. liq. 171.
Gathings, McNairy v.—52 M. 592.
Gathings, McNairy v.—57 M. 215.
Gathings, Patterson v.—48 M. 629.
Gatti v. New Orleans &c. Supply Co. 77 M. 754—fraud. conv. 52, 95; home. 110, 118.
Gattman v. Acker, 1 Miss. Dec. 264—plgs. 10; princ. & a. 14.
Gattman, Willis v.—53 M. 721.
Gaulding, Edwards v.—38 M. 118.
Gaultney v. Nolan, 33 M. 569—ex. & ad. 125, 463.
Gaunt, Grover v.—6 S. & M. 317.
Gavigan v. State, 55 M. 533—crim. l. 660, 1035, 1036, 1144; jury, 117; new tr. 140; witn. 252.
Gavin v. Lowry, 7 S. & M. 24—atty. & c. 97.
Gavin v. State, 96 M. 377—dis. h. 1; vag. 1.
Gaw, Minor v.—11 S. & M. 322.
Gay v. Edwards, 30 M. 218—app. & e. 372; eq. 45; lim. of act. 36; trusts, 63¾.
Gay v. Lemle, 32 M. 309—ex. & ad. 117, 416, 544; new tr. 67, 71.
Gayden v. Bates, W. 209—libel, 129; statut. 263.
Gayden v. Marshall, 8 S. & M. 489—cncts. 206; execution, 204, 207; guar. 36.
Gayden v. Tufts, 68 M. 691—assign. f. b. c. 176, 295, 334; sales, 316.
Gayden, Wren v.—1 H. 365.
Gayle, McKee v.—46 M. 676.
Gay, Wells v.—93 M. 268.
Gee v. Gee, 32 M. 190—des. & d. 93; eq. 17; parent & c. 10; trusts, 77, 82.
Gee v. State, 80 M. 285—crim. l. 762.
Gee, Halsey v.—79 M. 193.
Gelstrop v. Moore, 26 M. 206—ex. & ad. 319, 358, 362, 367.
General Accident &c. Co. v. Walker, 55 So. 51—ins. 3, 530.
Gentry v. Gamblin, 79 M. 437—eq. 141; estop. 77; quiet. t. 48.
Gentry v. State, 92 M. 141—hom. 292; ind. 86.
Geohegan v. Marshall, 66 M. 676—adv. pos. 54.
George v. Bean, 30 M. 147—ex. & ad. 157, 388b.
George v. Caldwell, 54 So. 316—app. & e. 1197.
George v. Derby Lumber Co. 81 M. 725—partners. 183.
George v. Greer, 53 M. 495—wills, 140, 209.
George v. Hewlett, 70 M. 1—attch. 337; inf. 91; replev. 11, 12, 118.
George v. Louisville &c. R. Co. 88 M. 306—app. & e. 169; carr. 83.
George v. Solomon, 71 M. 168—disc. 7; eq. 419, 422; hus. & w. 228.
George v. State, 37 M. 316—slaves, 1, 11, 18.
George v. State, 39 M. 570—crim. l. 508, 553, 555, 923; ind. 125a, 129, 130, 132, 133, 139, 140; jury, 110.
George v. Woods, 94 M. 268—jud. s. 31, 39; partit. 106, 107; statut. 230.
George, Buckley v.—71 M. 580.

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George, Caldwell v.—96 M. 484.
George, ex parte, 63 M. 143—guard. & w. 40, 58.
George, Lehman v.—56 So. 167.
George, Meridian v.—6 So. 619.
George, New Orleans &c. R. Co. v.—82 M. 710.
George, Stockton v.—7 H. 172.
George, Vasser v.—47 M. 713.
Georgia Home Ins. Co. v. Holmes, 75 M. 390—corp. 672; ins. 389, 620, 625, 628.
Georgia Home Ins. Co. v. Jones, 49 M. 80—app. & e. 838, 1028; ins. 115; land. & t. 80.
Georgia Home Ins. Co. v. Schild, 73 M. 128—ins. 283.
Georgia Home Ins. Co. v. Stein, 72 M. 943—ins. 330, 389, 574.
Georgia Home Ins. Co. Greenwood Ice Co. v.—72 M. 46.
Georgia Home Ins. Co. Yazoo &c. R. Co. v.—85 M. 7.
Georgia Pac. R. Co. v. Baird, 76 M. 521—ev. 22; plead. 391; r. r. 441.
Georgia Pac. R. Co. v. Bradfield, 10 So. 577—mast. & s. 281.
Georgia Pac. R. Co. v. Brooks, 66 M. 583—cncts. 97; eq. 13, 39, 146, 148, 247; estop. 54, 92, 98.
Georgia Pac. R. Co. v. Money, 8 So. 646—r. r. 407.
Georgia Pac. R. Co. v. Robinson, 68 M. 643—carr. 247; r. r. 277.
Georgia Pac. R. Co. v. Walker, 61 M. 481—marshaling, 8; mtg. 427, 532.
Georgia Pac. R. Co. v. West, 66 M. 310—carr. 294, 303, 348; new tr. 41; trial, 273.
Georgia Pac. R. Co. Baird v.—12 So. 547.
Georgia Pac. R. Co. Beckman v.—12 So. 956.
Georgia Pac. R. Co. Carroll County v.—11 So. 471.
Georgia Pac. R. Co. Ehnsley v.—10 So. 41.
Georgia State Building &c. Assn. v. Brown, 31 So. 911—estop. 69.
Georgia State B. & L. Assn. v. Grant, 82 M. 424—b. & l. assn. 30, 33.
Georgia State B. & L. Assn. v. Shannon, 80 M. 642—b. & l. assn. 46.
Georgia State B. & L. Assn. Kornegay v.—91 M. 551.
Georgia State B. & L. Assn. Shannon v.—78 M. 955.
Georgia &c. R. Co. Walker v.—1 Miss. Dec. 1.
Gerard v. Duncan, 84 M. 731—tax. 47, 124½.
Gerault v. Anderson, W. 30—judgm. 12, 822.
Gerdine v. State, 64 M. 798—crim. l. 823, 829.
Gerdine, Duncan v.—59 M. 550.
Gereaudeau, Lapice v.—W. 480.
Geren v. Wright, 8 S. & M. 360—assum. 22; dam. 152; trial, 332.
Germaine, Kiernan v.—62 M. 75.
Germain, Kiernan v.—61 M. 498.
German-American Provision Co. v. Jones, 87 M. 277—princ. & a. 111; sales, 102, 440, 441.
German Bank, Smith v.—60 M. 69.
Germania Fire Ins. Co. v. Francis, 52 M. 457—app. & e. 1025, 1028, 1063; dism. 44, 60; ev. 518; rem. of c. 99, 108; trial, 260.
German Security Bank, Clark v.—61 M. 611, 614.
Germany, Craft v.—34 M. 118.
Germany, Hobbs v.—94 M. 469.
Germany, Hurd v.—7 H. 675.
Gerock, Crump v.—40 M. 765.
Geron, Sumpter v.—4 H. 263.
Gerritt, Heard v.—34 M. 152.
Gervais, Frazer v.—W. 72.
Gervais, Head v.—W. 431.
Gex v. Dill, 86 M. 10—land. & t. 24, 30; liens, 44; perp. 1.
Ghio v. Western Assurance Co. 65 M. 532—ins. 620.
Gholson v. Hatter, 26 M. 240—judgm. 880.
Gholson, Clopton v.—53 M. 466.
Gholson, Hardy v.—26 M. 70.
Gholson, Legard v.—24 M. 691.
Gholson, Moore v.—34 M. 372.
Gholson, Robinson v.—8 S. & M. 392.
Giardina v. Greenville, 70 M. 896—mun. corp. 631, 639.
Gibbes v. Watson, 92 M. 9—wills, 616.
Gibbons v. Brittenum, 56 M. 232—des. & d. 6, 53; dower, 22; statut. 159, 160, 231, 239.
Gibbons v. Yazoo &c. R. Co. 33 So. 5—r. r. 102, 103, 112, 411.
Gibbons, Barr v.—23 M. 92.
Gibbons, Parr v.—27 M. 375.
Gibbs v. Bunch, 63 M. 47—hus. & w. 138; lim. of act. 143.
Gibbs v. Dortch, 62 M. 671—tax. 625, 679, 688.
Gibbs v. Green, 54 M. 592—const. law, 137, 139; inj. 85; lev. 28f, 34; statut. 57.
Gibbs v. Hall, 38 So. 369—tax. 764, 775.
Gibbs v. McGuire, 70 M. 646—deeds, 1, 46; seals, 2.
Gibbs v. McIntosh, 78 M. 648—elec. 45.
Gibbs v. Sims, 41 M. 706—ex. & ad. 415e.
Gibbs, Alabama &c. R. Co. v.—12 So. 545.
Gibbs, Christian v.—53 M. 314.
Gibbs, Davis v.—1 Miss. Dec. 89.
Gibbs, Edwards v.—39 M. 166.
Gibbs, Fant v.—54 M. 396.

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Gibbs, Gordon v.—3 S. & M. 473.
Gibbs, Hardee v.—50 M. 802.
Gibbs, Jones v.—51 M. 401.
Gibbs, Paden v.—88 M. 274.
Gibbs, Smith v.—2 S. & M. 479.
Gibbs, Wagner v.—80 M. 53.
Gibbs, West v.—42 M. 168.
Gibbs, Wood v.—35 M. 559.
Gibbs, Yocona Mills v.—27 So. 647.
Gibson v. Bailey, 24 M. 237—bills & n. 440.
Gibson v. Berry, 66 M. 515—tax. 615, 688; trial, 158.
Gibson v. Carr, 91 M. 773—app. & e. 147, 963.
Gibson v. Currier, 83 M. 284—inf. 89; jud. s. 53; lim. of act. 65.
Gibson v. Forte, 40 M. 788—eq. 153; trusts, 77, 78.
Gibson v. Gibson, W. 364—wills, 140, 142.
Gibson v. Green, 45 M. 209—attch. 204; bankr. 193, 433, 435.
Gibson v. Hughes, 6 H. 315—execution, 172; princ. & s. 168; statut. 239.
Gibson v. Jackson, 22 So. 891—bridges, 46.
Gibson v. Jayne, 37 M. 164—eq. 17, 232; life est. 8; lim. of act. 44, 70a; sales, 465; remaind. 10, 13, 17.
Gibson v. Lock, 58 M. 298—attch. 299; land. & t. 229h, 229½.
Gibson v. Marshall, 64 M. 72—assist. 1, 8.
Gibson v. Newman, 1 H. 341—ven. & pur. 144, 314.
Gibson v. Niblett, Sm. & M. Ch. 278—chat. m. 256.
Gibson v. Powell, 5 S. & M. 712—arb. & a. 57, 64, 65; assum. 23; bills & n. 183; plead. 384.
Gibson v. State, 38 M. 313—big. 6; death, 2.
Gibson v. State, 59 M. 341—crim. l. 598; licens. 21; plead. 193; tax. 570, 570f.
Gibson v. State, 68 M. 241—crim. l. 982.
Gibson v. State, 70 M. 554—jury, 137.
Gibson v. State, 76 M. 136—crim. l. 784, 1053.
Gibson v. State, 7 So. 211—crim. l. 1113; larc. 85.
Gibson v. State, 16 So. 298—crim. l. 366, 385.
Gibson v. State, 17 So. 892—crim. l. 815; rem. of c. 70.
Gibson v. W. C. Wood Lumber Co. 91 M. 702—mast. & s. 330.
Gibson v. Yazoo &c. R. Co. 43 So. 674—witn. 317.
Gibson, Byrd v.—1 H. 568.
Gibson, Cushing v.—W. 87.
Gibson, Ex parte, W. 377—ex. & ad. 510.
Gibson, Ex parte, 12 So. 209—hab. corp. 52.
Gibson, Home Insurance Co. v.—72 M. 58.
Gibson, Howell v.—30 M. 464.
Gibson, Jennings v.—W. 234.
Gibson Mfg. Co. v. Meek, 71 M. 614—mast. & s. 39; plead. 48.
Gibson Paving Co. v. Mills, 95 M. 726—j. p. 40.
Gibson, Perkins v.—51 M. 699.
Gibson, Upshaw v.—53 M. 341.
Giegolt v. Joor, 60 M. 817—excep. 15.
Gigner v. Hodges, 82 M. 215—libel, 43.
Gilbert v. McEachen, 38 M. 469—guard. & w. 30, 58, 159; judgm. 916.
Gilbert v. State, 78 M. 300—crim. l. 863, 1169.
Gilbert, Hickey v.—1 H. 32.
Gilbert, Lee County v.—70 M. 791.
Gilbert, Walker v.—Freem. Ch. 85.
Gilbert, Walker v.—7 S. & M. 456.
Gilbert, Walker v.—13 S. & M. 693.
Gilbert, White v.—39 M. 802.
Gilchrist v. Pearson, 70 M. 351—brok. 100.
Gildart v. Howell, 1 H. 198—ev. 449; plead. 180.
Gildart v. Starke, 1 H. 451—ex. & ad. 435.
Gildart, Doe v.—5 H. 606.
Gildart, Starke v.—4 H. 267.
Gildart, Starke v.—5 H. 606.
Gilder, Swain v.—61 M. 667.
Gildewell, Ogden v.—5 H. 179.
Gildwell, Ewing v.—3 H. 332.
Gilkey, McComb v.—29 M. 146.
Gill v. Jones, 57 M. 367—app. & e. 3; dower, 89; j. p. 146.
Gill v. Shirley, 55 M. 814—ex. & ad. 338.
Gillan, Fletcher v.—62 M. 8.
Gillard, Yarborough v.—77 M. 139.
Gilleland v. Wilkins, 1 H. 574—execution, 102.
Gillen, Panola County v.—59 M. 198.
Gillenwaters v. Miller, 49 M. 150—cncts. 175; ev. 449; fraud. conv. 161, 185; mtg. 249; paymt. 1; princ. & a. 71, 103; trusts, 179, 350.
Gillespie v. Hauenstein, 72 M. 838—guard. & w. 182c; ins. p. 31, 45, 94; judgm. 488.
Gillespie v. Magruder, 92 M. 511—app. & e. 1178.
Gillespie v. Planters' Oil-Mill &c. Co. 76 M. 406—bills & n. 408, 497; corp. 48.
Gillespie v. Planters' &c. Mfg. Co. 18 So. 120—bills & n. 97, 327; ins. 228; trial, 90.
Gillespie v. State, 96 M. 856—int. liq. 224.
Gillespie, Dennis v.—24 M. 581.
Gillespie, Hauenstein v.—72 M. 838.
Gillespie, Hauenstein v.—73 M. 742.
Gillespie, Jenkins v.—10 S. & M. 31.
Gillespie, Nevitt v.—1 H. 408.

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Gillespie, Thrasher v.—52 M. 840.
Gilleylen v. McKinney, 74 M. 764—guard. & w. 164.
Gilleylen v. Martin, 73 M. 695—app. & e. 69, 75, 862; partit. 12, 95, 113.
Gilleylen v. Stewart, 72 M. 262—land. & t. 274; replev. 92, 96.
Gilleylen, Bowen v.—58 M. 813.
Gilleylen, Martin v.—70 M. 324.
Gilliam v. Brown, 43 M. 641—cncts. 139, 140; ev. 449; jury, 109, 131; new tr. 42; wills, 714; witn. 197.
Gilliam v. Chancellor, 43 M. 437—eq. 39; wills, 441, 485, 772.
Gilliam v. Hopkins, 43 M. 641—eq. 65.
Gilliam v. Moore, 10 S. & M. 130—det. 20; trial, 135, 194, 217, 243, 421.
Gilliland v. Illinois Cent. R. Co. 81 M. 41—carr. 13, 20.
Gilliland, Burroughs v.—90 M. 127.
Gill, Illinois Cent. R. Co. v.—88 M. 417.
Gillis, Brooks v.—12 S. & M. 438.
Gillis, State v.—75 M. 331.
Gill, Mississippi &c. R. Co. v.—66 M. 39.
Gillock, Horn v.—W. 107.
Gill, Smith v.—52 M. 607.
Gillum v. Case, 67 M. 588—eject. 15.
Gillum v. Case, 71 M. 848—eject. 128, 143; judgm. 682.
Gillum v. State, 62 M. 547—crim. l. 390, 422, 423; hom. 166; jury, 82.
Gilman, Canton Female Academy v.—55 M. 148.
Gilman, Sneed v.—44 So. 830.
Gilman, Stamps v.—43 M. 456.
Gilmer v. Felhour, 45 M. 627—eject. 108; eq. 195; hus. & w. 129.
Gilmer, Hill v.—21 So. 528.
Gilmer, Lewis v.—3 S. & M. 560.
Gilmer, Thornhill v.—4 S. & M. 153.
Gilmore v. Borders, 2 H. 824—libel, 110.
Gilmore v. Brown, 93 M. 63—exemp. 4; home. 5, 162, 181.
Gilmore v. Carman, 1 S. & M. 279—carr. 4, 119.
Gilmore v. State, 33 So. 171—high. 108; ev. 27.
Gilmore, Leech v.—2 Miss. Dec. 583.
Gilpin v. Smith, 11 S. & M. 109—estop. 59; fraud. conv. 248; ven. & pur. 32, 36, 108, 123, 307.
Gilruth v. Decell, 72 M. 232—partners. 153, 159.
Gilruth, Lumbley v.—65 M. 23.
Gipson v. State, 38 M. 295—crim. l. 888; hom. 84; ind. 189; trial, 338.
Givens v. Southern R. Co. 94 M. 830—const. law, 208, 245; mast. & s. 180.
Givinn v. McCarroll, 1 S. & M. 351—attch. 217.
Gladney v. Barton, 51 M. 216—adv. pos. 41, 63; lim. of act. 193.
Glaskins, Work v.—33 M. 539.
Glass v. Lobdell, W. 105—assum. 7.
Glass v. Moss, 1 H. 519—j. p. 45, 141; set-off, 51.
Glasscock v. Robinson, 13 S. & M. 85—eq. 177; ven. & pur. 274, 281, 314.
Glasscock, Pleasants v.—Sm. & M. Ch. 17.
Glass, Peek v.—6 H. 195.
Glass, Wathen v.—54 M. 382.
Glazier v. Bailey, 47 M. 395—eject. 5; eq. 47; quiet. t. 3.
Gleason v. Wright, 53 M. 247—bills & n. 430; mtg. 305.
Glen Allen Oil Mill, Hardie Tynes Foundry &c. Co. v.—84 M. 259.
Glenn v. Caldwell, 74 M. 49—deeds, 95; execution, 263; forc. e. & d. 5, 8.
Glenn v. State, 64 M. 724—crim. l. 786.
Glenn v. Thistle, 23 M. 42—cov. 102; ex. & ad. 114, 115, 129; pub. lands, 34; ven. & pur. 2, 308, 308a.
Glenn v. Wragg, 41 M. 654—proc. 64, 135.
Glennen, State v.—93 M. 836.
Glidewell v. Hite, 5 H. 110—cncts. 108; judgm. 428, 431; slaves, 2.
Glidewell v. Morris, 89 M. 82—hab. corp. 99.
Globe & Rutgers Fire Ins. Co. v. Firemen's Fund Fire Ins. Co. 52 So. 454—consp. 17; mast. & s. 339; plead. 214.
Globe Ins. Co. v. Farnsworth, 72 M. 555—trial, 205.
Gloster v. Harrell, 77 M. 793—ev. 178; mun. corp. 173; offic. 37.
Gloster Oil Works v. Buckeye Cotton Oil Co. 87 M. 618—licens. 18; sales, 372.
Glover v. Hill, 57 M. 240—des. & d. 53; home. 141.
Glover, Jefferson v.—46 M. 510.
Glover, Memphis &c. R. Co. v.—78 M. 467.
Glover, Thornton v.—25 M. 132.
Goad v. Hart, 8 S. & M. 787—bills & n. 60; new tr. 102.
Goar v. McCanless, 60 M. 244—assign. 85; mtg. 244.
Godbold, Seavey & Co. v.—54 So. 838.
Goddard v. Long, 5 S. & M. 782—inj. 251; judgm. 951.
Godfrey, Frank & Co. v. Doughty, 47 So. 643—app. & e. 843.

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Godley v. Goodloe, 6 S. & M. 255—bills & n. 388, 415, 537, 538.
Godley, Goodloe v.—13 S. & M. 233.
Godwin v. Davis, 74 M. 742—pub. lands, 62.
Godwin v. State, 73 M. 873—hom. 257, 292, 789, 811, 1172; hom. 115, 340.
Godwin, Whitaker v.—53 So. 413.
Goff v. Bankston, 35 M. 518—princ. & s. 25.
Goff v. Cole, 71 M. 46—partit. 63.
Goff v. Robins, 33 M. 153—eq. 71, 87; judgm. 870b; jud. s. 49.
Goff, Delta Bank v.—12 So. 699.
Goff, Lucas v.—33 M. 629.
Goff, Robins v.—33 M. 153.
Goforth v. State, 60 M. 756—int. liq. 78.
Goforth v. Stingily, 79 M. 398—eject. 86, 109; plead. 325.
Goforth, Alabama &c. R. Co. v.—14 So. 457.
Goforth, Lindsey v.—22 So. 828.
Goings, Robinson v.—63 M. 500.
Goins, McFarland v.—50 So. 493.
Golden v. Goode, 76 M. 400—fraud. conv. 272.
Golden v. State, 63 M. 466—larc. 23.
Golden v. State, 75 M. 130—crim. l. 658.
Golden, Good v.—73 M. 91.
Goldford, Nabers v.—77 M. 661.
Goldman v. Page, 59 M. 404—bonds, 122; lost inst. 13.
Goldman, Foot v.—68 M. 529.
Goldsby, Brown v.—34 M. 437.
Gold, Stratton v.—40 M. 778.
Goleman v. Turner, 14 S. & M. 118—guard. & w. 59.
Golsby v. State, 54 So. 155—mast. & s. 343.
Good v. Golden, 73 M. 91—subrog. 26.
Goodall v. Stewart, 65 M. 157—assign. f. b. c. 161; ev. 122, 269; sales, 101.
Goodbar v. Dunn, 61 M. 618—app. & e. 1025; deeds, 37; ref. of inst. 10, 29; mtg. 563.
Goodbar v. Dunn, 61 M. 624—inj. 176, 244.
Goodbar v. Knight, 89 M. 124—assign. f. b. c. 334.
Goodbar v. Montgomery, 73 M. 73—assign. f. b. c. 135.
Goodbar v. Owens, 70 M. 840—j. p. 71, 78, 166.
Goodbar v. West, 1 Miss. Dec. 447—attch. 177, 178.
Goodbar, Bank of Hazlehurst v.—73 M. 566.
Goodbar, Day v.—69 M. 687.
Goodbar, Lowenstein v.—69 M. 808.
Goodbar, Macrae v.—80 M. 315.
Goodbar, Montgomery v.—69 M. 333.
Goodbar, Sanders v.—23 So. 583.
Goodbar Shoe Co. Harmon v.—18 So. 118.
Goodbar, Western Union Tel. Co. v.—7 So. 214.
Goode v. Linecum, 1 H. 281—new tr. 44; partners. 128; witn. 387.
Goode v. Mason, 6 H. 543—judgm. 784.
Goode v. State, 87 M. 495—int. liq. 136, 224, 239.
Goode, Carlisle v.—71 M. 453.
Goode, Golden v.—76 M. 400.
Goodloe v. Godley, 13 S. & M. 233—banks, 116; bills & n. 393, 403; princ. & a. 178.
Goodloe, Godley v.—6 S. & M. 255.
Goodman v. Burford, 10 S. & M. 385—sales, 65.
Goodman v. Ford, 23 M. 592—trial, 150.
Goodman v. Building &c. Association, 71 M. 310—b. & l. assn. 1, 32, 33; mtg. 350.
Goodman v. Moss, 64 M. 303—attch. 196; ev. 158; trover, 37.
Goodman v. White, 25 M. 163—partners. 128, 153.
Goodman, Mingo v.—1 H. 552.
Goodman, Simpson v.—92 M. 89.
Goodrum, Clarke v.—61 M. 731.
Goodsell v. Land Co. 72 M. 580—courts, 306; judgm. 471, 488, 829; rem. of c. 107.
Goodson, Herring v.—43 M. 392.
Goodwin v. Anderson, 5 S. & M. 730—execution, 36, 40.
Goodwin v. Mitchell, 38 So. 657—app. & e. 169, 1002, 1050; land. & t. 246, 248.
Goodwin, Lloyd v.—12 S. & M. 233.
Goodwynn v. State, 4 S. & M. 520—hom. 142; ind. 11b.
Goolsby v. State, 35 So. 212—crim. l. 872; weap. 17.
Goosey v. Goosey, 48 M. 210—deeds, 97, 124; wills, 27, 471.
Gorden, Hunt v.—52 M. 194.
Gordin v. Moore, 62 M. 493—garn. 164, 169.
Gordin, Bamberger v.—2 Miss. Dec. 111.
Gordon v. Anderson, 90 M. 677—fraud. conv. 269; lim. of act. 39.
Gordon v. Chiles, 12 So. 146—tax. 530.
Gordon v. Gibbs, 3 S. & M. 473—app. & e. 156, ex. & ad. 86, 118, 222, 224.
Gordon v. James, 86 M. 719—ex. & ad. 39, 41, 288, 325; wills, 564, 720, 750, 754, 798, 805, 812.
Gordon v. Kitrell, 21 So. 922—ev. 460.
Gordon v. McDougall, 84 M. 715—ex. & ad. 81, 225; wills, 670.
Gordon v. McEachin, 57 M. 834—witn. 126, 134.
Gordon v. Manning, 44 M. 756—hus. & w. 86, 148; lost inst. 18; ven. & pur. 230.

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Gordon v. Parker, 2 S. & M. 485—bills & n. 39, 428; excep. 20.
Gordon v. Perry, 54 So. 445—wills, 798.
Gordon v. Sizer, 39 M. 805—deeds, 111; eject. 7, 10, 15, 19, 115; priv. roads, 1, 7; ven. & pur. 230, 232.
Gordon v. State, 95 M. 543—crim. l. 763, 782, 789, 811.
Gordon v. State, 29 So. 529—crim. l. 52, 810; hom. 286b, 286c.
Gordon v. Warfield, 74 M. 553—dep. 56, 62, 83, 87; waters, 61.
Gordon v. Watkins, Sm. & M. Ch. 37—dep. 30, 48, 56, 83, 104.
Gordon, Bell v.—55 M. 45.
Gordon, Burrus v.—57 M. 93.
Gordon, Cato v.—63 M. 320.
Gordon, Coleman v.—16 So. 340.
Gordon, Gorin v.—38 M. 205.
Gordon, Littlejohn v.—32 M. 235.
Gordon, McLoskey v.—26 M. 260.
Gordon, Simmons v.—53 So. 623.
Gordon, Tucker v.—7 H. 306.
Gordon, Warfield v.—23 So. 520.
Gore v. Doolittle, 77 M. 620—anim. 47.
Gore, Ex parte, 57 M. 251—rewards, 9.
Gorin v. Gordon, 38 M. 205—hus. & w. 29, 31g.
Gorman, Vicksburg Water Supply Co. v.—70 M. 360.
Gorren, Crizer v.—41 M. 563.
Gortikov, Illinois Cent. R. Co. v.—90 M. 787.
Goss v. Whitehead, 33 M. 213—bills & n. 60, 452, 485.
Gothard v. Flynn, 25 M. 58—frds. st. of, 62; mtg. 1, 40.
Gould v. Chickasaw County, 85 M. 123—rewards, 9.
Gould v. Luckett, 47 M. 96—dower, 2, 27, 71.
Govan v. Binford, 25 M. 151—princ. & s. 103, 108.
Govan, Randolph v.—14 S. & M. 9.
Govan, State v.—70 M. 535.
Govan, Union Bank v.—10 S. & M. 333.
Governor v. Gridly, W. 328—paup. 3.
Gowan v. Gowan, 12 So. 29—des. & d. 106.
Gowan v. Jones, 10 S. & M. 164—jud. s. 31.
Gowan v. London Assur. Co. 19 So. 298—ins. 15.
Gowen, Jenkins v.—37 M. 444.
Gowing v. Bland, 2 H. 813—ex. & ad. 266; subrog. 10.
Goyer Cold Storage Co. v. Wildberger, 71 M. 438—app. & e. 187, 1167; b. & l. assn. 7; corp. 111, 114; execution, 202; fraud. conv. 115.
Goyer Co. v. Jones, 79 M. 253—bankr. 427.
Grace v. Gulf &c. R. Co. 25 So. 875—ev. 483; r. r. 92, 104.
Grace, Coor v.—10 S. & M. 434.
Grace, Southern R. Co. v.—95 M. 611.
Grafton v. Grafton, 8 S. & M. 77—adv. pos. 114, 115.
Grafton v. Smith, 66 M. 408—des. & d. 52; ex. & ad. 53; exemp. 50.
Grafton, Fleming v.—54 M. 79.
Grafton, Jefferson County v.—74 M. 435.
Graham v. Bryant, 95 M. 180—ref. of inst. 2.
Graham v. Busby, 34 M. 272—app. & e. 662, 923; ev. 277.
Graham v. Fitts, 53 M. 307—app. & e. 1064; ev. 69; mtg. 356, 369a.
Graham v. Jones, 7 So. 496—chat. m. 172.
Graham v. Morgan, 83 M. 601—fraud. conv. 95, 157.
Graham v. State, 71 M. 208—pawnb. 4.
Graham v. Thornton, 9 So. 292—eq. 106; partners. 146, 284, 302, 304; sales, 315.
Graham v. Warren, 81 M. 330—adv. pos. 63; eject. 26; ev. 158.
Graham, Baughan v.—1 H. 220.
Graham, Blackwell v.—74 M. 595.
Graham, Busby v.—26 M. 210.
Graham, Dowdy v.—42 M. 451.
Graham, Irby v.—46 M. 425.
Graham, McLauren v.—26 M. 400.
Graham, Sparkman v.—79 M. 376.
Graham, Stewart v.—93 M. 251.
Graham, Sutton v.—80 M. 636.
Granberry v. State, 61 M. 440—forn. 1, 3, 9; lewd. 1.
Granberry, Cooper v.—33 M. 117.
Granberry, Edmonson v.—73 M. 723.
Grand Court of Calanthe v. Downs, 53 So. 417—app. & e. 351, 539; atty. & c. 96.
Grand Gulf Bank v. Archer, 8 S. & M. 151—banks, 181; corp. 385, 387; statut. 180, 191, 223, 225, 246.
Grand Gulf Bank v. Barnes, 2 S. & M. 165—hus. & w. 111, 119.
Grand Gulf Bank v. Bryan, 8 S. & M. 234—eq. 17; propty. 9; pub. lands, 34, 41, 135, 188.
Grand Gulf Bank v. Henderson, 5 H. 292—execution, 326; judgm. 789, 800a.
Grand Gulf Bank v. Jeffers, 12 S. & M. 486—abate. & r. 39; judgm. 12.
Grand Gulf Bank v. State, 10 S. & M. 428—banks, 78; courts, 97; quo. w. 5.
Grand Gulf Bank v. Wood, 12 S. & M. 482—

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abate. & r. 39, 41; assign. 74; bills & n. 194, 286.
Grand Gulf Bank, Fairchild v.—5 H. 597.
Grand Gulf Bank, Hughes v.—2 S. & M. 115.
Grand Gulf Bank, Thomas v.—9 S. & M. 201.
Grand Gulf, Crapoo v.—9 S. & M. 205.
Grand Gulf &c. R. Co. v. Buck, 53 M. 246—const. law, 138; licens. 19.
Grand Gulf &c. R. Co. Thompson v.—3 H. 240.
Grand Gulf R. &c. Co. v. Conger, 9 S. & M. 505—attch. 129; parties, 4.
Grand Lodge K. P. v. Smith, 89 M. 718—ins. 116.
Grand Lodge K. P. Sullivan v.—52 So. 360.
Granger, Parks v.—96 M. 503.
Grangers' Life Ins. Co. v. Brown, 57 M. 308—contin. 26; ev. 271, 405; ins. 646, 647, 659, 667; int. 2; trial, 28.
Grant v. Independent Order of Sons and Daughters of Jacob, 52 So. 698—app. & e. 844; ins. 122, 693.
Grant v. Lloyd, 12 S. & M. 191—ex. & ad. 116, 380, 381, 389b, 389c, 408; fraud. conv. 13, 29, 113, 289.
Grant v. Planters' Bank, 4 H. 326—app. & e. 547, 855, 906; venue, 77.
Grant v. Spann, 33 M. 134—ex. & ad. 296, 314.
Grant v. Spann, 34 M. 294—ex. & ad. 14.
Grant, Attalla County v.—9 S. & M. 77.
Grant, Besrce v.—91 M. 791.
Grant, Georgia State B. & L. Assn. v.—82 M. 424.
Grantham v. Statham, 83 M. 176—des. & d. 40.
Grantham, Cannon v.—45 M. 88.
Grantham, Sandifer v.—62 M. 412.
Grant, Hand v.—5 S. & M. 508.
Grant, Hand v.—10 S. & M. 514.
Grant, Horton v.—56 M. 404.
Grant, Jones v.—34 M. 592.
Grantland, Huntingdon v.—33 M. 453.
Grant, Moody v.—41 M. 565.
Grant, Rupert v.—6 S. & M. 433.
Grant, Spann v.—83 M. 19.
Grant, Torrey v.—10 S. & M. 89.
Grant, Yazoo &c. R. Co. v.—86 M. 565.
Grarey, Ross v.—7 H. 47.
Graves v. Biloxi, 29 So. 768—mun. corp. 720.
Graves v. Bowers, 2 Miss. Dec. 374—partit. 9.
Graves v. Edwards, 32 M. 305—wills, 400.
Graves v. Fulton, 7 H. 592—appr. 24; judgm. 296, 306, 323.
Graves v. Graves, 88 M. 677—div. 37, 110.
Graves v. Hull, 27 M. 419—eq. 39, 148, 232; judgm. 439; set-off. 4.
Graves v. Mississippi &c. R. Co. 6 H. 548—app. & e. 1051; bills & n. 455; new tr. 104.
Graves v. Monet, 7 S. & M. 45—excep. 56; new tr. 46.
Graves v. Tucker, 10 S. & M. 9—app. & e. 999; escrow, 1; offic. 134; princ. & s. 39.
Graves v. Williams, 2 S. & M. 286—judgm. 236.
Graves, Carter v.—6 H. 9.
Graves, Fairbanks Co. v.—90 M. 453.
Graves, Farve v.—4 S. & M. 707.
Graves, Kilpatrick v.—51 M. 432.
Graves, McInnes v.—80 M. 632.
Graves, Puckett v.—6 S. & M. 384.
Graves, Shields v.—6 H. 262.
Graves, Union Bank v.—12 S. & M. 130.
Graves, White v.—24 M. 166.
Gray v. Bryson, 87 M. 304—app. & e. 66, 1175; home. 115; mtg. 338.
Gray v. Coahoma County, 72 M. 303—convt. 2; counties, 140; prisons, 18.
Gray v. Edwards, 30 M. 218—sheriffs, 49.
Gray v. Harris, 43 M. 421—app. & e. 909; ex. & ad. 258, 314j, 504, 507; guard. & w. 160; paymt. 12a.
Gray v. Helm, 60 M. 131—chat. m. 110, 117, 260.
Gray v. Hemby, 1 S. & M. 598—garn. 44.
Gray v. Keill, 14 S. & M. 186—ex. & ad. 120.
Gray v. Perkins, 12 S. & M. 622—attch. 177, 178, 192.
Gray v. Regan, 23 M. 304—eq. 186, 237, 239.
Gray v. Robinson, 95 M. 1—bills & n. 375; gaming, 40.
Gray v. Roden, 24 M. 667—eq. 348; ref. of inst. 26, 31, 45.
Gray v. State, 90 M. 235—crim. l. 1166½, 1171.
Gray v. Thomas, 12 S. & M. 111—bills & n. 512; excep. 38, 433, 442; judgm. 256, 273; witn. 82.
Gray, Bacon v.—23 M. 140.
Gray, Bowden v.—49 M. 547.
Gray, Bridgeforth v.—39 M. 136.
Gray, Burke v.—6 H. 527.
Gray, Conner v.—88 M. 489.
Gray, Elledge v.—41 So. 2.
Gray, Hanserd v.—46 M. 75.
Gray, Helm v.—59 M. 54.
Gray, Hudson v.—58 M. 589, 591, 882.
Gray, Levy v.—56 M. 318.
Gray, McLeod v.—4 So. 544.
Gray, Meaders v.—60 M. 400.
Gray, Mobile &c. R. Co. v.—62 M. 383.

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Gray, Potts v.—60 M. 57.
Gray, Ragan v.—27 M. 645.
Grayson v. Brooks, 64 M. 410—cncts. 338, 341; dam. 156; plead. 382; usury, 61.
Grayson v. Richardson, 65 M. 222—tax. 431, 546, 615, 679, 693.
Grayson v. Wilkinson, 5 S. & M. 268—atty. & c. 105, 116, 129.
Grayson v. Williams, W. 298—j. p. 44.
Grayson v. Wilson, 27 M. 553—ex. & ad. 86, 486, 509.
Grayson, Miss. &c. R. Co. v.—1 Miss. Dec. 438.
Gray, Swan v.—44 M. 393.
Gray, Wiley v.—36 M. 510.
Gray, Wilson v.—59 M. 525.
Great So. &c. Tel. Co. Rucks v.—23 So. 454.
Greaves v. Atkinson, 68 M. 598—hus. & w. 119; trusts, 371.
Greaves, Atkinson v.—70 M. 42.
Greaves, Ellis v.—82 M. 36.
Greaves, Harrison v.—59 M. 453.
Greaves, Illinois Cent. R. Co. v.—75 M. 360.
Green v. Anderson, 39 M. 359—attch. 44; statut. 236.
Green v. Boon, 57 M. 617—j. p. 157.
Green v. Booth, 91 M. 618—ev. 440.
Green v. Brandon, W. 372—princ. & s. 103, 105.
Green v. Brown, 34 So. 147—can. of i. 2.
Green v. Chilton, 57 M. 598—bankr. 420.
Green v. Collins, 38 So. 188—can. of i. 2.
Green v. Craft, 28 M. 70—tax. 684, 734b.
Green v. Creighton, 7 S. & M. 197—app. & e. 723, 906; ex. & ad. 415a, 415f, 415g, 419.
Green v. Creighton, 10 S. & M. 159—app. & e. 185; eq. 12, 22; ex. & ad. 473.
Green v. Finucane, 5 H. 542—cov. 26; ven. & pur. 78, 110, 144, 228.
Green v. Gaston, 56 M. 748—lim. of act. 167; mtg. 338, 411, 427, 433, 496, 497; statut. 267.
Green v. Green, 3 S. & M. 256—eq. 148; ex. & ad. 484; wills, 730.
Green v. Hankinson, W. 487—eq. 325.
Green v. Irving, 54 M. 450—cov. 102, 107; eject. 20; ev. 582; excep. 28; lim. of act. 47; propty. 10, ven. & pur. 339.
Green v. Lake, 54 M. 540—mun. corp. 605; nuis. 18, 19, 22, 35, 75, 78.
Green v. Lake, 60 M. 451—mun. corp. 623.
Green v. McCarroll, 24 M. 427—bills & n. 474; disc. 21; ex. & ad. 368, 377; plead. 217; ven. & pur. 308.
Green v. McDonald, 13 S. & M. 445—app. & e. 1097; bills & n. 364; inj. 108; ven. & pur. 123b, 123c, 123d, 344.
Green v. Mizelle, 54 M. 220—adv. pos. 59; 113; ev. 230; execution, 268; lim. of act. 19, 167; mtg. 35; witn. 133.
Green v. Planters' Bank, 3 H. 43—app. & e. 323.
Green v. Robinson, 3 H. 105—app. & e. 272, 671; bills & n. 474, 475; excep. 9; new tr. 87, 91, 95; plead. 236, 245.
Green v. Robinson, 5 H. 80—cncts. 103, 108; judgm. 428, 431.
Green v. Sizer, 40 M. 530—cncts. 108; paymt. 12, 12a; states, 18, 145.
Green v. Skinner, 72 M. 254—bills & n. 256.
Green v. State, 23 M. 509—ind. 125g, 165.
Green v. State, 28 M. 687—crim. l. 834, 970, 1031; hom. 115, 286b, 340, 340b; ind. 11b.
Green v. State, 53 M. 148—mand. 109; states, 142, 143, 171, 193; statut. 237.
Green v. State, 55 M. 454—crim. l. 835; hom. 314.
Green v. State, 56 M. 771—pub. lands, 142.
Green v. State, 59 M. 501—crim. l. 841, 924, 927, 1038, 1174.
Green v. State, 67 M. 356—rape, 50.
Green v. State, 72 M. 522—jury, 84, 103.
Green v. State, 89 M. 331—hom. 212.
Green v. State, 37 So. 646—hom. 309.
Green v. State, 46 So. 252—hom. 250.
Green v. State, 53 So. 415—crim. l. 354.
Green v. Tippah County, 58 M. 337—lim. of act. 105, 181.
Green v. Tunstall, 5 H. 638—app. & e. 73; ex. & ad. 533, 537d.
Green v. Weems, 85 M. 566—fraud. conv. 219.
Green v. Weller, 32 M. 650—com. l. 10; const. law, 11, 14, 15; states, 24; statut. 180, 189, 192, 204, 209, 285.
Green v. Whiting, 1 S. & M. 579—app. & e. 398.
Green, Abernathy v.—11 So. 186.
Green, Beard v.—51 M. 856.
Greenburg v. Massey, 90 M. 121—j. p. 98.
Greenburg v. Sauls Bros. & Co. 91 M. 410—app. & e. 684; paymt. 64.
Green, Christian v.—45 So. 425.
Green, Dickson v.—24 M. 612.
Greene v. Cole, 54 So. 65—banks, 80.
Greene v. Merchants' &c. Bank, 73 M. 542—judgm. 643; new tr. 146.
Greene v. Monroe Co. 72 M. 306—coro. 9.
Greene v. Rienzi, 87 M. 463—mun. corp. 147, 918, 944.
Greene v. Williams, 58 M. 752—eq. 360; tax. 696, 697, 709, 787, 822.

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Greene County, Dixon v.—76 M. 794.
Greener v. Neal, 61 M. 204—ex. & ad. 415b.
Green, Evans v.—23 M. 294.
Green, Gale v.—W. 159.
Green, Gibson v.—45 M. 209.
Green, Gibbs v.—54 M. 592.
Green, Hall v.—60 M. 47.
Green, Hartford Fire Ins. Co. v.—52 M. 332.
Green, Horne v.—52 M. 452.
Greenleaf v. Highland, W. 375—disc. 22.
Greenlee v. McCoy, 30 M. 588—app. & e. 105.
Green, McDonald v.—9 S. & M. 138.
Green, McLaughlin v.—48 M. 175.
Green, McLaughlin v.—50 M. 453.
Green, McKinney v.—52 M. 70.
Green, Memphis &c. R. Co. v.—52 M. 779.
Green, Ocean Springs v.—77 M. 472.
Green, Parisot v.—46 M. 747.
Green, Payne v.—10 S. & M. 507.
Green, Probate Judge v.—1 H. 146.
Green, Ragland v.—14 S. & M. 194.
Green, Stamps v.—33 M. 546.
Green, Stanton v.—34 M. 576.
Green, Storm v.—51 M. 103.
Greenville v. Harvie, 79 M. 754—mun. corp. 306.
Greenville v. Laurent, 75 M. 456—mun. corp. 11, 58, 868.
Greenville, Adams v.—77 M. 881.
Greenville, Alexander v.—54 M. 659.
Greenville Compress v. Planters' Press, 70 M. 669—acct. 19; corp. 385, 581, 582.
Greenville, Giardina v.—70 M. 896.
Greenville, Greenville Ice Co. v.—69 M. 86.
Greenville, Greenville Waterworks Co. v.—7 So. 409.
Greenville, Henning v.—69 M. 214.
Greenville Ice &c. Co. v. Greenville, 69 M. 86—statut. 194, 245; tax. 204, 235, 251.
Greenville, Jackson v.—72 M. 220.
Greenville, McCauley v.—37 M. 818.
Greenville, Nesbit v.—69 M. 22.
Greenville St. R. Co. Bowie v.—69 M. 196.
Greenville Waterworks Co. v. Greenville, 7 So. 409—mun. corp. 249.
Greenville, Reed v.—83 M. 192.
Greenville, Shanks v.—57 M. 168.
Green, Wickham v.—61 M. 463.
Greenville, Wilzinski v.—85 M. 393.
Greenville &c. Co. v. Hyatt &c. Mfg. Co. 11 So. 471—app. & e. 1002.
Greenville &c. Co. Leavenworth v.—82 M. 578.
Greenwade v. Mills, 31 M. 464—mal. pros. 16, 17, 71, 72; trial, 135, 189, 214.
Greenwald, Baum v.—95 M. 765.
Greenwald, Mitchell v.—43 M. 167.
Greenwall, Tufts v.—66 M. 360.
Greenwood v. Delta Bank, 75 M. 162—licens. 5½.
Greenwood v. Harris, 89 M. 121—mun. corp. 822.
Greenwood v. Henderson, 84 M. 802—mun. corp. 104.
Greenwood v. Jones, 91 M. 728—mun. corp. 109, 111.
Greenwood v. Ligon, 10 S. & M. 615—cncts. 153; cov. 21, 91; ven. & pur. 49, 129.
Greenwood v. Moore, 79 M. 201—land. & t. 66.
Greenwood v. Weaver, 96 M. 604—app & e. 843; crim. l. 1105.
Greenwood, Morris v.—73 M. 430.
Greenwood Grocery Co. Yazoo &c. R. Co. v.—51 So. 450.
Greenwood Ice Co. v. Georgia Home Ins. Co. 72 M. 46—ins. 81, 94.
Greenwood Lodge No. 135, A. F. & A. M. v. Priebatsch, 83 M. 120—bills & n. 46.
Greenwood, Washington v.—23 So. 258.
Greenwood, Yerger v.—77 M. 378.
Greer v. Bush, 57 M. 575—app. & e. 197; bills & n. 255, 283, 425; chat. m. 240; guar. 36; plead. 430; princ. & s. 66.
Greer v. State, 54 M. 378—crim. l. 622, 1152; statut. 39, 147, 170, 282.
Greer, Bonds v.—56 M. 710.
Greer, Brandon v.—95 M. 100.
Greer, George v.—53 M. 495.
Greer, Robinson v.—6 H. 223.
Greeson v. State, 5 H. 33—gr. jury, 22; ind. 11b, 17, 21, 101; larc. 4, 30.
Gregg, Anderson v.—44 M. 170.
Gregg, Hardy v.—2 So. 358.
Gregg, Magee v.—11 S. & M. 62.
Gregg, Varner v.—26 M. 590.
Grego v. Grego, 78 M. 443—app. & e. 544; 1178; div. 8, 89, 146, 183, 248; plead. 204.
Gregory v. Brogan, 74 M. 694—tax. 671, 694, 793.
Gregory v. Dodds, 60 M. 549—hus. & w. 47.
Gregory v. Field, 63 M. 323—guard. & w. 7, 11, 139.
Gregory v. Orr, 61 M. 307—ex. & ad. 468, 512; guard. & w. 143, 164.
Gregory v. State, 42 So. 168—mast. & s. 345.
Gregory, Clark v.—5 H. 363.
Gregory, Dodds v.—61 M. 351.
Gregory, Ex parte, 56 M. 164—costs, 322; pardon, 9.
Gregory, Hill v.—56 M. 341.
Gregory, Kinnare v.—55 M. 612.

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Gregory, Reed v.—46 M. 740.
Gregory, Reid v.—78 M. 247.
Gregory, Watkins v.—69 M. 469.
Gregory, Whitney v.—16 So. 292.
Grenada v. Wood, 81 M. 308—mun. corp. 111, 161, 164.
Grenada Academy, Morton v.—8 S. & M. 773.
Grenada Bank v. Adams, 87 M. 669—judgm. 948; tax. 123.
Grenada Cotton Compress Co. v. Atkinson, 94 M. 93—ev. 333; wareh. 14, 34.
Grenada County, Pass v.—71 M. 426.
Grenada Lumber Co. v. State, 54 So. 8—app. & e. 1167; const. law, 46; lim. of act. 11; monop. 30.
Grenada, Sherman v.—51 M. 186.
Gresham v. King, 65 M. 387—hus. & w. 14.
Gresham v. Roberts, 2 S. & M. 471—judgm. 778.
Gresham, Clark v.—67 M. 203.
Greve v. Magee, 92 M. 190—app. & e. 784.
Gribble v. Lang, 11 So. 6—partit. 9, 80, 83.
Grider, Aldridge v.—13 S. & M. 281.
Gridley v. Brigs &c. Co. 2 H. 830—dam. 198; judgm. 128.
Gridley v. Denney, 2 H. 820—judgm. 951.
Gridley v. Duncan, 8 S. & M. 456—bankr. 193.
Gridley v. Tucker, Freem. Ch. 209—bills & n. 97; cncts. 54; set-off. 35; ven. & pur. 351.
Gridley, Helm v.—W. 511.
Gridley, Rowland v.—1 H. 210.
Gridley, Tooley v.—3 S. & M. 493.
Gridly, Governor v.—W. 328.
Gridly, Lynn v.—W. 548.
Griffin v. Brock, 33 So. 968—trial, 143.
Griffin v. Byrd, 74 M. 32—app. & e. 1175; ven. & pur. 254.
Griffin v. Dogan, 48 M. 11—em. dom. 2; tax. 1, 615, 622, 809.
Griffin v. Ellis, 63 M. 348—tax. 671.
Griffin v. Griffin, 93 M. 651—trial, 190.
Griffin v. Harrison, 52 M. 824—quiet. t. 44.
Griffin v. Hickman, 92 M. 266—costs, 279.
Griffin v. Lancaster, 59 M. 340—execution, 190.
Griffin v. Levee Commissioners, 71 M. 767—abate. & r. 14; tax. 568.
Griffin v. Lovell, 42 M. 402—ex. & ad. 438; mtg. 298, 427, 428.
Griffin v. Lower, 37 M. 458—courts, 119; witn. 133.
Griffin v. McDaniel, 63 M. 121—courts, 119.
Griffin v. Mills, 40 M. 611—lim. of act. 114.
Griffin v. Mixon, 38 M. 424—const. law, 285; em. dom. 70; tax. 3, 545.
Griffin v. Ragan, 52 M. 78—hus. & w. 228, 237, 239, 242.
Griffin v. Refuge Cotton Oil Co. 93 M. 477—brok. 83.
Griffin v. Sheffield, 38 M. 359—ack. 28; adv. pos. 43; curt. 11; eject. 15, 25, 105; ev. 180, 368; hus. & w. 62, 195; land. & t. 61; life est. 3; partit. 63.
Griffin v. State, 96 M. 309—forg. 28, 29.
Griffin, Adams v.—3 S. & M. 556.
Griffin, Adams v.—85 M. 1.
Griffin, Baker v.—50 M. 158.
Griffin, Beard v.—10 S. & M. 586.
Griffin, Bond v.—74 M. 599.
Griffin, Boyle v.—84 M. 41.
Griffin, Byars v.—31 M. 603.
Griffin, Dogan v.—51 M. 782.
Griffin, Fellows v.—9 S. & M. 362.
Griffin, Grubbs v.—25 So. 663.
Griffin, Hunt v.—49 M. 742.
Griffin, Jages v.—43 M. 134.
Griffin, Lee v.—31 M. 632.
Griffin Lumber Co. v. Myer, 80 M. 435—bills & n. 500.
Griffing v. Hopkins, W. 49—parent & c. 8.
Griffing v. Mills, 40 M. 611—attch. 90, 209.
Griffing v. Pintard, 25 M. 173—app. & e. 150, 1025; tax. 531, 550, 614, 653.
Griffing, Pintard v.—32 M. 133.
Griffin, Montgomery v.—W. 453.
Griffin, Rabb v.—26 M. 579.
Griffin, Swanson v.—68 M. 319.
Griffith v. Vertner, 5 H. 736—ex. & ad. 463; proc. 49.
Griffith v. Vicksburg Waterworks Co. 88 M. 371—app. & e. 878; courts, 492; inj. 163, 202; waters, 203.
Griffith, Dale v.—93 M. 573.
Griffith, Vertner v.—W. 414.
Griffith, Wilson v.—24 M. 468.
Grigg, Ingraham v.—13 S. & M. 22.
Griggs v. Jesse French Piano &c. Co. 70 M. 211—j. p. 48.
Grigsbey v. Francis, 2 H. 845—app. & e. 545; excep. 9.
Grigsby v. Ford, 3 H. 184—bills & n. 540; dam. 200; judgm. 134; plead. 433.
Grimball v. Marshall, 3 S. & M. 359—bills & n. 408, 510.
Grimball v. Mississippi &c. R. Co. 3 S. & M. 38—costs, 117; judgm. 306, 310.
Grimes v. State, 54 So. 839—assa. 50.
Grimes, Buchanan v.—52 M. 82.
Grimes, Calhoun v.—25 M. 47.
Grimes, Cozine v.—76 M. 294.
Grimes, Fisher v.—Sm. & M. Ch. 107.

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Grimes, Marshall v.—41 M. 27.
Grimes, Wade v.—7 H. 425.
Grinstead v. Buckley, 32 M. 148—const. law, 51; judges, 14, 16.
Grinstead v. Fonte, 32 M. 120—ex. & ad. 124, 425; plead. 119.
Grinstead v. Foute, 26 M. 476—bills & n. 467.
Grisham v. Lutric, 76 M. 444—frds. st. of, 143.
Grisham, Porter v.—3 H. 75.
Grissom v. State, 62 M. 167—crim. l. 19, 47; hom. 294.
Grissom, Dick v.—Freem. Ch. 428.
Grissom, Hopkins v.—26 M. 143.
Grissom, Jones County v.—52 So. 629.
Grissom, New Orleans Acid &c. Co. v.—79 M. 662.
Grist v. Forehand, 36 M. 69—ex. & ad. 153; guard. & w. 36, 170.
Griswold v. Simmons, 50 M. 123—assist. l.
Griswold v. Simmons, 50 M. 137—app. & e. 169; eq. 195; refer. 102.
Groce v. Phœnix Ins. Co. 94 M. 201—ins. 282.
Grogan v. State, 63 M. 147—crim. l. 423, 593, 1151, 1166; rob. 16.
Groome, Alabama &c. R. Co. v.—52 So. 703.
Groome, Vicksburg v.—24 So. 306.
Gross v. Bartley, 66 M. 116—land. & t. 229b.
Gross v. Jones, 89 M. 44—app. & e. 1009; acct. 5; acct. st. 4; ins. p. 73, 75; trusts, 283.
Gross v. McKee, 53 M. 536—chat. m. 32; replev. 12.
Gross v. Oatis, 74 M. 357—estop. 35, 78.
Gross v. Pigg, 73 M. 286—hus. & w. 151.
Gross v. Todd, 94 M. 168—ev. 397; judgm. 620.
Gross, Illinois Cent. R. Co. v.—22 So. 946.
Groton Bridge &c. Co. v. Alabama &c. R. Co. 80 M. 162—cncts. 205; ev. 518.
Groton Bridge &c. Co. v. Warren County, 80 M. 214—counties, 114, 125.
Grouch v. Hazelhurst Lumber Co. 16 So. 496—estop. 89; trusts, 84; ven. & pur. 220.
Grover v. Gaunt, 6 S. & M. 317—bills & n. 462, 486; dam. 97; judgm. 106; plead. 118.
Grover, Metcalf v.—55 M. 145.
Groves v. Bailey, 24 M. 588—attch. 47, 216.
Groves v. Groves, 57 M. 658—dep. 53; lim. of act. 44.
Groves, Boarman v.—23 M. 280.
Groves, Terry v.—71 M. 539.
Grubb v. Wiley, 9 S. & M. 29—bonds, 128.
Grubb, Nye v.—8 S. & M. 643.
Grubb, Rea v.—39 So. 808.
Grubbs v. Collins, 54 M. 485—hus. & w. 151, 230; new tr. 102; plead. 437.
Grubbs v. Griffin, 25 So. 663—int. liq. 24, 28.
Grubbs v. Nye, 13 S. & M. 443—ev. 212.
Grubbs, Ex parte, 79 M. 358—hab. corp. 4, 22.
Grubbs, Ex parte, 80 M. 288—crim. l. 260; j. p. 202.
Guarantee Co. of North America v. Pitts, 78 M. 837—ins. 665.
Guenther, Armstrong v.—67 M. 698.
Guerrant v. Dawson, 34 M. 149—mech. liens, 258, 261.
Guerrant v. Smith, 48 M. 90—arb. & a. 25, 85; partners. 312.
Guess v. Smith, 56 So. 166—div. 245; judgm. 17c.
Guess, Illinois Cent. R. Co. v.—74 M. 170.
Guest v. State, 96 M. 871—crim. l. 700; hom. 10, 14, 35, 38, 203, 213, 214, 216, 340a.
Guevara, Rhyne v.—67 M. 139.
Guffy Petroleum Co. Vicksburg Waterworks Co. v.—86 M. 60.
Guice v. Sellers, 43 M. 52—deeds, 47, 79; ex. & ad. 453; ven. & pur. 308, 308a.
Guice v. State, 60 M. 714—crim. l. 814, 1144; hom. 189, 190, 286b; judges, 29; jury, 109, 131.
Guice, Adams v.—30 M. 397.
Guice, Brown v.—46 M. 299.
Guice, Cook v.—28 M. 242.
Guice, Lea v.—13 S. & M. 656.
Guice, Ogden v.—56 M. 330.
Guignard, Williams v.—2 H. 722.
Guion v. Doherty, 43 M. 538—acc. & s. 15; app. & e. 1003; paymt. 18; plead. 204; tender, 22.
Guion v. Pickett, 42 M. 77—mtg. 342, 342a, 342b.
Guion, Freeman v.—11 S. & M. 58.
Guise v. Middleton, Sm. & M. Ch. 89—eq. 429; jud. s. 3, 11.
Gulf Coast Canning Co. v. Foster, 17 So. 683—jud. s. 58, 61; lim. of act. 72a; partit. 106.
Gulf Coast Ice &c. Co. v. Bowers, 80 M. 570—em. dom. 16, 117, 306; inj. 1, 9, 135, 152; mun. corp. 272.
Gulf Compress Co. v. Woten Cotton Co. 54 So. 86—inj. 26.
Gulf of Mexico Land &c. Co. Louisville &c. R. Co. v.—82 M. 180.
Gulfort, Roux v.—52 So. 485.
Gulfport v. Martin, 96 M. 131—int. liq. 211.
Gulfport v. Stratakos, 90 M. 469—Sunday, 7.
Gulfport v. Todd, 92 M. 428—mun. corp. 966.
Gulfport Cotton Oil &c. Co. v. Reneau, 94 M. 904—frds. st. of, 53, 105, 114, 118.

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Gulfport, Edwards v.—95 M. 148.
Gulfport Land &c. Co. v. Ansley, 87 M. 648—paymt. 30.
Gulfport Land &c. Co. v. Augur, 48 So. 722—mtg. 413.
Gulfport, Price v.—52 So. 486.
Gulfport Sash &c. Co. v. Bond, 95 M. 723—ev. 180; mun. corp. 1035.
Gulfport &c. Co. Smith v.—95 M. 190.
Gulf &c. R. Co. v. Adams, 83 M. 306—r. r. 8.
Gulf &c. R. Co. v. Adams, 85 M. 772—cert. 24; ev. 23, 48; tax. 389.
Gulf &c. R. Co. v. Adams, 90 M. 559—const. law, 133, 287; tax. 42, 47.
Gulf &c. R. Co. v. Barnes, 94 M. 484—eq. 51; neg. 92; r. r. 286.
Gulf &c. R. Co. v. Blockman, 87 M. 192—mast. & s. 97.
Gulf &c. R. Co. v. Boswell, 85 M. 313—app. & e. 525, 548, 705, 1033.
Gulf &c. R. Co. v. Bussey, 82 M. 616—mast. & s. 112, 180.
Gulf &c. R. Co. v. Ellis, 85 M. 586—r. r. 103.
Gulf &c. R. Co. v. Ferguson McKinney Dry Goods Co. 52 So. 797—carr. 114, 132 136.
Gulf &c. R. Co. v. Flowers, 85 M. 633—execution, 171; new tr. 29.
Gulf &c. R. Co. v. Fuqua & Horton, 84 M. 490—carr. 114.
Gulf &c. R. Co. v. Hartley, 88 M. 674—app. & e. 1047; dam. 225; tresp. 43, 74.
Gulf &c. R. Co. v. Laurel Cotton Mills, 91 M. 166—carr. 13.
Gulf &c. R. Co. v. Nelson, 82 M. 653—dam. 216.
Gulf &c. R. Co. v. Railroad Commission, 94 M. 124—r. r. 227.
Gulf &c. R. Co. v. Ramsey, 54 So. 440—j. p. 78, 174.
Gulf &c. R. Co. v. Seminary, 81 M. 237—mun. corp. 21.
Gulf &c. R. Co. v. Singleterry, 78 M. 772—home. 118a.
Gulf &c. R. Co. v. Sneed, 84 M. 252—r. r. 94, 303, 337.
Gulf &c. R. Co. Bell v.—76 M. 71.
Gulf &c. R. Co. Bussey v.—79 M. 597.
Gulf &c. R. Co. Grace v.—25 So. 875.
Gulf &c R. Co. Johnson v.—82 M. 452.
Gulf &c. R. Co. Laurel Cotton Mills v.—84 M. 339.
Gulf &c. R. Co. Leake v.—91 M. 398.
Gulf &c. R. Co. Korter v.—87 M. 482.
Gulf &c. R. Co. Menge v.—53 So. 424.
Gulf &c. R. Co. Miss. Railroad Commission v.—78 M. 750.
Gulf &c. R. Co. Muse v.—48 So. 897.
Gulf &c. R. Co. Nichols v.—83 M. 126.
Gulledge v. Berry, 31 M. 346—ex. & ad. 87.
Gulledge v. Slayden-Kirksey Woolen Mills, 75 M. 297—chat. m. 139; fraud. conv. 173; sales, 52, 225, 316; trial, 249.
Gullich v. Alford, 61 M. 224—partners. 102; sales, 112.
Gully v. Dunlap, 24 M. 410—courts, 95; guard. & w. 53, 149.
Gully v. Hull, 31 M. 20—fraud. conv. 172; hus. & w. 35, 86; trusts, 133.
Gully v. Neville, 55 So. 289—perp. 4; wills, 473, 578.
Gumbel v. Koon, 59 M. 264—execution, 50.
Gumbel v. Koon, 59 M. 264—execution, 54; partners. 162.
Gumbel, Burbridge v.—72 M. 371.
Gumbel, Johnston v.—19 So. 100.
Gumbel, Menken v.—57 M. 756.
Gumble, House v.—78 M. 259.
Gum Carbo Co. v. New Orleans German Gazette, 90 M. 177—judgm. 407.
Gundy, Gusdofer v.—72 M. 312.
Gunn v. Rankin County Savings Institution, 2 Miss. Dec. 92—eq. 420.
Gunn, Carlisle v.—68 M. 243.
Gunning v. Royal, 59 M. 45—bills & n. 91; cncts. 74.
Gunn, Mobile &c. R. Co. v.—68 M. 366.
Gunn, Watts v.—53 M. 502.
Gunst, Lindenmyer v.—70 M. 693.
Gunter, Jefcoat v.—73 M. 539.
Gunter, Sears v.—39 M. 338.
Gurley v. Gurley, 77 M. 413—partners. 250.
Gurlie, Jones v.—61 M. 423.
Gurlie, Jones v.—62 M. 760.
Gusdofer v. Gundy, 72 M. 312—inf. 107; judgm. 422.
Gustavus v. Marx, 44 M. 446—attch. 217, 325.
Guthrie v. State, 47 So. 639—larc. 42; tresp. 84.
Guthrie, Watkins v.—38 So. 370.
Guyot, Henderson v.—6 S. & M. 209.
Guy, Perkins v.—55 M. 153.
Gwin v. Harris, Sm. & M. Ch. 528—judgm. 66.
Gwin v. McCarroll, 1 S. & M. 351—app. & e. 154, 1175; courts, 88; ex. & ad. 337, 358; judgm. 16, 17.
Gwin v. McLean, 62 M. 121—paymt. 38.
Gwin v. Mandeville, 9 S. & M. 320—plead. 188.

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Gwin v. Melmoth, Freem. Ch. 505—adj. land. 10; nuis. 18, 19.
Gwin v. Nettles, 18 So. 798—wills, 669.
Gwin v. Stone, Sm. & M. Ch. 124—eq. 152.
Gwin v. Williams, 27 M. 324—app. & e. 544, 701; appr. 5; eject. 68; plead. 87.
Gwin, Eakin v.—1 Miss. Dec. 30.
Gwin, Harris v.—10 S. & M. 563.
Gwin, Wooten v.—56 M. 422.
Gwynn v. State, 64 M. 324—gr. jury, 36; recogn. 11.
Gwyn, Thompson v.—46 M. 522.

H

Haas, O'Hara v.—46 M. 374.
Haber v. Lane, 45 M. 608—new tr. 108.
Haberstraw, Higgins v.—76 M. 627.
Hackler v. Cabel, W. 91—app. & e. 544; des. & d. 12; dower, 11; pub. lands, 114.
Hackman, Abbott v.—2 S. & M. 510.
Hackney v. Illinois Cent. R. Co. 33 So. 723—r. r. 327.
Hadley, Carter v.—59 M. 130.
Hadley, Tucker v.—52 M. 414.
Hafter v. Strange, 65 M. 323—estop. 89, 94; ven. & pur. 232.
Hafter, Fall v.—40 M. 606.
Hafter, Interstate B. & L. Assn. v.—76 M. 770.
Hagan v. Barksdale, 44 M. 186—ex. & ad. 93.
Hague v. State, 34 M. 616—hom. 286b; ind. 11b.
Hahn v. Katz, 24 So. 964—attch. 308.
Hahn, Bernheim v.—65 M. 459.
Hahn, Rogers v.—63 M. 578.
Hahn, Stansel v.—96 M. 616.
Haines v. Haines, 90 M. 100—marr. 38.
Haines v. Haines, 54 So. 433—app. & e. 862, 1097, 1201.
Hairston v. Francher, 7 S. & M. 249—high. 158; j. p. 174.
Hairston v. Hairston, 27 M. 704—dom. 1, 4, 7; dower, 2; hus. & w. 6.
Hairston v. Hairston, 30 M. 276—wills, 172, 178, 333, 356.
Hairston v. Jaudon, 42 M. 380—frds. st. of, 56, 125, 151.
Hairston v. State, 54 M. 689—assa. 91; consp. 28.
Hairston v. State, 10 So. 479—hom. 169.
Hairston, Probate Judge v.—4 H. 242.
Haise v. Lorch, 47 M. 685—app. & e. 110.
Halbert, Eckford v.—30 M. 273.
Hale v. Bozeman, 60 M. 965—eq. 37; fraud. conv. 314; judgm. 419.
Hale v. State, 72 M. 140—crim. l. 561, 789; hom. 189, 336; jury, 67, 73, 109, 131.
Hale, Berry v.—1 H. 315.
Hale, Williams v.—12 S. & M. 562.
Haley v. Drainage Comrs. 55 So. 353—drains, 12, 19; statut. 77, 146.
Haley v. Martin, 85 M. 698—bound. 10.
Haley v. Taylor, 77 M. 867—ten. in c. 55; tresp. 36, 45, 62, 67.
Haley v. Williams, 8 S. & M. 487—execution, 356.
Haley, Crook v.—23 So. 388.
Haley, Marx v.—92 M. 113.
Haley, Means v.—84 M. 550.
Haley, Means v.—86 M. 557.
Haley, Porter v.—55 M. 66.
Haley, Roberts v.—2 H. 886.
Haley, Warren v.—Sm. & M. Ch. 647.
Halfacre v. Dobbins, 50 M. 766—eq. 2; ex. & ad. 537a.
Halfacre, Dobbins v.—52 M. 561.
Halfacre, Smith v.—6 H. 582.
Hall v. Allen, 75 M. 175—ins. 779.
Hall v. Barnett, 71 M. 37—deeds, 55.
Hall v. Browder, 4 H. 224—des. & e. 52; trial, 156.
Hall v. Cassedy, 25 M. 48—time, 7.
Hall v. Clopton, 56 M. 555—ev. 119; princ. & s. 30, 40.
Hall v. Dickey, 32 M. 208—adv. pos. 64; bailm. 24.
Hall v. Eastman, 89 M. 588—logs, 1.
Hall v. Green, 60 M. 47—fraud. conv. 164; lim. of act. 139; judgm. 755, 778, 910; quiet. t. 29.
Hall v. Hall, 27 M. 458—ex. & ad. 129, 291.
Hall v. Hall, 66 M. 35—deeds, 24; frds. st. of, 62.
Hall v. Hall, 77 M. 741—div. 182.
Hall v. Lafayette County, 69 M. 529—counties, 95, 99, 101; eq. 23; judgm. 645; offic. 37; princ. & s. 78; ref. of inst. 18, 27, 42; tax. 568.
Hall v. Lyon, 59 M. 218—elec. 300.
Hall v. Meridian Sav. Inst. 56 M. 674—execution, 268; judgm. 784.
Hall v. Moore, 68 M. 527—execution, 246.
Hall v. Moore, 70 M. 75—costs, 279; execution, 256; witn. 23.
Hall v. State, 79 M. 38—states, 191, 193.
Hall v. State, 91 M. 216—crim. l. 209.
Hall v. State, 1 So. 351—crim. l. 854, 1085; hom. 116, 300f.
Hall v. State, 44 So. 810—hom. 127; ind. 58, 74.
Hall v. Thompson, 1 S. & M. 443—ack. 49; cncts. 94, 350; ev. 220, 265; fraud. 1, 22, 25,

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58; ven. & pur. 27, 31, 32, 34, 37, 104, 108, 112, 119, 123b, 123c, 232, 314.
Hall v. Waddell, 78 M. 16—app. & e. 1217; deeds, 55; eq. 453; ev. 221; plead. 127; set-off, 30.
Hall v. Wells, 54 M. 289—app. & e. 1179; eject. 121; guard. & w. 8; lim. of act. 5; sci. fa. 3.
Hall, Battaile v.—24 M. 246.
Hall, Caldwell v.—60 M. 330.
Hall, Clopton v.—51 M. 482.
Hall, Coppage v.—9 S. & M. 360.
Hall, Gibbs v.—38 So. 369.
Hall, Johnson v.—87 M. 667.
Hall, La Fayette County v.—68 M. 719.
Hall, La Fayette County v.—70 M. 678.
Hall, Lehr v.—5 H. 54.
Hall, Lyebrook v.—73 M. 509.
Hall, Miles v.—12 S. & M. 332.
Hallock, Lauderdale v.—7 S. & M. 622.
Hall Safe Co. Paine v.—64 M. 175.
Hall's Gin Co. v. Berg, 65 M. 184—princ. & a. 145.
Hallum v. Mobile &c. R. Co. 24 So. 909—app. & e. 840; carr. 229.
Hall, Vining v.—40 M. 83.
Hall, Walker v.—66 M. 390.
Hall, Western Union Tel. Co. v.—79 M. 623.
Halpin v. Stanard, 60 M. 822—sales, 348.
Halpin, Chaffe v.—62 M. 1.
Halpin, Hamilton v.—68 M. 99.
Halsell v. Turner, 84 M. 432—atty. & c. 173; exemp. 53.
Halsell, Nathan v.—91 M. 785.
Halsell, Peirce v.—90 M. 171.
Halsey v. Gee, 79 M. 193—wills, 546.
Halsey v. Norton, 45 M. 703—app. & e. 913; partners. 64, 198, 271, 277, 296; plead. 193, 436.
Halsey v. Pinchard, 6 H. 279—plead. 436.
Halsey, Henry v.—5 S. & M. 573.
Halsey, Robb v.—11 S. & M. 140.
Halto, Brooks v.—33 M. 575.
Ham v. Cerniglia, 73 M. 290—ev. 400, 449; paymt. 36; sales, 456, 478.
Ham v. Yazoo Mississippi Delta, 83 M. 534—lev. 14, 19, 34.
Hamberlin v. Marble, 24 M. 586—execution, 172.
Hamberlin v. Terry, 7 H. 143—courts, 198; statut. 159; wills, 213, 247.
Hamberlin v. Terry, Sm. & M. Ch. 589—wills, 247.
Hamberlin, Fulcord v.—4 S. & M. 649.
Hamblen v. Hamblen, 33 M. 455—execution, 122, 134.
Hamblet v. Harrison, 80 M. 118—cncts. 139; hus. & w. 25.
Hamblet v. Steen, 65 M. 474—hus. & w. 149; partners. 162.
Hamblet, Marks v.—23 So. 393.
Hamblet, Steen v.—66 M. 112.
Hamblett v. White, 11 So. 185—schools, 97.
Hamblin v. Foster, 4 S. & M. 139—bills & n. 541; sheriffs, 125, 130, 159.
Hamblin v. Moore, 32 M. 205—app. & e. 150.
Hamblin, Brown v.—23 M. 392.
Hamblin, Garrett v.—11 S. & M. 219.
Hamblin, McKay v.—40 M. 472.
Hamblin, Matthews v.—28 M. 611.
Hamblin, Scott v.—3 S. & M. 285.
Hamblin, Shotwell v.—23 M. 156.
Hambrick v. Dent, 70 M. 59—app. & e. 1168; judgm. 107.
Hambrick v. Jones, 64 M. 240—app. & e. 1034, 1170; eq. 422; liens, 17; lim. of act. 80, 143; ven. & pur. 285.
Hambrick v. Wilkins, 65 M. 18—attch. 124, 156; sales, 121, 122, 287, 425, 442.
Hambrick, Foote v.—70 M. 157.
Hamer v. Harper, 46 So. 707—adv. pos. 114.
Hamer v. Johnson, 5 H. 698—bills & n. 313, 364.
Hamer v. Johnston, Sm. & M. Ch. 563—estop. 86.
Hamer v. Kirkwood, 25 M. 95—interest, 22; paymt. 42.
Hamer v. Rigby, 65 M. 41—app. & e. 518, 934; bills & n. 125, 488; interest, 4, 39; plead. 433.
Hamer, Alcorn v.—38 M. 652.
Hamer, Arnold v.—Freem. Ch. 509.
Hamer, Commercial &c. Bank v.—7 H. 448.
Hamer, Dickson v.—Freem. Ch. 284.
Hamer, Henderson v.—5 H. 525.
Hamer, Marlow v.—6 H. 189.
Hamer, Nevitt v.—5 S. & M. 145.
Hamer, Newell v.—4 H. 684.
Hamer, Stillman v.—7 H. 421.
Hamer, Tarpley v.—9 S. & M. 310.
Ham, Evans v.—54 So. 250.
Hamilton v. Booth, 55 M. 60—hus. & w. 126, 157.
Hamilton v. Catchings, 58 M. 92—bills & n. 454, 460, 540; venue, 26.
Hamilton v. Cooper, W. 542—adv. pos. 2; contin. 49; ex. & ad. 523; lim. of act. 2, 169.
Hamilton v. Flowers, 57 M. 14—hab. corp. 86; witn. 7, 22.
Hamilton v. Halpin, 68 M. 99—can. of i, 23; eq. 66, 186; home. 85; licens. 39; mtg. 346; partners. 20.

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Hamilton v. Homer, 46 M. 378—costs, 45, 99; eject. 30.
Hamilton v. Lockhart, 41 M. 460—eq. 79, 215; ex. & ad. 337, 349, 351; judgm. 577.
Hamilton v. Mississippi College, 52 M. 65—fraud. conv. 241.
Hamilton v. Moore, 32 M. 205—guard. & w. 10.
Hamilton v. Moore, 32 M. 625—new tr. 95, 96.
Hamilton v. State, 35 M. 214—app. & e. 928; crim. l. 1043, 1109, 1142; larc. 3.
Hamilton v. State, 67 M. 217—app. & e. 307, 1173; states, 104, 105.
Hamilton v. State, 8 So. 761—convt. 10; plead. 112; prisons, 1; states, 105.
Hamilton v. Yazoo &c. R. Co. 72 M. 39—r. r. 251.
Hamilton, Atlanta Stove Works v.—83 M. 704.
Hamilton-Brown v. Walker, 67 M. 197—judgm. 778.
Hamilton, Carney v.—89 M. 747.
Hamilton, Davis v.—50 M. 213.
Hamilton, Effingham v.—68 M. 523.
Hamilton, Ex parte, 65 M. 98—app. & e. 167; hab. corp. 30, 47, 91, 113, 118, 122.
Hamilton, Ex parte, 65 M. 147—bail, 49.
Hamilton, Kellogg v.—10 So. 479.
Hamilton, Marshall v.—41 M. 229.
Hamilton, Shelton v.—23 M. 496.
Hamilton, Shines v.—87 M. 384.
Hamilton, State v.—69 M. 116.
Hamilton, Vicksburg &c. R. Co. v.—62 M. 503.
Hamlett, Hiserodt v.—74 M. 37.
Hamlin v. Yazoo &c. R. Co. 72 M. 39—trial, 231.
Hamline v. Southern R. Co. 76 M. 410—r. r. 94.
Hamlin, Little v.—27 So. 528.
Hamlin, Van Earon v.—16 So. 594.
Hammack, Rosenbaum v.—51 So. 213.
Hammel v. Atkinson, 82 M. 465—forc. e. & d. 17; land. & t. 287.
Hammet, Jones v.—2 Miss. Dec. 265.
Hammock, Temple v.—52 M. 360.
Hammond v. Olive, 44 M. 543—proc. 132, 135.
Hammond v. State, 74 M. 214—crim. l. 381, 776, 789; ind. 137, 140.
Hammond, Echols v.—30 M. 177.
Hammond, Jennings v.—1 S. & M. 174.
Hammond, Pack v.—13 S. & M. 11.
Hamm, Ready v.—46 M. 422.
Hampton v. State, 88 M. 257—crim. l. 724.
Hampton v. State, 54 So. 722—crim. l. 326, 369, 419, 759, 809, 1170½; embez. 35, 45; ind. 105.
Hampton, Lee v.—79 M. 321.
Hampton, Stern v.—73 M. 555.
Hampton, Stern v.—19 So. 300.
Hancock v. Dodge, 85 M. 228—app. & e. 1167; brok. 43, 75; frds. st. of, 71.
Hancock v. Titus, 39 M. 224—des. & d. 153; execution, 44; trial, 231; wills, 630.
Hancock County v. Imperial Naval Stores Co. 93 M. 822—app. & e. 1169; ev. 5, 13; land. & t. 24; licens. 44; mines, 55; tax. 62.
Hancock County v. Simmons, 86 M. 302—tax. 469.
Hancock County, Mitchell v.—91 M. 414.
Hancock County, Poitevent v.—58 M. 810.
Hancock County, Weston v.—54 So. 307.
Hancock, First Nat. Bank v.—17 So. 736.
Hand v. Columbus, 4 S. & M. 203—arb. & a. 5; mun. corp. 1011.
Hand v. Fillingame, 92 M. 185—deeds, 126.
Hand v. Grant, 5 S. & M. 508—app. & e. 1051; execution, 239, 334; new tr. 41.
Hand v. Grant, 10 S. & M. 514—execution, 229, 235, 275, 326; judgm. 791.
Hand v. Winn, 52 M. 784—home. 12, 33, 162; hus. & w. 171, 218, 237.
Hand, Brotherhood Locomotive Firemen v.—90 M. 893.
Hand, Dunlap v.—26 M. 460.
Hand, Lawrence v.—23 M. 103.
Handley, McGee v.—5 H. 625.
Handy v. Andrews, 52 M. 626—eq. 337, 392.
Handy v. Cobb, 44 M. 699—arb. & a. 7; eq. 417, 442; hus. & w. 60.
Handy v. Noonan, 51 M. 166—guard. & w. 70; inf. 29; quiet. t. 44.
Handy v. State, 63 M. 207—dis. h. 11, 14.
Handy, Ettringham v.—60 M. 334.
Handy, Illinois Cent. R. Co. v.—63 M. 609.
Handy, Montgomery v.—62 M. 16.
Handy, Montgomery v.—63 M. 43.
Handy, Wohner v.—68 M. 153.
Hanes v. Planters' Cotton-Press &c. Assn. 55 M. 654—action, 53; bonds, 119; inj. 176; judgm. 715.
Hanes, Alabama &c. R. Co. v.—69 M. 160.
Hanes, Planters' Compress Assn.—52 M. 469.
Haney v. State, 38 So. 284—mast. & s. 345.
Haney, Lienkauf Banking Co. v.—93 M. 613.
Haney, State v.—96 M. 792.
Hankinson, Green v.—W. 487.
Hanks v. Neal, 44 M. 212—app. & e. 1028; contin. 3; crim. l. 1172; ex. & ad. 320, 333, 336, 337, 346, 349, 361, 362, 375, 388c; guard. & w. 86, 108; judgm. 491; partit. 54; plead. 131; trial, 5.

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Hanlan, Barkley v.—55 M. 606.
Hanna v. Harper, 3 S. & M. 793—ven. & pur. 112, 144.
Hanna v. Renfro, 32 M. 125—adv. pos. 69, 77, 99; champ. 1, 7; eject. 8, 25; evid. 452; new tr. 41; tax. 764; trial, 60.
Hannah v. Long, 14 So. 520—bills & n. 432.
Hannah v. State, 87 M. 375—crim. l. 631; hom. 309.
Hannah, Mortimer v.—82 M. 645.
Hannah, Southern Ins. Co. v.—37 So. 506.
Hanna, Miss. Cent. R. Co. v.—54 So. 74.
Hannum v. Cameron, 12 S. & M. 509—eq. 268; execution, 301.
Hannum, Cocke v.—39 M. 423.
Hannum, Watson v.—10 S. & M. 521.
Hanon v. Weil, 69 M. 476—app. & e. 71, 101.
Hanover Nat. Bank v. Klein, 64 M. 141—eq. 344; partners. 183, 184.
Hanover Nat. Bank, Kriger v.—72 M. 462.
Hanover Nat. Bank, Montgomery v.—79 M. 443.
Hanover Nat. Bank, Whitney v.—71 M. 1009.
Hansborough, Hoy v.—Freem. Ch. 533.
Hansboro, Wilson v.—50 So. 982.
Hansboro, Wilson v.—54 So. 845.
Hansell v. Forbes, 33 M. 42—ex. & ad. 415b.
Hanserd v. Gray, 46 M. 75—app. & e. 1201; eq. 375.
Hansford v. State, 11 So. 106—crim. l. 836, 1085, 1088; hom. 146.
Hanson v. Field, 41 M. 712—eq. 79, 215; ven. & pur. 42, 123b.
Hanway v. Robertshaw, 49 M. 758—bills & n. 91; eq. 45; partners. 193, 245, 246.
Hanway, Robertshaw v.—52 M. 713.
Haralson v. Holcomb, 10 S. & M. 581—execution, 221, 348.
Haralson v. White, 38 M. 178—ex. & ad. 468, 481; witn. 134.
Harbour, Robinson v.—42 M. 795.
Hardaway v. Biles, 1 S. & M. 657—app. & e. 372, 385.
Hardaway v. Parham, 27 M. 103—ex. & ad. 35.
Hardaway v. State, 54 So. 833—crim. l. 723.
Hardee v. Cheatham, 52 M. 41—conv. 1, 14; eq. 57; ex. & ad. 101, 216.
Hardee v. Gibbs, 50 M. 802—abate. & r. 45; mand. 154, 158; offic. 119; statut. 29.
Hardeman v. Byrne, 7 H. 365—new tr. 159.
Hardeman v. Cowan, 10 S. & M. 486—bills & n. 131, 435; estop. 44; execution, 260; fraud. conv. 24; ven. & pur. 190.
Hardeman v. State, 16 So. 876—crim. l. 1047; r. r. 255.
Harden, House v.—52 M. 860.
Harden, Martin v.—52 M. 694.
Hardenstein v. Brien, 96 M. 493—ev. 355; ex. & ad. 221, 437.
Hardie v. Bulger, 66 M. 577—can. of l. 42; corp. 210; eq. 146, 148, 241, 247, 273, 277.
Hardie v. Chrisman, 60 M. 671—tax. 656, 771, 787.
Hardie Tynes Foundry &c. Co. v. Glen Allen Oil Mill, 84 M. 259—cncts. 163; dam. 78; sales, 81.
Hardie, Yazoo &c. R. Co. v.—55 So. 42.
Hardie, Yazoo &c. R. Co. v.—55 So. 967.
Hardin v. Ho-yo-po-nubby, 27 M. 567—atty. & c. 65; ev. 83, 335, 342, 453; Indians, 14, 27.
Hardin v. Osborne, 43 M. 532—ex. & ad. 183; exemp. 30.
Hardin v. Pelan, 41 M. 112; hus. & w. 79, 230; judgm. 195.
Hardin, Cato v.—1 Miss. Dec. 274.
Harding v. State, 96 M. 204—crim. l. 1131.
Harding v. Cobb, 47 M. 599—eq. 93; hus. & w. 85, 179, 221; parties, 81, 85; ven. & pur. 279.
Hardin, Morrison v.—81 M. 583.
Hardy v. Alabama &c. R. Co. 73 M. 719—ease. 18; r. r. 102.
Hardy v. Gholson, 26 M. 70—appr. 20; courts, 198, 200¼, 202b; ex. & ad. 508a; statut. 267.
Hardy v. Gregg, 2 So. 358—eq. 138; partit. 12, 26, 34, 76.
Hardy v. Hartman, 65 M. 504—pub. lands, 66.
Hardy v. McClellan, 53 M. 507—rec. 3.
Hardy v. Pilcher, 57 M. 18—bills & n. 402; ev. 402.
Hardy v. Richards, 54 So. 76—wills, 786, 788.
Hardy v. Smith, 3 S. & M. 316—hab. corp. 8, 48, 73, 85; judges, 28; slaves, 9.
Hardy v. State, 96 M. 844—gr. jury, 22; ind. 139, 195.
Hardy v. Thomas, 23 M. 544—dism. 26; ex. & ad. 544.
Hardy, Bank of Meadville v.—94 M. 587.
Hardy, Blalack v.—37 M. 615.
Hardy, Commercial Bank v.—53 So. 395.
Hardy, Hill v.—34 M. 298.
Hardy, McCaughan v.—76 M. 598.
Hardy, Miss. Cent. R. Co. v.—88 M. 732.
Hardy, Rhodes v.—53 M. 587.
Hardy, Rigby v.—4 So. 114.
Hardy, Wright v.—76 M. 524.
Hare v. Sproul, 2 H. 772—new tr. 102.
Hare v. State, 4 H. 187—crim. l. 292, 849, 924, 927, 928, 929; jury, 10, 84.
Hargreaves, Pratt v.—75 M. 897.

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Hargreaves, Pratt v.—76 M. 955.
Hargreaves, Pratt v.—77 M. 892.
Hargrove v. Baskin, 50 M. 194—cred. s. 37; des. & d. 137; ex. & ad. 320, 423.
Hargrove v. Martin, Pleasants & Co. 6 S. & M. 61—eq. 422.
Hargroves v. Thompson, 31 M. 211—app. & e. 193; ex. & ad. 3; marr. 19, 25, 26.
Hargroves, Walton v.—42 M. 18.
Hargrove, Upshaw v.—6 S. & M. 286.
Hargus v. Bowen, 46 M. 72—app. & e. 1170; ex. & ad. 374, 375; judgm. 17d.
Haring v. Flowers, 91 M. 242—wills, 596.
Harington v. Allen, 48 M. 492—ven. & pur. 238.
Haris v. State, 12 So. 904—int. liq. 200.
Hariston v. Sale, 6 S. & M. 634—mast. & s. 2, 42, 63, 73.
Harkey, Beaty v.—2 S. & M. 563.
Harkins, Keenan v.—82 M. 709.
Harkins, Lovelady v.—6 S. & M. 412.
Harkleroad v. Bass, 84 M. 483—wills, 505.
Harkleroad, Maxwell v.—77 M. 456.
Harkleroads, Board of Levee Commissioners v.—62 M. 807.
Harkness v. Kansas City &c. R. Co. 33 So. 77—carr. 278.
Harkness v. State, 95 M. 506—elec. 328; ind. 70.
Harkness, Dulion v.—80 M. 8.
Harkness, Miss. Cent. R. Co. v.—32 M. 203.
Harkness, State v.—95 M. 506.
Harkreader v. Clayton, 56 M. 383—adv. pos. 63; deeds, 59; escrow, 8, 11, 14; tax. 656, 674.
Harkreader v. Eubanks, 12 So. 210—cncts. 298.
Harlan v. State, 41 M. 566—courts, 182; crim. l. 14; states, 17.
Harland v. Adams, 76 M. 308—int. liq. 47.
Harlan, Knickerbocker Life Ins. Co. v.—56 M. 512.
Harlow v. Mister, 64 M. 25—eq. 93; mtg. 433, 496.
Harlow v. St. Louis &c. Ins. Co. 54 M. 425—ins. 244, 363.
Harman v. Fleming, 25 M. 135—cncts. 303; slaves, 8.
Harman v. Hoskins, 56 M. 142—chat. m. 188; fraud. conv. 9.
Harman v. James, 7 S. & M. 111—champ. 7; deeds, 38, 95; eject. 18; ev. 165; hus. & w. 119; land. & t. 269; lost inst. 2; plead. 434; ten. in c. 38.
Harman, Cole v.—8 S. & M. 562.
Harmon v. Barstow, 23 M. 276—const. law, 41; costs, 273; eq. 15; princ. & a. 168, 171.
Harmon v. Goodbar Shoe Co. 18 So. 118—trial, 143.
Harmon v. Magee, 57 M. 410—ack. 28; hus. & w. 168, 228; interest, 50; tender, 10.
Harmon v. Partier, 12 S. & M. 425—Indians, 15.
Harmon v. Short, 8 S. & M. 433—chat. m. 159, 172; sales, 234, 235, 400, 455; slaves, 7.
Harmon v. Thompson, 2 H. 808—ex. & ad. 299.
Harmon, Choppin v.—46 M. 304.
Harness v. Williams, 64 M. 600—licens. 15, 36.
Harney v. Demoss, 3 H. 174—atty. & c. 156, 182.
Harney v. Morton, 36 M. 411—eject. 22; estop. 26; quiet t. 15; princ. & a. 76, 126.
Harney v. Morton, 39 M. 508—assist. 7, 8.
Harney v. Pack, 4 S. & M. 229—fraud. conv. 7, 109, 115, 171, 242; sales, 234.
Harney, Parham v.—6 S. & M. 55.
Harney, State v.—57 M. 863.
Harper v. Archer, 4 S. & M. 99—app. & e. 376, 803; des. & d. 27; hus. & w. 10.
Harper v. Archer, 8 S. & M. 229—dower, 54.
Harper v. Archer, 9 S. & M. 71—ex. & ad. 509, 512.
Harper v. Archer, 28 M. 212—des. & d. 52; dower, 54, 107; ex. & ad. 101; ev. 100; hus. & w. 11.
Harper v. Barnett, 16 So. 533—judgm. 324, 384, 386, 393, 529.
Harper v. Bibb, 34 M. 472—ven. & pur. 231, 239.
Harper v. Bondurant, 7 S. & M. 397—app. & e. 1040; plead. 218.
Harper v. Calhoun, 7 H. 203—banks, 89, 105, 109; cncts. 16; corp. 189; paymt. 12.
Harper v. Hill, 35 M. 63—eject. 118; ev. 343; execution, 69, 246, 256; judgm. 460.
Harper v. Lacey, 62 M. 5—spec. perf. 106, 117; witn. 164.
Harper v. Lowry, 6 H. 268—app. & e. 807.
Harper v. Montgomery, 11 S. & M. 611—supersed. 8.
Harper v. Ray, 27 M. 622—mast. & s. 2, 73, 80; neg. 120.
Harper v. Reno, Freem. Ch. 323—deeds, 79; notice, 4; ven. & pur. 228, 229, 240, 343, 351.
Harper v. State, 71 M. 202—burg. 29; larc. 41.
Harper v. State, 79 M. 575—hom. 209.
Harper v. State, 83 M. 402—crim. l. 59, 68,

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

338, 805, 823, 829, 1134, 1173; hom. 142, 305; ind. 170.
Harper v. State, 85 M. 338—int. liq. 146.
Harper v. State, 27 So. 621—hom. 234.
Harper v. Tapley, 35 M. 506—adv. pos. 15, 46, 53, 69; deeds, 84; eject. 39; ev. 343; lim. of act. 5; new tr. 41.
Harper v. Wilkings, 65 M. 215—estop. 101; ven. & pur. 266.
Harper, Hamer v.—46 So. 707.
Harper, Hanna v.—3 S. & M. 793.
Harper, Illinois Cent. R. Co. v.—83 M. 560.
Harper, Johns v.—61 M. 142.
Harper, Lavenburg v.—27 M. 299.
Harper, McLeod v.—43 M. 42.
Harper, Moody v.—25 M. 484.
Harper, Moody v.—28 M. 615.
Harper, Moody v.—33 M. 465.
Harper, Moody v.—38 M. 599.
Harper, Pickens v.—Sm. & M. Ch. 539.
Harper, Reno v.—23 M. 154.
Harper, Work v.—24 M. 517.
Harper, Work v.—31 M. 107.
Harper, Yarborough v.—25 M. 112.
Harrahan, Dale v.—85 M. 49.
Harralson v. White, 38 M. 178—witn. 112.
Harrall, Kitchens v.—54 M. 474.
Harrel, Hopson v.—56 M. 202.
Harrell v. Bixler, W. 176—bills. & n. 416.
Harrell v. State, 39 M. 702—crim. l. 74.
Harrell v. Miller, 35 M. 700—frds. st. of, 72; logs, 3; property, 3.
Harrell v. State, 39 M. 702; hom. 7, 100.
Harrell, Bull v.—7 H. 9.
Harrell, Gloster v.—77 M. 793.
Harrell, Morgan v.—26 M. 468.
Harrell, Payne v.—40 M. 498.
Harrell, Ragan v.—52 M. 818.
Harrelson, Enoch v.—57 M. 465.
Harrill v. Robinson, 61 M. 153—quiet. t. 35.
Harrington v. Allen, 48 M. 492—app. & e. 1009, 1011; mtg. 172.
Harrington v. Harrington, 2 H. 701—dep. 97; eq. 5; ref. of inst. 31, 45; wills, 86, 88.
Harrington v. Mobley, 33 M. 34—abate & r. 3; eq. 156.
Harrington v. O'Reilley, 9 S. & M. 216—execution, 69, 159, 275.
Harrington v. Pinson, 30 M. 30—spec. perf. 106.
Harrington v. State, 54 M. 490—forg. 30; ind. 71, 79, 110; records, 22.
Harrington v. Wofford, 46 M. 31—guard. & w. 76, 81, 86, 89; inf. 89; judgm. 491.
Harrington, Fenn v.—54 M. 733.
Harrington, Magee v.—13 S. & M. 403.
Harrington, Martin v.—57 M. 208.
Harrington, Smith v.—49 M. 771.
Harrington, Ward v.—29 M. 238.
Harrington, Yazoo &c. R. Co. v.—85 M. 366.
Harris v. Bolton, 7 H. 167—cov. 26; judgm. 449.
Harris v. Fisher, 5 S. & M. 74—courts, 200¼; cred. s. 22; ex. & ad. 412, 415f, 416, 473.
Harris v. Frank, 52 M. 155—land. & t. 75, 80, 209.
Harris v. Gwin, 10 S. & M. 563—appr. 11; judgm. 460.
Harris v. Holliday, 4 H. 338—app. & e. 1003; plgs. 29; princ. & a. 171.
Harris v. Hazlehurst Oil Mill &c. Co. 78 M. 603—judgm. 844.
Harris v. Herberton, 5 H. 575—notaries, 9.
Harris v. Hutcheson, 65 M. 9—ex. & ad. 225.
Harris v. Lombard, 60 M. 29—plgs. 4.
Harris v. McCann, 75 M. 805—wills, 596.
Harris v. McKissack, 34 M. 464—cncts. 134; Indians, 14; pub. lands, 715.
Harris v. Mississippi &c. R. Co. 51 M. 602—corp. 600; quo w. 46; r. r. 32.
Harris v. Newman, 5 H. 654—app. & e. 548, 906, 1180; excep. 28; tresp. 20; trover, 12, 15, 36.
Harris v. Newman, 3 S. & M. 565—ev. 158; indians, 14.
Harris v. Perkins, 25 So. 154—ev. 584; trial, 143.
Harris v. Phelps, 2 Miss. Dec. 173—cred. s. 37; eq. 74; lim. of act. 174, 180; plead. 189.
Harris v. Planter's Bank, 7 H. 346—app. & e. 272.
Harris v. Planters' Bank, 4 S. & M. 701—cert. 1.
Harris v. Railroad Co. 51 M. 602—corp. 592, 611.
Harris v. Ransom, 24 M. 504—can. of i. 44; cncts. 94; ex. & ad. 337, 379; ven. & pur. 104, 108, 123b, 123c, 314.
Harris v. Robson, 68 M. 506—hus. & w. 235.
Harris v. Sledge, 21 So. 783—assign. f. b. c. 101, 104; attch. 47; fraud. conv. 115.
Harris v. State, 47 M. 318—crim. l. 654; hom. 190, 286b, 340d; new tr. 41; trial, 29.
Harris v. State, 55 M. 50—tax. 568.
Harris v. State, 61 M. 304—burg. 28; crim. l. 923; ind. 125d; larc. 41.
Harris v. State, 71 M. 462—crim. l. 935, 1159, 1184; hom. 257.
Harris v. State, 72 M. 99—arr. 65; hom. 276.
Harris v. State, 72 M. 960—counties, 52; int. liq. 32.
Harris v. State, 96 M. 379—crim. l. 721, 723.

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Harris v. Stockett, 58 M. 825—tax. 301, 362½.
Harris v. Threefoot, 12 So. 335—partner. 51.
Harris v. Water Valley, 78 M. 659—licens. 29; mun. corp. 48.
Harris v. West, 25 M. 156—execution, 75; judgm. 853.
Harris, Adams v.—47 M. 144.
Harris, Agricultural Bank v.—2 S. & M. 463.
Harris, Alabama &c. R. Co. v.—71 M. 74.
Harris, Baskerville v.—41 M. 535.
Harris, Brewer v.—2 S. & M. 84.
Harris, Bryant v.—70 M. 683.
Harris, Coulson v.—43 M. 728.
Harris, Davis v.—13 S. & M. 9.
Harris, Eaver v.—95 M. 607.
Harris, Ex parte, 85 M. 4—land. & t. 19; mast. & s. 67.
Harris, Farned v.—11 S. & M. 366.
Harris, Finney v.—30 M. 36.
Harris, Fellows v.—12 S. & M. 462.
Harris, Gray v.—43 M. 421.
Harris, Greenwood v.—89 M. 121.
Harris, Gwin v.—Sm. & M. Ch. 528.
Harris, Herring v.—45 M. 62.
Harris, Hicks v.—26 M. 420.
Harris, Illinois Cent. R. Co. v.—81 M. 208.
Harris, Illinois Cent. R. Co. v.—85 M. 15.
Harris, Illinois Cent. R. Co. v.—29 So. 760.
Harris, Jones v.—58 M. 293.
Harris, Jones v.—59 M. 214.
Harris, Jordan v.—31 M. 257.
Harris, Kaiser v.—63 M. 590.
Harris, Lawrence v.—18 So. 125.
Harris, Lester v.—41 M. 668.
Harris, McIntyre v.—41 M. 81.
Harris, Marshall v.—2 Miss. Dec. 255.
Harris, Miss. &c. R. Co. v.—36 M. 17.
Harris, Mitchell v.—43 M. 314.
Harris, Mount v.—1 S. & M. 185.
Harris, Newman v.—4 H. 522.
Harris, Newman v.—3 S. & M. 565.
Harris, New Orleans &c. R. Co. v.—27 M. 517.
Harris, Odom v.—34 M. 410.
Harris, O'Leary v.—50 M. 13.
Harrison v. Balfour, 5 S. & M. 301—dism. 59; inj. 244; judgm. 195.
Harrison v. Bank, 2 S. & M. 307—plead. 164.
Harrison v. Breeden, 7 H. 670—mech. liens, 116.
Harrison v. Crowder, 6 S. & M. 464—bills & n. 130, 393, 403, 404, 405, 510, 526.
Harrison v. Greaves, 59 M. 453—elec. 160; quo w. 9, 24.
Harrison v. Harrison, 56 M. 174—partit. 54; tax. 812, 816; ten. in c. 18, 20, 36.
Harrison v. Motz, 5 S. & M. 578—ex. & ad. 419; insolv. 135; judgm. 342.
Harrison v. Pike, 48 M. 46—bills & n. 268, 328, 357, 384, 449, 452, 497; interpl. 21; mtg. 455; partners. 198.
Harrison v. Roy, 39 M. 396—carr. 4.
Harrison v. Southern R. Co. 93 M. 40—ev. 150; r. r. 397, 400.
Harrison v. Stowers, W. 165—cncts. 257; ven. & pur. 31.
Harrison v. Vicksburg, 3 S. & M. 581—com. 63; licens. 7; mun. corp. 956; tax. 3, 27.
Harrison County v. Rogers, 85 M. 578—app. & e. 154, 374.
Harrison County v. Seal, 66 M. 129—ded. 31, 49.
Harrison County, Moss Point Lumber Co. v.—89 M. 448.
Harrison County, Native Lumber Co. v.—89 M. 171.
Harrison County, Soria v.—96 M. 109.
Harrison County, Union Invest. Co. v.—67 M. 614.
Harrison, Cummings v.—57 M. 275.
Harrison, Davidson v.—33 M. 41.
Harrison, Frisby v.—30 M. 452.
Harrison, Griffin v.—52 M. 824.
Harrison, Hamblet v.—80 M. 118.
Harrison, Herndon v.—34 M. 486.
Harrison, Kelly v.—69 M. 856.
Harrison, Kohlheim v.—34 M. 457.
Harrison, Leigh v.—69 M. 923.
Harrison, Mahorner v.—13 S. & M. 53.
Harrison, Miss. &c. R. Co. v.—66 M. 419.
Harrison Naval Stores Co. v. Johnson, 91 M. 747—tresp. 20.
Harrison Naval Stores Co. Scarborough v.—95 M. 497.
Harrison, New Orleans &c. R. Co. v.—48 M. 112.
Harrison, Ogden v.—56 M. 743.
Harrison, Parker v.—63 M. 225.
Harrison, Rice v.—2 Miss. Dec. 403.
Harrison, Strong v.—62 M. 61.
Harrison, Tallahatchie County v.—75 M. 744.
Harrison, Walker v.—75 M. 665.
Harris, Phelps v.—51 M. 789.
Harris, Phelps v.—61 M. 705.
Harris, Pindell v.—57 M. 739.
Harris, Preston v.—24 M. 247.
Harris, Rice v.—76 M. 422.
Harris, Smith v.—1 Miss. Dec. 210.
Harrisson v. Agricultural Bank, 2 S. & M. 307—app. & e. 902; appr. 7; dism. 23; pros. 161.
Harris, State v.—52 M. 686.

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Harris, State v.—10 So. 478.
Harris, State v.—18 So. 123.
Harriston v. Francher, 7 S. & M. 249—high. 95.
Harris, Wall v.—90 M. 671.
Harris, Whitfield v.—48 M. 710.
Harris, Whitworth v.—40 M. 483.
Harris, Williams v.—2 H. 627.
Hart v. American B. & L. Assn. 29 So. 999—b. & l. assn. 31.
Hart v. Boyt, 54 M. 547—lim. of act. 148, 150.
Hart v. Bloomfield, 66 M. 100—eq. 350; quiet. t. 44.
Hart v. Chemical Nat. Bank, 27 So. 926—app. & e. 190, 1169; courts, 99.
Hart v. Dunbar, 4 S. & M. 273—conv. 14; courts, 198.
Hart v. Forbes, 60 M. 745—attch. 225, 322; ins. 594; judgm. 844.
Hart v. Foundry Co. 72 M. 809—attch. 64, 217; banks, 183; bills & n. 277, 328; cncts. 144; corp. 642, 657; estop. 58; judgm, 616; liens, 2; sales, 202.
Hart v. Gardner, 74 M. 153—cncts. 147; deeds, 93, 97, 135, 141.
Hart v. Gardner, 81 M. 650—execution, 273, 290; ven. & pur. 231.
Hart v. Hart, 39 M. 221—ex. & ad. 379.
Hart v. Picard, 75 M. 651—eject. 86; ev. 383; judgm. 740; tax. 709.
Hart v. Potter, 80 M. 796—eq. 267; quiet. t. 42.
Hart v. State, 87 M. 171—com. 60; const. law, 48, 206; int. liq. 17, 146.
Hart v. Taylor, 70 M. 655—bills & n. 48, 147, 455, 493; bonds, 78; ev. 432.
Hart, Caldwell v.—57 M. 123.
Hart, Chicago &c. R. Co. v.—2 Miss. Dec. 384.
Hart, Clark v.—3 So. 33.
Hart, Davis v.—66 M. 642.
Hartfield, Life Assur. Soc. v.—87 M. 548.
Hartford Fire Ins. Co. v. Green, 52 M. 332—app. & e. 171, 231, 701, 963; crim. l. 1151; dep. 110; plead. 347, rem. of c. 86.
Hartford Fire Insurance Co. v. Shlenker, 80 M. 667—ins. 152, 180, 495, 500.
Hartford Fire Ins. Co. Wildberger v.—72 M. 338.
Hart, Goad v.—8 S. & M. 787.
Hart, Jones v.—62 M. 13.
Hartley v. O'Brien, 70 M. 825—mtg. 324c.
Hartley, Gulf &c. R. Co. v.—88 M. 674.
Hart, Lisloff v.—25 M. 245.
Hart, Louisville &c. R. Co. v.—2 Miss. Dec. 384.
Hartman v. Moore, 79 M. 74—mtg. 475.
Hartman v. Pickering, 84 M. 427—judgm. 567, 665, 723.
Hartman v. Nettles, 64 M. 495—adv. pos. 114.
Hartman, Butterfield Lumber Co. v.—82 M. 494.
Hartman, Cassedy v.—93 M. 94.
Hartman, Day v.—74 M. 489.
Hartman, Hardy v.—65 M. 504.
Hartman, Henderson v.—65 M. 466.
Hartman, Pfiefer v.—60 M. 505.
Hartman Mercantile Co. Lutz v.—41 So. 1039.
Hartman, Thayer v.—78 M. 590.
Hart, Proctor v.—72 M. 288.
Hart, Quin v.—85 M. 71.
Hartsell v. Myers, 57 M. 135—afft. 16; agric. 15; ev. 461; land. & t. 42.
Hart, Taylor v.—73 M. 22.
Hart, Tucker v.—23 M. 548.
Hart, Vicksburg &c. R. Co. v.—61 M. 468.
Hart, Withers v.—51 So. 714.
Hartzog v. Western Union Tel. Co. 84 M. 448—tel. & t. 54.
Hartzog v. Western Union Tel. Co. 34 So. 361—tel. & t. 65, 69.
Harvey v. Briggs, 68 M. 60—adv. pos. 48; app. & e. 662; dower, 49; inf. 55, 58; land. & t. 119; life est. 3.
Harvey v. Clark, 81 M. 166—land. & t. 315.
Harvey v. Covel, 12 So. 462—mast. & s. 227; neg. 135; trial, 140, 190.
Harvey v. Edington, 25 M. 22—action, 48; hus. & w. 10; lim. of act. 73; replev. 107, 199.
Harvey v. Ellis, 11 S. & M. 348—garn. 180.
Harvey v. Kelly, 41 M. 490—eq. 152; ven. & pur. 261, 266a.
Harvey v. Ledbetter, 48 M. 95—des. & d. 104; trusts, 98.
Harvey v. Lumber Mineral Co. 96 M. 627—app. & e. 363.
Harvey v. Miles, 1 Miss. Dec. 135—ex. & ad. 138; judgm. 475.
Harvey v. Morton, 36 M. 411—eq. 327.
Harvey v. State, 95 M. 601—crim. l. 369.
Harvey v. State, 20 So. 837—crim. l. 520.
Harvey v. Troupe, 23 M. 538—bills & n. 21, 393, 397, 423.
Harvey, Adams v.—2 Miss. Dec. 319.
Harvey, Carter v.—7 So. 286.
Harvey, Carter v.—77 M. 1.
Harvey, Dudley v.—59 M. 34.
Harvey, Ingram Lumber Co. v.—53 So. 347.
Harvey, Martin v.—54 M. 685.
Harvey, Noel v.—29 M. 72.
Harvey, Phillips v.—50 M. 489.

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Harvie v. Bostic, 1 H. 106—judgm. 17d.
Harvie, Greenville v.—79 M. 754.
Harvin v. Denton, 87 M. 238—arb. & a. 36.
Harvy, Pattison v.—81 M. 348.
Harwood v. Colson, 1 Miss. Dec. 514—ex. & ad. 478, 509.
Harwood, Burt v.—39 M. 756.
Harz, Alabama &c. R. Co. v.—88 M. 681.
Hasie v. Alabama &c. R. Co. 78 M. 413—neg. 115; r. r. 384, 397.
Hasie v. Alabama &c. R. Co. 79 M. 581—app. & e. 1002.
Haskins v. Scott County, 51 M. 406—mand. 8, 154, 165.
Hassam v. Day, 39 M. 392—partit. 15.
Hassam, Hursey v.—45 M. 133.
Hasser, Walker v.—41 M. 90.
Hastings v. State, 59 M. 541—crim. l. 881, 967, 1166.
Hastings, Lake v.—24 M. 490.
Hatch v. Monroe County, 56 M. 26—high. 79.
Hatch v. Roberts, 41 M. 92—app. & e. 214; plead. 409.
Hatch v. Sykes, 64 M. 307—land. & t. 206; mtg. 372.
Hatch, Behaly v.—W. 369.
Hatcher v. Stalworth, 25 M. 376—bills & n. 69.
Hatchett v. Louisville &c. R. Co. 1 Miss. Dec. 38—em. dom. 318.
Hatch, Rothschild v.—54 M. 554.
Hathcock v. Owen, 44 M. 799—app. & e. 705; bills & n. 208, 455; proc. 167; parties, 7.
Hathorn, State v.—36 M. 491.
Hatten v. State, 95 M. 546—seduct. 45.
Hatter v. Illinois Cent. R. Co. 69 M. 642—mast. & s. 101, 207, 210.
Hatter, Gholson v.—26 M. 240.
Hattiesburg, Beverly v.—83 M. 342.
Hattiesburg, Beverly v.—83 M. 621.
Hattiesburg Compress Co. v. Johnson, 81 M. 731—wareh. 34.
Hattiesburg Plumbing Co. v. Carmichael, 80 M. 66—cncts. 197; ev. 457.
Hattiesburg, Rodgers v.—55 So. 481.
Hattiesburg Trust &c. Co. v. Hood, 52 So. 790—garn. 144, 148; j. p. 200, 209.
Hattiesburg, Turner v.—53 So. 681.
Hatto v. Brooks, 33 M. 575—courts, 64.
Hatton v. State, 92 M. 651—crim. l. 288, 1142; seduct. 16, 29, 30; statut. 241.
Hattox v. State, 80 M. 186—crim. l. 594.
Hauenstein v. Gillespie, 72 M. 838—courts, 31.
Hauenstein v. Gillespie, 73 M. 742—estop. 13; ev. 166; guard. & w. 182.
Hauenstein, Gillespie v.—72 M. 838.
Haughton v. Brandon, 40 M. 729—wills, 440, 620.
Haughton v. Sartor, 71 M. 357—deeds, 114, 118; mtg. 48.
Haughton, Clopton v.—57 M. 787.
Haughton, Peevey v.—72 M. 918.
Haun, Pipkin v.—Freem. Ch. 254.
Haun, Robertson v.—Freem. Ch. 265.
Hauser v. Robbins, 61 M. 551—land. & t. 229k, 274.
Havard v. Day, 62 M. 748—tax. 31, 419, 734.
Havens v. State, 75 M. 488—crim. l. 595.
Haviland, Otley v.—36 M. 19.
Haviland, Reed v.—38 M. 323.
Hawkins v. Blair, 36 So. 246—ref. of inst. 45.
Hawkins v. Carroll County, 50 M. 735—const. law, 14; counties, 57, 154, 176; elec. 59, 236, 293, 295; statut. 189.
Hawkins v. Coleman, 1 Miss. Dec. 478—fraud. conv. 26, 294.
Hawkins v. Hawkins, 72 M. 749—ten. in c. 2; wills, 622.
Hawkins v. James, 69 M. 274—ev. 116; land. & t. 18, 279.
Hawkins v. James, 69 M. 361—land. & t. 229k, 274.
Hawkins v. McAlister, 86 M. 84—attch. 160, 286.
Hawkins v. Mangum, 78 M. 97—tax. 34, 43, 348.
Hawkins v. Mississippi &c. R. Co. 35 M. 688—corp. 84; ex. & ad. 447; plead. 201, 205, 223.
Hawkins v. Neal, 60 M. 256—bills & n. 329, 371, 503.
Hawkins, Boyd v.—59 M. 325.
Hawkins, Case v.—53 M. 702.
Hawkins, Clement v.—8 S. & M. 339.
Hawkins, Illinois Cent. R. Co. v.—65 M. 200.
Hawkins, Kansas City &c. R. Co. v.—82 M. 209.
Hawkins, McLemore v.—46 M. 715.
Hawkins, Smith v.—47 So. 429.
Hawkins, Vaiden v.—59 M. 406.
Hawkins, Vaiden v.—6 So. 227.
Hawkins, Westbrook v.—59 M. 499.
Hawks v. Neal, 44 M. 212—crim. l. 1172.
Hawks, Anderson v.—70 M. 639.
Hawks, Lee v.—68 M. 669.
Hawks, Peoples' B. & L. Assn. v.—81 M. 61.
Hawley v. Henderson, 34 M. 261—mech. liens, 198.
Hawley, Field v.—12 S. & M. 320.

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Hawthorne v. State, 58 M. 778—crim. l. 561, 822; hom. 10, 146, 244, 286b, 308.
Hawthorne v. State, 61 M. 749—hom. 190.
Hawthorne, Ross v.—55 M. 551.
Hayden v. State, 81 M. 55—crim. l. 1023.
Hayden v. State, 81 M. 291—phys. 6.
Hayden, Folkes v.—29 M. 123.
Hayden, Redus v.—43 M. 614.
Haydock Carriage Co. Head v.—16 So. 420.
Haydon v. Moore, 1 S. & M. 605—ev. 162, 178.
Hayes v. Flowers, 25 M. 169—bankr. 389½, 417, 435.
Hayes v. Slidell Liquor Co. 55 So. 356—app. & e. 287; set-off, 4; trial, 170.
Hayes v. State, 92 M. 831—hom. 15.
Hayne v. Beauchamp, 5 S. & M. 515—corp. 88.
Hayne, Alabama &c. R. Co. v.—76 M. 538.
Haynes v. Covington, 9 S. & M. 470—plead. 205, 217, 225.
Haynes v. Covington, 13 S. & M. 408—corp. 385; counties, 155, 218; states, 124.
Haynes v. Ezell, 25 M. 242—bills & n. 308; plead. 433.
Haynes v. Slack, 32 M. 193—trusts, 282.
Haynes v. State, 32 M. 400—crim. l. 1056.
Haynes v. State, 93 M. 670—gr. jury, 29.
Haynes v. State, 22 So. 871—crim. l. 1185, 1188.
Haynes v. State, 23 So. 182—int. liq. 242.
Haynes v. State, 27 So. 601—crim. l. 786, 787; hom. 143, 284.
Haynes v. Thompson, 34 M. 17—eq. 45.
Haynes, Dejarnett v.—23 M. 600.
Haynes, Illinois Cent. R. Co. v.—63 M. 485.
Haynes, Illinois Cent. R. Co. v.—64 M. 604.
Haynie v. State, 32 M. 400—app. & e. 549; crim. l. 1089; int. liq. 224.
Hays v. Barlow, 54 So. 2—exemp. 78.
Hays v. Bostick, 96 M. 794—bills & n. 103; judgm. 17; ven. & pur. 262.
Hays v. Mercer, 1 Miss. Dec. 185—ven. & pur. 285.
Hays v. State, 57 M. 783—assa. 74; rape, 20.
Hays v. State, 96 M. 153—ind. 200.
Hays, Campbell v.—41 M. 561.
Hays, State v.—91 M. 755.
Hays, Southern R. Co. v.—78 M. 319.
Hayter, Huston v.—6 H. 580.
Haywood v. State, 47 M. 1—ind. 160; names, 1.
Haywood v. State, 66 M. 402—weap. 11.
Haywood v. State, 90 M. 461—crim. l. 358, 552.
Haywood, State v.—21 So. 660.
Hazard v. Railroad, 67 M. 32—carr. 54.
Hazlehurst v. Cumberland Tel. &c. Co. 83 M. 303—action, 39; plead. 205.
Hazlehurst v. Mayes, 84 M. 7—em. dom. 117, 119.
Hazlehurst v. Mayes, 96 M. 656—mun. corp. 57, 58, 166, 909, 911; statut. 176.
Hazlehurst, Kemp v.—80 M. 443.
Hazlehurst Lodge, Morgan v.—53 M. 665.
Hazlehurst Lumber Co. v. Fay &c. Co. 18 So. 485—fixt. 9; sales, 198.
Hazlehurst Lumber Co. Bacot v.—23 So. 481.
Hazlehurst Lumber Co. Grouch v.—16 So. 496.
Hazlehurst Oil Mill &c. Co. Decell v.—83 M. 346.
Hazlehurst Oil Mill &c. Co. v. Decell, 33 So. 412—licens. 18.
Hazlehurst Oil Mill &c. Co. Harris v.—78 M. 603.
Hazlett v. Witherspoon, 25 So. 150—replev. 118, 123, 124.
Hazlip v. Leggett, 6 S. & M. 326—banks, 98; ev. 166; phys. 24.
Hazlip v. Noland, 6 S. & M. 294—cov. 91; deeds, 77, 114, 123; ev. 460; ven. & pur. 74, 129, 308.
Hazlip v. Nunnery, 29 So. 821—tax. 689.
Hazzlerigg, Kline v.—21 So. 11.
Head v. Beaty, 5 H. 480—execution, 151b, 153b.
Head v. Gervais, W. 431—atty. & c. 93; eq. 42.
Head v. Haydock Carriage Co. 16 So. 420—execution, 194; princ. & a. 145.
Head v. State, 44 M. 731—app. & e. 1028; crim. l. 364, 822, 829, 1172; gr. jury, 2, 19; hom. 115, 151, 286b; jury, 48, 58, 131; trial, 260; witn. 297, 302, 306, 338, 379, 387, 395, 410.
Head v. Wash, 31 M. 358—eq. 392.
Headley Lumber Co. v. Cranford, 38 So. 548—sales, 136, 346.
Healy v. Alston, 25 M. 190—eq. 17, 60.
Healy v. Just, 53 M. 547—app. & e. 338; judgm. 306, 310, 321; lim. of act. 38.
Heard v. Baird, 40 M. 793—chat. m. 172; eject. 8, 10, 13, 22, 25, 95; mtg. 298.
Heard v. Crum, 73 M. 157—exemp. 48.
Heard v. Daniel, 26 M. 451—guard. & w. 149, 151, 163.
Heard v. Drennen, 93 M. 236—ex. & ad. 14; wills, 434.
Heard v. Evans, Freem. Ch. 79—mtg. 121, 298.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Heard v. Garrett, 34 M. 152—cncts. 162, 192; hus. & w. 31b.
Heard v. James, 49 M. 236—replev. 3, 81; trover, 43, 60.
Heard v. McGuffie, 2 Miss. Dec. 338—estop. 95.
Heard v. State, 59 M. 545—app. & e. 231; crim. l. 531, 533, 1043; trial, 80.
Heard v. Walton, 39 M. 388—lev. 28h.
Heard v. Whitehead, 41 M. 404—app. & e. 948; ex. & ad. 336, 375.
Heard, Bass v.—33 M. 131.
Heard, Brent v.—40 M. 370.
Heard, Davis v.—44 M. 50.
Heard, Kansas City &c. R. Co. v.—87 M. 378.
Heard, Reed v.—53 So. 400.
Heard, Roy v.—38 M. 544.
Heard, Soggins v.—31 M. 426.
Heard, Tillman v.—95 M. 238.
Heard, Wash v.—27 M. 400.
Hearn v. Brogan, 64 M. 334—int. liq. 25, 40, 62.
Hearn, Dunlap v.—37 M. 471.
Heath v. Newman, 11 S. & M. 201—cov. 102; trial, 46; ven. & pur. 308a, 319.
Heath, Dennis v.—11 S. & M. 206.
Heatherington v. Lewenberg, 61 M. 372—annu. 6; wills, 619, 729, 820.
Heatherington, Piper v.—32 M. 306.
Heath, Erwin v.—50 M. 795.
Heath, Horton v.—2 Miss. Dec. 144.
Heaverin v. Donnell, 7 S. & M. 244—bills. & n. 68; ev. 402, 432.
Hebron v. Kelly, 75 M. 74—trusts, 71.
Hebron v. Kelly, 77 M. 48—app. & e. 220; eq. 392; inf. 110, 111; trusts, 375.
Hebron v. Yerger, 65 M. 548—lim. of act. 56.
Heckingbottom v. Shell, 3 S. & M. 588—app. & e. 66, 69.
Heckler v. Frankenbush, 76 M. 780—bills & n. 152, 176; disc. 8.
Hedges v. Aydelott, 46 M. 99—witn. 139.
Hedrick, Cross v.—66 M. 61.
Hedrick, Vicksburg &c. R. Co. v.—62 M. 28.
Heflin v. Kinard, 67 M. 522—lim. of act. 148, 196.
Heflin, Bradford Construction Co. v.—88 M. 314.
Heggie v. Stone, 70 M. 39—execution, 124; j. p. 32, 60.
Heggie, Stone v.—82 M. 410.
Heidelberg v. Taylor, 25 So. 166—ven. & pur. 314.
Heidelberg, Clayton v.—9 S. & M. 623.
Heidelberg, Melton Hardware Co. v.—91 M. 598.
Heidelberg, Toulmin v.—32 M. 268.
Heiderhoff, Nicholson v.—50 M. 56.
Heidingsfelder, Merchants' Wharfboat Assn. v.—64 M. 678.
Heirmann v. Stricklin, 60 M. 234—ev. 390; fraud. conv. 227, 263; judgm. 491; mtg. 37.
Heirn v. Bridault, 37 M. 209—aliens, 3; citiz. 1; int. liq. 1, 7; slaves, 12, 13, 22.
Heirn v. Carron, 11 S. & M. 361—acc. & s. 15, 25; plead. 272.
Heirn v. McCaughan, 32 M. 17—action, 27; carr. 4, 265, 273, 277a, 277c; cncts. 303; ev. 454; trial, 189, 192, 273; partners. 128, 174.
Heizer v. Fisher, 13 S. & M. 672—app. & e. 1115; judgm. 890.
Helderburn, Commercial Bank v.—6 H. 536.
Helm v. Gray, 59 M. 54—attch. 308, 315; excep. 13.
Helm v. Gridley, W. 511—sheriffs, 123.
Helm v. Natchez Ins. Co. 8 S. & M. 197—trial, 82.
Helm v. Philbrick, 28 M. 210—cred. s. 1.
Helm v. Smith, 2 S. & M. 403—bills & n. 411; ex. & ad. 225; excep. 27, 222.
Helm v. State, 66 M. 537—crim. l. 184, 185, 292, 295, 867, 1088.
Helm v. State, 67 M. 562—crim. l. 170, 295, 296, 939; hom. 171, 308; ind. 14; jury, 97; witn. 345.
Helm v. Yerger, 61 M. 44—mtg. 530.
Helm, Archer v.—70 M. 874.
Helm, Bloom v.—53 M. 21.
Helm, Davis v.—3 S. & M. 17.
Helm, Gray v.—60 M. 131.
Helm, Johnson v.—1 Miss. Dec. 170.
Helm, Kells v.—56 M. 700.
Helm, Miller v.—2 S. & M. 687.
Helm, Natchez Ins. Co. v.—13 S. & M. 182.
Helm, Parisot v.—52 M. 617.
Helm, Pollock v.—54 M. 1.
Helm, Routh v.—6 H. 127.
Helms, Adams v.—95 M. 211.
Helm, Stanton v.—87 M. 287.
Helm &c. R. Co. v. Turner, 89 M. 334—em. dom. 254.
Helton v. McLeod, 93 M. 516—attch. 115, 122.
Helton, Wayne County v.—79 M. 122.
Helzheim, Drane v.—13 S. & M. 336.
Hemby, Gray v.—1 S. & M. 598.
Hemingway v. Scales, 42 M. 1—com. l. 10; hus. & w. 11, 14, 15.
Hemingway v. State, 68 M. 371—crim. l. 594, 754, 807, 917, 919, 970, 1151, 1152, 1166, 1171, 1172; embez. 26, 35, 36, 44, 45, 50; ev. 88; ind. 132.

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Hemingway v. Vicksburg &c. R. Co. 52 M. 16—r. r. 34.
Hemingway, Board of Commissioners v.—66 M. 289.
Hemingway, Cohea v.—71 M. 22.
Hemingway, Levee Commissioners v.—66 M. 289.
Hemingway, State v.—69 M. 491.
Hemphill v. Bank of Alabama, 6 S. & M. 44—bills & n. 60, 145, 449, 485, 489; ev. 35; statut. 288.
Hemphill v. Fortner, 11 S. & M. 344—ex. & ad. 415f; judgm. 342.
Hemphill v. Hemphill, 34 M. 68—fraud. conv. 172; hus. & w. 52; judgm. 486, 577; proc. 3.
Hemphill v. McBride, 12 S. & M. 620—dep. 39; witn. 294, 295.
Hemphill v. State, 71 M. 877—crim. l. 1172; perj. 30, 34, 40.
Hemphill, Hubbard v.—94 M. 388.
Hemphill, New Orleans &c. R. Co. v.—35 M. 17.
Henderson v. Cameron, 73 M. 843—ven. & pur. 230.
Henderson v. Cargill, 31 M. 367—bast. 65; big. 11; dep. 39, 72, 74, 76; ev. 285; hus. & w. 348; marr. 40, 41; names, 16.
Henderson v. Clarke, 27 M. 436—cncts. 99; des. & d. 82; ex. & ad. 122, 288.
Henderson v. Downing, 24 M. 106—execution, 272; fraud. conv. 85, 110, 154; judgm. 788; mtg. 171, 172.
Henderson v. Garrett, 35 M. 554—garn. 200.
Henderson v. Guyot, 6 S. & M. 209—app. & e. 909; courts, 202c; des. & d. 52; hus. & w. 10; wills, 720.
Henderson v. Hamer, 5 H. 525—app. & e. 959; appr. 5, 11, 24; plead. 85, 236.
Henderson v. Hartman, 65 M. 466—usury, 103.
Henderson v. Herrod, 10 S. & M. 631—mtg. 244; partners. 241.
Henderson v. Herrod, 23 M. 434—action, 21; jud. s. 8, 31, 45; mtg. 514, 526, 529.
Henderson v. Ilsley, 11 S. & M. 9—ex. & ad. 227, 255, 433, 437; lim. of act. 143; witn. 253.
Henderson v. Mississippi Union Bank, 6 & M. 314—corp. 518.
Henderson v. State, 8 So. 649—crim. l. 260b.
Henderson v. Still, 61 M. 391—home. 205.
Henderson v. Talbert, 5 S. & M. 109—abate. & r. 62; dism. 23.
Henderson v. Thornton, 37 M. 448—attch. 16, 217; bills & n. 75; execution, 8.
Henderson v. Warmack, 27 M. 830—chat. m. 224, 300; hus. & w. 5; sales, 234; trusts, 203.
Henderson v. Wilson, 6 H. 65—alt. inst. 15, 25; bills & n. 310; plead. 291.
Henderson v. Wilson, 4 S. & M. 732—app. & e. 323.
Henderson v. Winchester, 31 M. 290—app. & e. 934, 1193, 1196; ex. & ad. 31, 74, 114; judgm. 470.
Henderson, Bell v.—6 H. 311.
Henderson, Davis v.—25 M. 549.
Henderson, Effinger v.—33 M. 449.
Henderson, Fink v.—74 M. 8.
Henderson, Grand Gulf Bank v.—5 H. 292.
Henderson, Greenwood v.—84 M. 802.
Henderson, Hawley v.—34 M. 261.
Henderson, Henry v.—79 M. 452.
Henderson, Henry v.—81 M. 743.
Henderson, Herndon v.—41 M. 584.
Henderson, Hill v.—6 S. & M. 351.
Henderson, Hill v.—13 S. & M. 688.
Henderson, Independent Order of Sons and Daughters of Jacob of America v.—76 M. 326.
Henderson, Ledyard v.—46 M. 260.
Henderson, Lindsey v.—27 M. 502.
Henderson, Luckett v.—12 S. & M. 334.
Henderson, McCullough v.—24 M. 92.
Henderson, Morris v.—37 M. 492.
Henderson, Nelson v.—16 So. 911.
Henderson, Ormond v.—77 M. 34.
Henderson, Perkins v.—68 M. 631.
Henderson, Poindexter v.—W. 176.
Henderson, Simmons v.—Freem. Ch. 493.
Henderson, Vasser v.—40 M. 519.
Henderson, Whitehead v.—4 S. & M. 704.
Henderson, Wilson v.—9 S. & M. 375.
Henderson, Wood v.—2 H. 893.
Henderson, Wright v.—7 H. 539.
Henderson, Zingerling v.—18 So. 432.
Hendon v. State, 61 M. 146—licens. 10, 42.
Hendrich, Jenkins v.—23 So. 423.
Hendrick v. Foote, 57 M. 117—hus. & w. 148.
Hendricks v. Huddleston, 5 S. & M. 422—courts, 202c; ex. & ad. 509; guard. & w. 147a.
Hendricks v. Johnston, 45 M. 644—counties, 168; mand. 7, 15.
Hendricks v. Lowndes County, 49 M. 612—clks. of c. 10; counties, 76; offic. 93.
Hendricks v. Peavy, 78 M. 316—hus. & w. 220.
Hendricks v. Pugh, 57 M. 157—eq. 119, 446; proc. 36, 152; lim. of act. 130, 181.

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Hendricks v. Robinson, 56 M. 694—cust. & u. 22; frds. st. of, 14, 23, 26, 52; sales, 341.
Hendricks v. Snodgrass, W. 86—ex. & ad. 37.
Hendricks v. State, 79 M. 368—const. law, 46; land. & t. 19; mast. & s. 67.
Hendricks, Board of Levee Comrs. v.—77 M. 483.
Hendricks, Douglass v.—W. 230.
Hendricks, Friley v.—27 M. 412.
Hendricks, O'Reilly v.—2 S. & M. 388.
Hendricks, Polkinghorne v.—61 M. 366.
Hendricks, Tennessee Brewing Co. v.—77 M. 491.
Henington, E. E. Forbes Piano Co. v.—48 So. 609.
Henley, Colbert v.—64 M. 374.
Henley, Evans v.—66 M. 148.
Henly, Drake v.—W. 541.
Hennessey v. Traders' Ins. Co. 87 M. 259—libel, 9.
Hennessey, Vicksburg v.—52 M. 178.
Hennessy, Vicksburg v.—54 M. 391.
Henning v. Greenville, 69 M. 214—crim. l. 260b, 1134.
Hennington, Forbes Piano Co. v.—53 So. 777.
Henry v. Carter, 88 M. 21—statut. 34.
Henry v. Dillard, 68 M. 536—hus. & w. 45; replev. 96.
Henry v. Davis, 60 M. 212—land. & t. 229a, 229d, 243, 246, 251, 260.
Henry v. Fullerton, 13 S. & M. 631—execution, 36, 268; fraud. conv. 68, 103, 207; judgm. 233, 780; statut. 288; trial, 327.
Henry v. Halsey, 5 S. & M. 573—ev. 35; interest, 2; judgm. 529; usury, 2; proc. 53.
Henry v. Henderson, 79 M. 452—eq. 148.
Henry v. Henderson, 81 M. 743—ex. & ad. 90; wills, 733, 735, 821.
Henry v. Hoover, 6 S. & M. 417—plead. 139, 434; set-off, 12.
Henry v. Shepherd, 52 M. 125—costs, 127; dism. 58; tresp. 40.
Henry v. State, 87 M. 1—convt. 8, 10; const. law, 71; states, 202.
Henry v. State, 88 M. 843—convt. 8, 10.
Henry v. State, 53 So. 397—crim. l. 179.
Henry, Bailey v.—1 Miss. Dec. 565.
Henry, Campbell v.—45 M. 326.
Henry, Carter v.—87 M. 411.
Henry, Davis v.—63 M. 110.
Henry, Hightower v.—85 M. 476.
Henry, Odeneal v.—70 M. 172.
Henry, Smith v.—35 M. 369.
Henry, State v.—87 M. 125.
Henry, Townsend v.—26 M. 203.
Henshaw, Bower v.—53 M. 345.
Henshaw, Bower v.—56 M. 619.
Henson, Rearden v.—29 So. 764.
Hentz v. Delta Bank, 76 M. 429—eq. 232, 233; inj. 161.
Henwood v. State, 41 M. 579—int. liq. 111.
Hepburn v. Kincannon, 74 M. 691—banks, 242.
Herbert v. Spurlock, 26 M. 180—j. p. 44.
Herbert, Loury v.—25 M. 101.
Herbert, Mizell v.—12 S. & M. 547.
Herberton, Harris v.—5 H. 575.
Herd, Lindsey v.—W. 18.
Hereford v. Rabb, 19 So. 201—bast. 1; des. & d. 25.
Herman v. Perkins, 52 M. 813—agric. 10; chat. m. 138.
Herman v. State, 75 M. 340—crim. l. 369, 404, 761, 825; hom. 146, 157.
Herman v. Stricklin, 60 M. 234—judgm. 17d, 119.
Hermann, Isaacs v.—49 M. 449.
Herman, Vicksburg v.—72 M. 211.
Hernandez v. Aaron, 73 M. 434—agric. 10; fact. 48, 65.
Hernando Bank, Blythe v.—17 So. 4.
Herndon v. Bonner, 52 So. 513—hab. corp. 99.
Herndon v. Bryant, 39 M. 335—dep. 107, 110; sales, 275, 364, 446; slaves, 7a; trial, 252.
Herndon v. Harrison, 34 M. 486—ven. & pur. 147, 170, 351.
Herndon v. Henderson, 41 M. 584—app. & e. 1053; ev. 400; plead. 383; trial, 243.
Herndon v. Mayfield, 79 M. 533—tax. 411, 434.
Herndon, Davis v.—39 M. 484.
Herndon, Everman v.—11 So. 652.
Herndon, Everman v.—15 So. 135.
Herndon, Holmes v.—31 M. 296.
Herndon, Moye v.—30 M. 110.
Herndon, Treadwell v.—41 M. 38.
Hernsheim, Browne v.—71 M. 574.
Herrick v. Pascagoula &c. R. Co. 54 So. 660—mun. corp. 956, 970.
Herrin v. Daly, 80 M. 340—mast. & s. 159, 266; trial, 77.
Herrin v. Warren, 61 M. 509—garn. 108; mech. liens, 107; r. r. 159.
Herring v. Edwards, 29 So. 787—logs, 6; trial, 158.
Herring v. Goodson, 43 M. 392—bast. 2; guard & w. 8.
Herring v. Harris, 45 M. 62—ex. & ad. 131.
Herring v. Moses, 71 M. 620—tax. 671, 764.
Herring v. State, 87 M. 628—hom. 113, 300c.

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Herring v. Sutton, 86 M. 283—eq. 10; mtg. 369.
Herring v. Wellons, 5 S. & M. 354—courts, 202c; ex. & ad. 419; insolv. 126, 172; judgm. 342.
Herring v. Winans, Sm. & M. Ch. 466—bills & n. 314, 481; eq. 76; judgm. 440.
Herring, Alexander v.—55 So. 360.
Herring, American Cotton Co. v.—84 M. 693.
Herring-Hall Marvin Co. v. Moore, 17 So. 385—sales, 471, 478.
Herring, James v.—12 S. & M. 336.
Herring, Smith v.—10 S. & M. 518.
Herrington v. Bradford, W. 520—deeds, 109; ev. 120; wills, 93.
Herrington v. Herrington, W. 305—ex. & ad. 33, 442.
Herrington v. Herrington, W. 322—wills, 421.
Herrington v. State, 53 So. 783—gr. jury, 39.
Herring, Tyler v.—67 M. 169.
Herrin, Tully v.—44 M. 626.
Herrod v. Davis, 43 M. 102—paymt. 12a; slaves, 24.
Herrod, Coulter v.—27 M. 685.
Herrod, Henderson v.—10 S. & M. 631.
Herrod, Henderson v.—23 M. 434.
Herron v. Bondurant, 45 M. 683—crim. l. 888; ev. 273; trial, 338.
Herron v. Jennings, 31 So. 965—tax. 671.
Herron v. Walker, 69 M. 707—ev. 386; judgm. 784.
Herron, Alabama &c. Life Ins. Co. v.—56 M. 643.
Herron, Burwell v.—16 So. 356.
Herron, Mutual Life Ins. Co. v.—79 M. 381.
Herron, Turner v.—34 M. 460.
Hervey, Jones v.—66 M. 99.
Hester v. Allen, 52 M. 162—agric. 10, 11.
Hester v. Crisler, 36 M. 681—pub. lands, 51, 54.
Hester v. Hooker, 7 S. & M. 768—can. of l. 13; cncts. 257; spec. perf. 3, 8, 96, 123; ven. & pur. 96, 104, 115, 123.
Hester v. Kembrough, 12 S. & M. 659—eject. 11; eq. 17; judgm. 415; pub. lands, 114, 117.
Hester v. Memphis &c. R. Co. 32 M. 378—corp. 84.
Hester v. State, 67 M. 129—tresp. 84.
Hester v. Thomson, 58 M. 108—app. & e. 1071; fraud. conv. 235, 307.
Hester, Thomson v.—55 M. 656.
Heth v. Wilson, 55 M. 587—ex. & ad. 351.
Heth, Dement v.—45 M. 388.
Heth, Doty v.—52 M. 530.
Heward v. State, 13 S. & M. 261—crim. l. 151, 193½, 972; ind. 189.
Hewes v. Seal, 80 M. 437—tax. 671, 695.
Hewes, Nixon v.—80 M. 88.
Hewes, Redfield v.—67 M. 479.
Hewett v. Cobb, 40 M. 61—app. & e. 923; courts, 81; judgm. 353; jury, 148.
Hewett, Bisland v.—11 S. & M. 164.
Hewett, Langan v.—13 S. & M. 122.
Hewett, Mitchell v.—5 S. & M. 361.
Hewlett v. Ragsdale, 68 M. 703—dam. 54; death, 93; disc. 16; false imp. 32; parent & c. 11; witn. 127, 133.
Hewlett v. Railroad Co. 65 M. 463—cncts. 108, 129.
Hewlett, George v.—70 M. 1.
Heyford v. Mississippi Union Bank, 7 S. & M. 434—judgm. 195.
Heyfron, Ex parte, 7 H. 127—atty. & c. 47; judgm. 17.
Heyman v. Dillard, 1 Miss. Dec. 195—app. & e. 1053; princ. and a. 122.
Hibbette v. Baines, 78 M. 695—cncts. 108; hab. corp. 99, 113; parent & c. 2, 17.
Hibbler v. State, 87 M. 362—crim. l. 778; hom. 84.
Hibernian Bank v. Everman, 52 M. 500—bills & n. 327, 329, 336, 340, 363; lis pens. 23; partners. 154.
Hibernia Bank &c. Co. v. Smith, 89 M. 298—bills & n. 403, 463, 472, 508.
Hibou, Cudahy Packing Co. v.—92 M. 234.
Hickey v. Gilbert, 1 H. 32—des. & d. 36, 37.
Hickey, Ex parte, 4 S. & M. 751—cmpt. 8, 51; hab. corp. 44; pardon, 3; states, 41.
Hickey, Hodges v.—67 M. 715.
Hickingbottom, Long v.—28 M. 772.
Hickman v. Kansas City &c. R. Co. 66 M. 164—mun. corp. 817; neg. 113; plead. 67.
Hickman v. Ruff, 55 M. 549—des. & d. 52; home. 134, 141; statut. 231.
Hickman, Griffin v.—92 M. 266.
Hickman, Smith v.—24 So. 973.
Hickory Flat, Melbane v.—55 So. 359.
Hicks v. Blakeman, 74 M. 459—eject. 139, 142, 145; guard. & w. 108.
Hicks v. Harris, 26 M. 420—abate. & r. 65; ex. & ad. 475.
Hicks v. Mississippi Lumber Co. 95 M. 353—app. & e. 1068; tresp. 25; trial, 252.
Hicks v. Murphy, W. 66—app. & e. 115; aud. 1; execution, 69, 159; motions, 2.
Hicks v. State, 47 So. 524—witn. 393.
Hicks v. Stiegleman, 49 M. 377—aband. 1, 5; eject. 16, 86, 95; trial, 154.
Hicks, Biglane v.—33 So. 413.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Hicks, Butler v.—11 S. & M. 78.
Hicks, Cumberland Tel. &c. Co. v.—89 M. 270.
Hicks, Foster v.—93 M. 219.
Hicks, Gamble v.—27 M. 781.
Hicks, Jones v.—52 M. 682.
Hicks, Mobile &c. R. Co. v.—91 M. 273.
Hicks, Tanner v.—4 S. & M. 294.
Hide, Osburn v.—68 M. 45.
Hierman v. Stricklin, 60 M. 234—j. p. 122.
Hiern, Quarles v.—70 M. 259, 891.
Higdon v. Higdon, 57 M. 264—trusts, 82, 85.
Higdon v. Salter, 76 M. 766—tax. 671.
Higdon v. Vaughn, 58 M. 572—app. & e. 154; attch. 296, 339, 345, 353; plead. 253, 356.
Higginbotham, Chicago Bldg. &c. Co. v.—29 So. 79.
Higginbotham, Willis v.—61 M. 164.
Higginbottom v. Short, 25 M. 160—partit. 10, 99.
Higgins v. Deloach, 54 M. 498—j. p. 32, 44.
Higgins v. Haberstraw, 76 M. 627—estop. 104.
Higgins v. Louisville &c. R. Co. 64 M. 80—carr. 277b, 294, 303.
Higgins, Ex parte, 57 M. 824—convt. 10.
Higgins, Horne v.—76 M. 813.
Higgins, Meridian v.—81 M. 376.
Highland, Greenleaf v.—W. 375.
Hightower v. Henry, 85 M. 476—anim. 97; ev. 385, 402, 442.
Hightower v. Mobile &c. R. Co. 83 M. 708—bills & n. 103; eq. 51.
Hightower v. State, 58 M. 636—crim. l. 402, 1036, 1054, 1144.
Hightower, Wilty v.—6 S. & M. 345.
Hightower, Wilty v.—12 S. & M. 478.
Hignite v. Hignite, 65 M. 447—ten. in c. 15.
Hik-tuk-ho-mi v. Watts, 7 S. & M. 363—indians, 14; pub. lands, 114, 117.
Hill v. Alabama &c. R. Co. 79 M. 587—app. & e. 998, 1004.
Hill v. Anderson, 5 S. & M. 216—inf. 31a; sales, 234.
Hill v. Billingsly, 53 M. 111—eject. 118; ex. & ad. 386; inj. 26, 167.
Hill v. Boyland, 40 M. 618—eq. 87; ex. & ad. 314a; lim. of act. 114; mtg. 428; parties, 22; states, 18b; tax. 527.
Hill v. Bugg, 52 M. 397—hus. & w. 144, 149.
Hill v. Calvin, 4 H. 231—alt. inst. 30; app. & e. 1028; guar. 7; new tr. 160.
Hill v. Franklin, 54 M. 632—home. 18.
Hill v. Fulmer, 39 So. 53—execution, 41.
Hill v. Gilmer, 21 So. 528—land. & t. 243.
Hill v. Gregory, 56 M. 341—dower, 11; partit. 14.
Hill v. Hardy, 34 M. 289—courts, 198; des. & d. 86.
Hill v. Henderson, 6 S. & M. 351—rem. of c. 44, 90.
Hill v. Henderson, 13 S. & M. 688—ex. & ad. 544; rem. of c. 88.
Hill v. Hill, 11 S. & M. 616—arb. & a. 7, 32, 56, 57, 68, 85; ev. 461.
Hill v. Josselyn, 13 S. & M. 597—lim. of act. 11; princ. & a. 74; states, 121, 201; trusts, 238.
Hill v. McLauren, 28 M. 288—cncts. 92; ex. & ad. 35.
Hill v. Nash, 73 M. 849—app. & e. 1041; curt. 2, 11; eq. 71; estop. 98; hus. & w. 14; lim. of act. 44.
Hill v. Richards, 11 S. & M. 194—eq. 367; motions, 1, 6.
Hill v. Robeson, 2 S. & M. 541—app. & e. 1175; assum. 6, 14, 17; ex. & ad. 453; mast. & s. 26, 80.
Hill v. Robertson, 23 M. 306—app. & e. 492.
Hill v. Robertson, 24 M. 368—mtg. 466.
Hill v. Samuel, 31 M. 307—mtg. 90; ven. & pur. 190, 339.
Hill v. State, 64 M. 431—bail, 44; crim. l. 539; hom. 219, 333.
Hill v. State, 72 M. 527—crim. l. 595, 970; ind. 200.
Hill v. State, 89 M. 23—courts, 93; crim. l. 265, 1111; jury, 60.
Hill v. State, 94 M. 391—hom. 116.
Hill v. State, 52 So. 630—hom. 194.
Hill v. Swinney, 72 M. 248—schools, 132, 143.
Hill v. Warren County, 8 So. 257—tax. 316.
Hill, Abbay v.—64 M. 340.
Hill, Allgood v.—54 M. 666.
Hill, Anderson v.—12 S. & M. 679.
Hillard, Fox v.—35 M. 160.
Hill, Briggs v.—6 H. 362.
Hill, Brown v.—26 M. 643.
Hill, Dorrah v.—73 M. 787.
Hiller v. Cotten, 54 M. 551—garn. 234; inj. 164, 170.
Hiller v. Cotton, 48 M. 593—eq. 247; new tr. 85, 96.
Hiller v. Ellis, 72 M. 701—assign. f. b. c. 32, 39, 108, 136, 140, 142, 158, 184, 332; sales, 37; usury, 17, 44, 146.
Hiller v. Ivy, 37 M. 431—atty. & c. 97.
Hiller v. Jones, 66 M. 636—deeds, 96; mtg. 171; ven. & pur. 230, 232.
eject. 86; ev. 83; garn. 184, 188.
Hiller v. Lamkin, 54 M. 14—attch. 139;

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Hiller v. Levy, 66 M. 30—paymt. 40.
Hiller, Cotton v.—52 M. 7.
Hillery, Morris v.—7 H. 61.
Hiller, Western Union Tel. Co. v.—93 M. 658.
Hill, Erwin v.—47 M. 675.
Hill, Ex parte, 12 So. 902—convt. 10.
Hilley v. Western Union Tel. Co. 85 M. 67—tel. & t. 67, 78.
Hill, Glover v.—57 M. 240.
Hill, Harper v.—35 M. 63.
Hill, Hollingsworth v.—69 M. 73.
Hill, Howell v.—94 M. 566.
Hilliard v. Berry, see Berry v. Folkes.
Hilliard v. Cagle, 46 M. 309—chat. m. 184, 193; estop. 70; fraud. conv. 50, 131, 154, 207, 225; mtg. 16.
Hilliard v. Chew, 76 M. 763—j. p. 122.
Hilliard, Ricks v.—45 M. 359.
Hillier, Edwards v.—70 M. 803.
Hillman, Allen v.—69 M. 225.
Hill, Pool v.—44 M. 306.
Hill, Rappleye v.—4 H. 295.
Hill, State v.—70 M. 106.
Hill, State v.—53 So. 411.
Hill, Wadlington v.—10 S. & M. 560.
Hill &c. Co. v. Bloom &c. Co. 1 Miss. Dec. 385—attch. 96; plead. 255; rem. of c. 109.
Hilton v. Hilton, 88 M. 529—hus. & w. 283.
Hilzheim v. Drane, 10 S. & M. 556—cred. s. 11, 16; fraud. conv. 241.
Hincle, McMullen v.—39 M. 142.
Hindman, Bank of Gloster v.—95 M. 742.
Hinds v. Brazealle, 2 H. 837—cncts. 101.
Hinds v. Miller, 52 M. 845—app. & e. 190, 880, 1034; attch. 171, 209, 217, 232; bills & n. 460; garn. 124; judgm. 17a; partners, 208; proc. 98; sci. fa. 10.
Hinds v. Morgan, 75 M. 509—home. 6, 70, 177.
Hinds v. Pugh, 48 M. 268—cncts. 54; dower, 1, 44; sales, 234.
Hinds v. Terry, W. 80—new tr. 29, 107; ten. in c. 38; trover, 24, 46.
Hinds County v. Natchez &c. R. Co. 85 M. 599—corp. 195, 388, 439; counties, 154.
Hinds County, Brabham v.—54 M. 363.
Hinds County, Downing v.—84 M. 29.
Hinds County, Miller v.—68 M. 88.
Hinds County, Osburn v.—71 M. 19.
Hinds County, Rainey v.—78 M. 308.
Hinds County, Stewart v.—25 M. 479.
Hinds County, Thomas v.—69 M. 665.
Hinds, Epps v.—27 M. 657.
Hines v. Baine, Sm. & M. Ch. 530—cov. 107; ven. & pur. 212, 219.
Hines v. Noah, 52 M. 192—ex. & ad. 508b.
Hines v. North Carolina, 10 S. & M. 529—excep. 26; guard. & w. 170; states, 190.
Hines v. Potts, 56 M. 346—guard. & w. 50; ins. p. 72, 87; lim. of act. 181; plead. 204; subrog. 23, 41; trusts, 277.
Hines v. Rogers, W. 486—paymt. 62.
Hines v. Shumaker, 95 M. 477—app. & e. 515.
Hines v. Shumaker, 52 So. 705—libel, 6, 50½, 101, 121, 123.
Hines, Philips v.—33 M. 163.
Hines, Potts v.—57 M. 735.
Hines, Reinhardt v.—51 M. 344.
Hines, Strong v.—35 M. 201.
Hinson v. Forsdick, 25 So. 353—ev. 461.
Hinson v. State, 66 M. 532—hom. 190.
Hinton v. First Nat. Bank, 53 So. 344—judgm. 914.
Hinton v. Perry County, 84 M. 536—const. law, 25; counties, 31, 53, 57; courts, 45; inj. 188; judgm. 508.
Hinton, Gardiner v.—86 M. 604.
Hirsch v. Richardson, 65 M. 227—fraud. conv. 85.
Hirsch v. Richardson, 7 So. 323—fraud. conv. 294, 309.
Hirsch v. Shafer, 66 M. 439—partners. 213.
Hirsch, Brenner v.—69 M. 309.
Hirschburg Optical Co. v. Jackson, 63 M. 21—ev. 434; sales, 40, 178.
Hirsch, Louisville &c. R. Co. v.—69 M. 126.
Hirsch, Schoolfield v.—71 M. 55.
Hirsh, Columbus Ins. Co. v.—61 M. 74.
Hirshman, Leech v.—90 M. 723.
Hiserodt v. Hamlett, 74 M. 37—trusts, 14, 17, 24, 59, 60; wills, 481.
Hitchler v. Bank, 63 M. 403—chat. m. 184; fraud. conv. 29; mtg. 433.
Hite, Glidewell v.—5 H. 110.
Hitt v. Applewhite, 20 So. 161—subrog. 23; trusts, 79.
Hitt v. Terry, 92 M. 671—app. & e. 882; trial, 295, 296; wills, 154, 162, 328.
Hitt, Mobile &c. R. Co. v.—55 So. 484.
Hitzheim, Elder v.—35 M. 231.
Hiwannee Lumber Co. v. McPhearson, 95 M. 580—pub. lands, 35.
Hobart, Cumberland Telegraph &c. Co. v.—89 M. 252.
Hobbs v. Germany, 94 M. 469—inj. 85; schools, 170.
Hobbs, Roberson v.—45 So. 365.
Hobson v. Edwards, 57 M. 128—hus. & w. 179; ven. & pur. 261.
Hodge v. Bennett, 78 M. 868—deeds, 136.
Hodge v. Mitchel, 27 M. 560—execution, 69; judgm. 654.

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Hodge v. Wilson, 12 S. & M. 498—tax. 670, 734a.
Hodges v. Causey, 77 M. 353—anim. 96, 97.
Hodges v. Coffee, 13 So. 878—tax. 526.
Hodges v. Darden, 51 M. 199—lim. of act. 73; plead. 229, 339.
Hodges v. Hickey, 67 M. 715—fraud. conv. 51, 277; home. 106; marshaling, 3.
Hodges v. Phillip, 50 M. 362—eq. 312.
Hodges, Bigner v.—82 M. 215.
Hodges, Booyer v.—45 M. 78.
Hodges, Gigner v.—82 M. 215.
Hodges, McAnulty v.—33 M. 579.
Hodges, Sims v.—65 M. 211.
Hodnett v. State, 66 M. 26—const. law, 197, 200; ind. 58, 87; states, 272; statut. 277; weap. 3, 17a, 17b.
Hoel v. Coursery, 26 M. 511—ex. & ad. 375; guard. & w. 96, 102, 103, 199; trusts, 69.
Hoff v. Rogers, 67 M. 208—partners. 193.
Hoff v. State, 83 M. 488—crim. l. 721; seduct. 37.
Hoff, Dickson v.—3 H. 165.
Hoffheimer, Phœnix Fire Ins. Co. v.—46 M. 645.
Hoffman v. Kuhn, 57 M. 746—party w. 5.
Hoffman v. Simon, 52 M. 302—garn. 64, 86, 178.
Hoffman v. Smith, 61 M. 544—partit. 114.
Hoffman, Hyde v.—31 So. 415.
Hoffman, Leiper v.—26 M. 615.
Hoffman, Schlottman v.—73 M. 188.
Hoffman, Wren v.—41 M. 616.
Hogan v. Burnett, 37 M. 617—eq. 61; fraud. conv. 263; judgm. 780.
Hogan v. State, 46 M. 274—crim. l. 761, 785b; rape, 50; trial, 252.
Hogan, Bowie v.—5 H. 13.
Hogan, Eckford v.—44 M. 398.
Hoggatt v. Bingaman, 7 H. 565—bills & n. 403; courts, 88.
Hoggatt v. Ferrall, 41 M. 642—app. & e. 321, 324.
Hoggat v. Hunt, W. 216—app. & e. 891, 976; eq. 392; parties, 57.
Hoggatt v. Montgomery, 6 H. 93—ex. & ad. 442, 450, 537g, 537j; judgm. 306; trial, 338.
Hoggatt v. Wade, 10 S. & M. 143—ex. & ad. 364, 368; ven. & pur. 229.
Hoggatt, Brandon v.—32 M. 335.
Hoggett v. State, 56 So. 172—crim. l. 8, 592.
Hogsett v. State, 40 M. 522—crim. l. 59, 63, 418, 538, 763; larc. 3.
Hogue v. Lewellen, 42 M. 302—dism. 66; jury, 148; plead. 182, 436.
Holberg v. Jaffray, 64 M. 746—attch. 202; fraud. conv. 123; judgm. 29.
Holberg v. Jaffray, 65 M. 526—lim. of act. 148.
Holberg v. Macon, 55 M. 112—cert. 35; j. p. 195; licens. 5½, 7.
Holberg, Davis v.—59 M. 362.
Holberg, Dorroh v.—25 So. 661.
Holberg, Levy v.—67 M. 526.
Holberg, Levy v.—71 M. 66.
Holberg Mercantile Co. v. State, 95 M. 21—int. liq. 249, 251.
Holberg, New Orleans Ins. Assn. v.—64 M. 51.
Holberg, Penny v.—53 M. 567.
Holcomb v. McCutchen, 30 So. 754—princ. & a. 190.
Holcomb v. Mason, 35 M. 698—parties, 4; plead. 88.
Holcomb v. Foxworth, 34 M. 265—attch. 341.
Holcomb, Barnes v.—12 S. & M. 306.
Holcomb, Haralson v.—10 S. & M. 581.
Holcomb, Redus v.—27 So. 524.
Holden v. Bloxum, 35 M. 381—app. & e. 994; new tr. 41; partners. 146.
Holden v. Bond, 29 So. 769—lev. 23.
Holden v. Brimage, 72 M. 228—ack. 20; app. & e. 906; chat. m. 172; ev. 265.
Holden v. Davis, 57 M. 769—bills. & n. 434; paymt. 85.
Holden v. Rice Mercantile Co. 51 So. 895—hus. & w. 235.
Holden, Bangle v.—52 M. 804.
Holden, Coleman v.—88 M. 798.
Holden, Lowry v.—41 M. 410.
Holden, Miss. Cent. R. Co. v.—54 So. 851.
Holder v. Crump, 56 So. 183—tax. 768.
Holder v. Sykes, 77 M. 64—judges, 22.
Holder v. Wineman, 76 M. 824—pub. lands, 142.
Holder, Bogan v.—76 M. 597.
Holder, State v.—76 M. 158.
Holiday, Mobile &c. R. Co. v.—79 M. 294.
Holifield v. Laurel, 96 M. 59—crim. l. 543.
Holifield, Smith v.—54 So. 84.
Holiman v. Dibrell, 51 M. 96—app. & e. 359; ex. & ad. 455.
Holland v. Beard, 59 M. 161—clks. of c. 72; marr. 12; parent & c. 7.
Holland v. State, 60 M. 939—escape, 5, 9; ind. 34, 87.
Holland, Beard v.—59 M. 164.
Holland, Falconer v.—5 S. & M. 689.
Holland, Holliday v.—41 M. 528.
Holland, Kansas City &c. R. Co. v.—68 M. 351.

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Holland, Pickle v.—24 M. 566.
Holland, Thornton v.—87 M. 470.
Holley v. State, 74 M. 878—crim. l. 101, 105, 258, 260a.
Holley, Vice v.—88 M. 572.
Holliday v. Cooper, 1 S. & M. 633—bonds, 129.
Holliday v. Holland, 41 M. 528—ex. & ad. 173, 438; exemp. 30.
Holliday, Harris v.—4 H. 338.
Holliday, Moorehead v.—1 S. & M. 625.
Holliday, Paine v.—68 M. 298.
Hollinshed v. Yazoo &c. R. Co. 55 So. 40—dam. 41, 50; mast. & s. 265; neg. 119.
Hollins, Stewart v.—47 M. 708.
Hollingsworth v. Hill, 69 M. 73—land. & t. 252; paymt. 38.
Hollingsworth v. Willis, 64 M. 152—app. & e. 542; arb. & a. 84; land. & t. 229g.
Hollis, Walton v.—16 So. 260.
Hollman v. Bennett, 44 M. 322—ex. & ad. 322, 324, 325, 363; statut. 239.
Holloman v. Bullock, 82 M. 405—pub. lands, 35.
Holloman v. Holloman, 5 S. & M. 559—app. & e. 840; dower, 68, 69; ex. & ad. 71, 424.
Holloway v. Armstrong, 30 M. 504—app. & e. 1068; new tr. 41.
Holloway v. Brame, 83 M. 335—bankr. 174, 186; corp. 448, 506.
Holloway v. Ellis, 25 M. 103—ven. & pur. 254a, 260, 262.
Holloway v. Miller, 84 M. 776—cov. 130; pub. lands, 135; ven. & pur. 308a.
Holloway v. Moore, 4 S. & M. 594—ven. & pur. 102.
Holloway, Bennett v.—55 M. 211.
Holloway, Benson v.—59 M. 358.
Holloway, Byrd v.—6 S. & M. 199, 323.
Holloway, Carter v.—28 So. 941.
Holloway, Philbrick v.—6 H. 91.
Holloway, Rankin v.—3 S. & M. 614.
Holloway, Ross v.—60 M. 553.
Holly v. Cook, 70 M. 590—judgm. 883; set-off, 54.
Holly v. State, 55 M. 424—assa. 51, 99, 190.
Holly-Matthews Mfg. Co. Delano v.—47 So. 475.
Holly Springs v. Manning, 55 M. 380—atty. & c. 139, 142, 157.
Holly Springs, American Surety Co. v.—77 M. 428.
Holly Springs, Deberry v.—35 M. 385.
Holly Springs &c. Ins. Co. v. Marshall County, 52 M. 281—tax. 39, 216.
Holman v. Bennett, 44 M. 322—com. l. 10.
Holman v. Bonner, 63 M. 131—land. & t. 66, 279.
Holman v. Fisher, 49 M. 472—abate. & r. 50, 51; garn. 35.
Holman v. Murdock, 34 M. 275—app. & e. 1173; ev. 100, 120, 270, 271; new tr. 131.
Holman v. Ringo, 36 M. 690—assign. 53; bills & n. 302; cncts. 112; gaming, 19, 22, 25.
Holman v. State, 72 M. 108—witn. 89.
Holman, Steadman v.—33 M. 550.
Holmes v. Bacon, 28 M. 607—chat. m. 246; mtg. 298.
Holmes v. Carman, Freem. Ch. 408—bills & n. 279, 329, 331, 357, 359; notice, 4; princ. & a. 125; trusts, 355.
Holmes v. Evans, 48 M. 247—frds. st. of, 110.
Holmes v. Ferguson-McKinney Dry Goods Co. 86 M. 782—app. & e. 1073; fraud. conv. 95, 272, 314; frds. st. of, 23; partners. 184.
Holmes v. Herndon, 31 M. 296—garn. 174.
Holmes v. Holmes, W. 474—div. 27, 200.
Holmes v. Illinois Cent. R. Co. 75 M. 371—carr. 371.
Holmes v. Lemon, 15 So. 141—eq. 343, 345.
Holmes v. McGee, 12 S. & M. 411—dower, 1.
Holmes v. McGee, 64 M. 129—eject. 140.
Holmes v. McGinty, 44 M. 94—mtg. 234, 415.
Holmes v. Preston, 70 M. 152—atty. & c. 109; bills & n. 515; plead. 431, 433; trial, 156.
Holmes v. Preston, 71 M. 541—app. & e. 204; bills & n. 393; guar. 83.
Holmes v. Shands, 26 M. 639—mech. liens, 105.
Holmes v. Simon, 71 M. 245—app. & e. 999; trial, 143, 167, 405.
Holmes, Alabama &c. R. Co. v.—75 M. 371.
Holmes, Claiborne v.—51 M. 146.
Holmes County v. Black Creek Drainage Dist. 55 So. 963—drains, 67; statut. 64.
Holmes County v. Morton, 24 M. 240—tax. 316.
Holmes County, Evans v.—11 So. 652.
Holmes County, Thomas v.—67 M. 754.
Holmes County, Wofford v.—44 M. 579.
Holmes, Eustice v.—52 M. 305.
Holmes, Eustis v.—48 M. 34.
Holmes, Fortinberry v.—89 M. 373.
Holmes, Georgia Home Ins. Co. v.—75 M. 390.
Holmes, Learned v.—49 M. 290.
Holmes, McGee v.—63 M. 50.
Holmes, Neilson v.—W. 261.
Holmes, Shay v.—25 So. 872.
Holmes, Simmons v.—49 M. 134.
Holmes, Slocumb v.—1 H. 139.
Holmes, State v.—W. 415.

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Holster, Kramer v.—55 M. 244.
Holt v. Bacon, 25 M. 567—banks, 104.
Holt v. Barton, 42 M. 711—cncts. 140.
Holt v. Briscoe, W. 19—abate. & r. 65.
Holt v. Mills, 4 S. & M. 110—app. & e. 516; jury, 148.
Holt v. State, 78 M. 631—crim. l. 997; hom. 165.
Holt, Boylan v.—45 M. 277.
Holt, Mobile &c. R. Co. v.—62 M. 170.
Holton v. Binns, 40 M. 491—replev. 15.
Holt, Pugh v.—27 M. 461.
Homan, Dodson v.—2 Miss. Dec. 11.
Home Ins. Co. v. Bank, 71 M. 608—app. & e. 154, 1028; ins. 335, 645.
Home Ins. Co. v. Gibson, 72 M. 58—ins. 376, 377, 389, 558, 576.
Home Ins. Co. v. Lowenthal, 36 So. 1042—app. & e. 1025, 1069; licens. 27.
Home Ins. Co. v. Scales, 71 M. 975—app. & e. 840; ins. 323, 376.
Homer v. Rigby, 65 M. 41—interest, 37.
Homer, Hamilton v.—46 M. 378.
Home &c. Assn. v. Leonard, 77 M. 39—forc. e. & d. 12.
Homochitto River Comrs. v. Withers, 29 M. 21—nav. wat. 5.
Honea v. Monroe County, 63 M. 171—bills & n. 148; counties, 165, 167; mand. 107, 108.
Honea v. Monroe County, 15 So. 789—counties, 216.
Honea v. Page, 60 M. 248—land. & t. 229e.
Honea, McAllister v.—71 M. 256.
Hood v. Bowman, Freem. Ch. 290—ev. 265; frds. st. of, 129, 156; inf. 91.
Hood v. State, 27 So. 643—hom. 300d.
Hood, Hattiesburg Trust &c. Co. v.—52 So. 790.
Hood, Stephens v.—9 S. & M. 75.
Hooe, Mahorner v.—9 S. & M. 247.
Hooke v. Wood, 2 H. 867—judgm. 551.
Hooker v. Austin, 41 M. 717—inj. 39, 172; usury, 91.
Hooker v. Hooker, 10 S. & M. 599—const. law, 191; statut. 263, 267.
Hooker v. Hooker, 31 M. 448—eq. 12; guard. & w. 165.
Hooker v. Levy, 18 So. 385—contin. 10; new tr. 156; stip. 14.
Hooker v. McIntosh, 76 M. 693—bills & n. 92, 499; pub. lands, 139.
Hooker v. Sutcliff, 71 M. 792—assign. f. b. c. 147; attch. 298; chat. m. 116, 164, 173, 184; fraud. conv. 13, 285.
Hooker v. Williams, 18 So. 420—contin. 10; new tr. 156.
Hooker v. Yale, 56 M. 197—attch. 201; eject. 8, 105; estop. 68.
Hooker, Hester v.—7 S. & M. 768.
Hooker, Lee v.—7 S. & M. 601.
Hooker, Lowenstein v.—71 M. 102.
Hooker, Noel v.—1 Miss. Dec. 444.
Hooker, Shackelford v.—54 M. 716.
Hooks v. Railway Co. 73 M. 145—carr. 294, 303.
Hoole v. Dorroh, 75 M. 257—land. & t. 3, 19; mast. & s. 342.
Hooper v. Burnett, 26 M. 428—atty. & c. 114.
Hooper, Beer v.—32 M. 246.
Hooper, Jones v.—50 M. 510.
Hoopes v. Bailey, 28 M. 328—assign. f. b. c. 184; mtg. 6, 609.
Hoopes v. Newman, 2 S. & M. 71—bills & n. 310, 388, 420, 421, 469, 489; paymt. 18.
Hoopes, Davis v.—33 M. 173.
Hoopes, McCreary v.—25 M. 428.
Hoopes, McGrath v.—26 M. 496.
Hoover v. Brem. 43 M. 603—ex. & ad. 314b; slaves, 13.
Hoover v. Chambers, 27 M. 606—garn. 62.
Hoover v. Pierce, 26 M. 627—cncts. 108, 138, 139; trial, 68.
Hoover v. Shackelford, 23 M. 520—atty. & c. 110.
Hoover v. Wells, 33 M. 536—hus. & w. 193, 195.
Hoover v. Wells, 35 M. 159—ex. & ad. 427.
Hoover v. Wells, 39 M. 445—hus. & w. 10.
Hoover v. Wheeler, 23 M. 314—mech. liens, 187.
Hoover, Brumfield v.—90 M. 502.
Hoover, Henry v.—6 S. & M. 417.
Hoover, Hope v.—21 So. 134.
Hoover, Rowland v.—2 H. 769.
Hoover, Sadler v.—31 M. 260.
Hope v. Evans, Sm. & M. Ch. 195—cncts. 138; eq. 345; ev. 265; paymt. 82.
Hope v. Evans, 4 S. & M. 321—slaves, 2.
Hope v. Hoover, 21 So. 134—des. & d. 52.
Hope v. Hurt, 59 M. 174—ev. 340; ex. & ad. 524.
Hope v. Natchez &c. R. Co. 54 So. 369—mast. & s. 101, 125, 265.
Hope Oil Mill &c. Co. v. Phœnix Assur. Co. 74 M. 320—ins. 115, 164, 582, 614.
Hope Oil Mill &c. R. Co. Kehl v.—77 M. 762.
Hopkins v. Carey, 23 M. 54—execution, 36, 40; hus. & w. 149.
Hopkins v. Drake, 44 M. 619—attch. 302; replev. 5.
Hopkins v. Grissom, 26 M. 143—attch. 1, 2, 110.

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Hopkins v. Sandidge, 31 M. 668—statut. 239; tax. 558, 615.
Hopkins, Byrd v.—8 S. & M. 441.
Hopkins, Gilliam v.—43 M. 641.
Hopkins, Griffing v.—W. 49.
Hopkins, Lile v.—12 S. & M. 299.
Hopkins, Pittman v.—74 M. 563.
Hopkins, Steamer Genl. Worth v.—30 M. 703.
Hopkins, Woodson v.—85 M. 171.
Hopper v. Hopper, 2 Miss. Dec. 641—exemp. 106.
Hopper v. McAllun, 87 M. 441—frds. st. of, 116.
Hopper v. Overstreet, 79 M. 241—eq. 186; witn. 239.
Hopper, Drewry v.—77 M. 744.
Hopper, Sproule v.—16 So. 901.
Hopsen, Sparks v.—83 M. 124.
Hopsom, Allen v.—Freem. Ch. 276.
Hopson v. Harrell, 56 M. 202—eq. 108; parties, 89.
Hopson v. Kansas City &c. R. Co. 87 M. 789—r. r. 324, 327, 328.
Hopson v. Railway Co. 71 M. 503—em. dom. 79.
Hopson, Louisville &c. R. Co. v.—73 M. 773.
Hopton v. Swan, 50 M. 545—execution, 246, 249; proc. 157.
Hord, Farley v.—45 M. 96.
Horman v. James, 7 S. & M. 111—execution, 40.
Horn v. Beatty, 85 M. 504—can. of i. 34; deeds, 70.
Horn v. Gillock, W. 107—j. p. 170.
Horne v. Green, 52 M. 452—counties, 193; tax. 210, 216, 265.
Horne v. Higgins, 76 M. 813—can. of i. 36; frds. st. of, 56; trusts, 40.
Horne v. Nugent, 74 M. 102—execution, 265; ven. & pur. 231; witn. 150.
Horne v. Tartt, 76 M. 304—princ. & s. 150.
Horne, Jacobson v.—52 M. 185.
Horne, Johnston v.—32 M. 151.
Horne, Monk v.—38 M. 100.
Horne, Parker v.—38 M. 215.
Horner v. Coffey, 25 M. 434—mun. corp. 1038.
Horne, Saffold v.—71 M. 762.
Horne, Saffold v.—72 M. 470.
Horne, Swann v.—54 M. 337.
Horne, Wilson v.—37 M. 477.
Horn, McKinnon v.—78 M. 307.
Hornthall, Clark v.—47 M. 434.
Horton v. Grant, 56 M. 404—garn. 132.
Horton v. Heath, 2 Miss. Dec. 144—land. & t. 229½.
Horton v. State, 84 M. 473—ind. 190; rape, 42, 59.
Horton v. State, 13 So. 886—prisons, 13.
Horton, Fonte v.—36 M. 350.
Horton, Peebles v.—39 M. 406.
Hosey v. Ferriere, 1 S. & M. 663—attch. 25.
Hoskins v. Ames, 78 M. 986—lim. of act. 44; remand. 16.
Hoskins v. Brantley, 57 M. 814—offic. 54; sheriffs, 3, 5.
Hoskins v. Illinois Cent. R. Co. 78 M. 768—tax. 175, 616.
Hoskins v. Johnson, 31 M. 128—judgm. 786.
Hoskins, Bowen v.—45 M. 183.
Hoskins, Ehrman v.—67 M. 192.
Hoskins, Harman v.—56 M. 142.
Hoskins, Illinois Cent. R. Co. v.—80 M. 730.
Hoskins, Lexington v.—96 M. 163.
Hoskins, Masonic Benefit Ass'n v.—56 So. 169.
Hoskins, Moody v.—64 M. 468.
Hoskins, Moore v.—66 M. 496.
Houck v. Wright, 77 M. 476—monop. 17; sales, 48.
Houck v. Wright, 23 So. 422—ev. 397, 440.
Hough v. Perkins, 2 H. 724—indem. 15; partners. 95, 242.
Hough, Bonhannon v.—W. 461.
Houghton, Ware v.—41 M. 370.
House v. Bierne, 5 S. & M. 622—attch. 128, 137.
House v. Callicott, 83 M. 506—cncts. 95; comp. 6.
House v. Fultz, 13 S. & M. 39—app. & e. 204; execution, 36; trial, 243.
House v. Gumble, 78 M. 259—plead. 312; tax. 671, 794.
House v. Harden, 52 M. 860—hus. & w. 119; trusts, 87.
House v. State, 41 M. 737—int. liq. 80.
House v. State, 94 M. 107—hom. 7, 16, 215, 332.
House v. State, 96 M. 653—jury, 3.
House, Fultz v.—6 S. & M. 404.
House, Vick v.—2 H. 617.
Houston v. Belcher, 12 S. & M. 514—attch. 2, 128, 138.
Houston v. Black, 14 So. 529—app. & e. 517, 1166, 1203.
Houston v. Burney, 2 S. & M. 583—assign. 97; sales, 259.
Houston v. Crutcher, 31 M. 51—interest, 18, 56, 59; mon. lent, 1; plead. 163.
Houston v. National Mut. B. & L. Assn. 80 M. 31—champ. 6; mtg. 362, 378, 594, 597, 609.

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Houston v. Royston, 7 H. 543—eq. 2; judges, 7; offic. 54.
Houston v. Royston, 1 S. & M. 238—eq. 44.
Houston v. Smith, 2 S. & M. 597—new tr. 89; plead. 139; set-off, 12.
Houston v. Smythe, 66 M. 118—app. & e. 1028; land. & t. 229b; replev. 69.
Houston v. Totten, 1 Miss. Dec. 244—chat. m. 46; execution, 199.
Houston v. Witherspoon, 68 M. 188—app. & e. 626.
Houston v. Witherspoon, 68 M. 190—estop. 54.
Houston, Alexander v.—31 So. 211.
Houston, Board of Levee Commissioners v.—81 M. 619.
Houston, Dixon v.—35 M. 636.
Houston, Jamison v.—15 So. 114.
Houston, Lowry v.—3 H. 394.
Houston, McClure v.—10 S. & M. 392.
Houston, Melius v.—41 M. 59.
Houston, National Mutual B. & L. Assn. v.—81 M. 386.
Houston, Ross v.—25 M. 591.
Houston, Sherwood v.—41 M. 59.
Houze, Thompson v.—48 M. 444.
Howard v. Chicago &c. R. Co. 61 M. 194—carr. 254.
Howard v. Cousins, 7 H. 114—app. & e. 318; ex. & ad. 408, 450, 451; judgm. 951.
Howard v. Frazier, 2 Miss. Dec. 578—attch. 130.
Howard v. Jackson, 92 M. 720—mun. corp. 758.
Howard v. Louisville &c. R. Co. 67 M. 247—r. r. 415.
Howard v. Priestly, 58 M. 21—execution, 338; proc. 164.
Howard v. Proskauer, 57 M. 247—sheriffs, 125.
Howard v. Simmons, 43 M. 75—agric. 3.
Howard v. State, 83 M. 378—crim. l. 291, 785; ind. 124, 125.
Howard v. Stephens, 52 M. 239—estop. 92; hus. & w. 97.
Howard v. Tomicich, 81 M. 703—ev. 454; land. & t. 83.
Howard v. Walters, 2 Miss. Dec. 187—tax. 625, 787.
Howard, Albin v.—74 M. 370.
Howard, Apgar v.—11 So. 110.
Howard, Bratton v.—52 So. 210.
Howard, Jones v.—53 M. 707.
Howard, Kelly v.—54 So. 10.
Howard, McGill v.—61 M. 411.
Howard, Marks v.—70 M. 445.
Howard, Meek v.—10 S. & M. 502.
Howard, Melton v.—7 H. 105.
Howard, Pankey v.—47 M. 83.
Howard, Worten v.—2 S. & M. 527.
Howarth, Scroggins v.—23 M. 514.
Howcott v. Collins, 23 M. 398—ex. & ad. 115, 116, 453; hus. & w. 174; interest, 18.
Howd v. Railroad Co. 50 M. 178—mast. & s. 85, 101, 159, 167, 210, 264.
Howe v. Cole, 16 So. 531—action, 54.
Howe v. Jolly, 68 M. 323—int. liq. 325; trover, 2.
Howe v. Kerr, 69 M. 311—partners. 144; princ. & a. 145.
Howe v. Moneghan, 19 So. 202—app. & e. 190, 339.
Howe v. State, 53 M. 57—counties, 47 94, 95, 101; ev. 333; lim. of act. 22, 57.
Howe, Brady v.—50 M. 607.
Howell v. Bush, 54 M. 437—eq. 20; home. 118, 118a, 198; liens, 16; mtg. 305; subrog. 23.
Howell v. Gibson, 30 M. 464—frds. st. of, 158; ref. of inst. 21, 44.
Howell v. Hill, 94 M. 566—home. 118c; ven. & pur. 261.
Howell v. Illinois Cent. R. Co. 75 M. 242—r. r. 278, 279.
Howell v. Miller, 88 M. 655—tax. 60.
Howell v. Shannon, 80 M. 598—app. & e. 1009; ten. in c. 20.
Howell v. State, 53 So. 954—crim. l. 778, 785b, 789.
Howell, Bacon v.—60 M. 362.
Howell, Gildart v.—1 H. 198.
Howe, Vicksburg &c. R. Co. v.—52 M. 202.
Howie v. Bonds, 87 M. 698—costs, 233.
Howie v. Pratt, 83 M. 15—ev. 178, 434.
Howie, Jeffries v.—38 M. 97.
Howie, Moyse v.—53 So. 402.
Howland, Selph v.—23 M. 264.
Howry v. Calloway, 48 M. 587—appr. 1; inf. 11.
Howze v. New Orleans &c. R. Co. 91 M. 695—carr. 160, 230.
Howze v. State, 59 M. 230—counties, 102; witn. 87.
Howze v. State, 1 Miss. Dec. 520—crim. l. 1182.
Howze v. Whitehead, 93 M. 578—party w. 8; princ. & a. 118, 123.
Hoy v. Couch, 5 H. 188—app. & e. 1049, 1180, 1186; excep. 11; execution, 154b, 155; judgm. 577.

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Hoy v. Hansborough, Freem. Ch. 533—eq. 43; indem. 5, 15; spec. perf. 3.
Hoy v. Hoy, 93 M. 732—deeds, 69; statut. 225¾; wills, 191.
Hoy v. Taliaferro, 8 S. & M. 727—cov. 90, 102; judgm. 780; ven. & pur. 308a.
Hoye v. Newton Lumber Co. 54 So. 839—ev. 166.
Hoye, Mobile &c. R. Co. v.—87 M. 571.
Hoyle v. Shirley, 94 M. 466—bills & n. 97.
Hoyle, Kernosky v.—52 So. 481.
Ho-yo-po-nubby, Hardin v.—27 M. 567.
Hoy, Robertson v.—12 S. & M. 566.
Hoyt, Acme Lumber Co. v.—71 M. 106.
Hoyt, Tomilson v.—1 S. & M. 515.
Hoyt &c. Co. Meridian Nat. Bank v.—74 M. 221.
Hubanks, State v.—56 So. 163.
Hubbard v. Flynt, 58 M. 266—eq. 203; judgm. 713, 734; trusts, 371.
Hubbard v. Hemphill, 94 M. 388—costs, 184.
Hubbard v. Rutledge, 52 M. 581—libel, 120.
Hubbard v. Rutledge, 57 M. 7—jury, 92, 110; libel, 104.
Hubbard v. Sage Land &c. Co. 81 M. 616—home. 118c, 145.
Hubbard v. State, 64 M. 315—contin. 48; crim. l. 600.
Hubbard, Carnes v.—2 S. & M. 108.
Hubbard, Cason v.—38 M. 35.
Hubbard, Flynt v.—57 M. 471.
Hubbard, May v.—94 M. 456.
Hubbard, Yazoo &c. R. Co. v.—85 M. 480.
Hubert v. Williams, W. 175—execution, 69, 159.
Huckaby, Volking v.—67 M. 206.
Hackleman, Perkins v.—26 M. 41.
Huddleston v. State, 1 Miss. Dec. 559—bail, 81.
Huddleston, Hendricks v.—5 S. & M. 422.
Hudson v. Gray, 58 M. 589—app. & e. 374, 375.
Hudson v. Gray, 58 M. 882—ex. & ad. 110, 323, 326, 329, 483; subrog. 10; wills, 461, 498, 604.
Hudson v. Gray, 58 M. 591—app. & e. 378.
Hudson v. Kimbrough, 74 M. 341—atty. & c. 63; lim. of act. 98, 100, 101, 104.
Hudson v. Mississippi Cent. R. Co. 95 M. 41—app. & e. 843; mast. & s. 258.
Hudson v. Nalty, 55 M. 582—j. p. 210.
Hudson v. Poindexter, 42 M. 304—abate. & r. 40; debt, act. 10; plead. 431; seals, 3.
Hudson v. State, 73 M. 784—crim. l. 260c.
Hudson v. Strickland, 49 M. 591—new tr. 163, 165; trial, 160.
Hudson v. Strickland, 58 M. 186—guard. & w. 69, 151; inf. 47; partit. 83, 86.
Hudson v. Watson, 26 M. 357—cov. 91; ven. & pur. 147.
Hudson, Dabney v.—68 M. 292.
Hudson, Mobile &c. R. Co. v.—50 M. 572.
Hudson, Strickland v.—55 M. 235.
Hudson, Turnipseed v.—50 M. 429.
Hudson, Vaughn v.—59 M. 421.
Hudson, Wilkerson v.—71 M. 130.
Hudspeth, Coleman v.—49 M. 562.
Huff v. Parker, 31 So. 833—app. & e. 1171.
Huff, Fitts v.—63 M. 594.
Huffman v. State, 84 M. 479—crim. l. 162, 164.
Huffman, Burnham v.—W. 381.
Hughes v. Buckingham, 5 S. & M. 632—clks. of c. 7.
Hughes v. Daniel, W. 488—ev. 390.
Hughes v. Evans, 4 S. & M. 737—dism. 23.
Hughes v. Fisher, W. 516—dam. 75.
Hughes v. Grand Gulf Bank, 2 S. & M. 115—banks, 227; bills & n. 488; plead. 324.
Hughes v. Lacock, 63 M. 112—judgm. 277.
Hughes v. Lake, 63 M. 552—attch. 23; banks, 75.
Hughes v. Lapice, 5 S. & M. 451—proc. 164.
Hughes v. Levee Com'rs, 27 So. 744—lev. 19.
Hughes v. Stallings, 52 M. 375—imp. 4; land. & t. 252.
Hughes v. State, 58 M. 355—crim. l. 921.
Hughes v. State, 2 Miss. Dec. 88—crim. l. 742; new tr. 89.
Hughes v. State, 74 M. 368—crim. l. 970; larc. 32.
Hughes v. State, 79 M. 77—courts, 188.
Hughes v. State, 38 So. 33—hom. 169, 232.
Hughes v. State, 52 So. 631—int. liq. 25.
Hughes v. Thomas, 29 So. 74—tax. 419, 764, 775.
Hughes v. Thweatt, 57 M. 376—app. & e. 160; bankr. 460; bills & n. 476; cncts. 338; mtg. 454.
Hughes v. Wilkinson, 28 M. 600—eject. 15; judgm. 870a.
Hughes v. Wilkinson, 37 M. 482—ack. 14, 19; deeds, 123, 178, 201; eject. 48; execution, 69; judgm. 870; princ. & a. 10; ven. & pur. 84.
Hughes, A. W. Stevens Lumber Co. v.—38 So. 769.
Hughes, Chaffe v.—57 M. 256.
Hughes, Chapman v.—61 M. 339.
Hughes, Choctaw County v.—83 M. 195.
Hughes, Fleming v.—6 So. 842.
Hughes, Fulton v.—63 M. 61.

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Hughes, Gibson v.—6 H. 315.
Hughes, Jones v.—66 M. 413.
Hughes, Lapiece v.—24 M. 69.
Hughes, Murdock v.—7 S. & M. 219.
Hughes, New Orleans &c. R. Co. v.—49 M. 258.
Hughes, State v.—80 M. 601.
Hughes, State v.—96 M. 581.
Hughes, Stevens Lumber Co. v.—38 So. 769.
Hughes, Whatley v.—53 M. 268.
Hughes, Yazoo &c. R. Co. v.—94 M. 242.
Hughes, Yazoo &c. R. Co. v.—50 So. 627.
Hughes, Young v.—12 S. & M. 93.
Hughs v. State, 22 So. 827—weap. 14.
Hughston v. Carroll County, 68 M. 660—offic. 93; statut. 263; tax. 316.
Hughston v. Cornish, 59 M. 372—execution, 10; judgm. 768; j. p. 138.
Hughston v. Nail, 73 M. 284—bills & n. 445.
Hugonin v. Adams, 33 So. 497—int. liq. 71.
Hull v. Clark, 14 S. & M. 187—eq. 17; ex. & ad. 234, 293, 367, 388a; sales, 240.
Hull v. Garner, 31 M. 145—app. & e. 934; partners. 150.
Hull v. Neal, 27 M. 424—ex. & ad. 32.
Hull, Clark v.—31 M. 520.
Hull, Conner v.—36 M. 424.
Hull, Garland v.—13 S. & M. 76.
Hull, Graves v.—27 M. 419.
Hull, Gully v.—31 M. 20.
Hull, Radford v.—30 M. 712.
Hull, State v.—53 M. 626.
Hulme v. Montgomery, 31 M. 105—des. & d. 32.
Hume, Irion v.—50 M. 419.
Humphreys v. Irvine, 6 S. & M. 205—abate. & r. 59, 72; judgm. 12.
Humphreys v. McFarland, 48 So. 182—app. & e. 20.
Humphreys v. Merrill, 52 M. 92—fraud. conv. 154; judgm. 788.
Humphreys v. Stafford, 71 M. 135—judgm. 564, 713.
Humphreys v. Vertner, Freem. Ch. 251—bills & n. 236; chat. m. 207.
Humphreys v. Wilson, 43 M. 328—bills & n. 448; princ. & a. 7, 10, 14, 166.
Humphreys, Vertner v.—14 S. & M. 130.
Humphreys, Wilkins v.—23 M. 311.
Humphrey, Yazoo &c. R. Co. v.—83 M. 721.
Humphries v. Bartee, 10 S. & M. 282—judgm. 372, 415, 431, 433, 440, 744; mtg. 172; sales, 148; ven. & pur. 232.
Humphries v. Illinois Cent. R. Co. 70 M. 453—carr. 271, 278.
Humphries v. McLachlan, 87 M. 532—atty. & c. 146.
Humphries, Cole v.—78 M. 163.
Humphries, Columbus Ins. &c. Co. v.—64 M. 258.
Humphries, Mobile &c. R. Co. v.—7 So. 522.
Humphries, Southern R. Co. v.—79 M. 761.
Hundermark v. New South B. & L. Assn. 29 So. 528—b. & l. assn. 5, 14.
Hundley v. Buckner, 6 S. & M. 70—app. & e. 204; champ. 4; chat. m. 159, 262; deeds, 86; det. 11, 17; parties, 4; plead. 375.
Hundley v. Mount, 8 S. & M. 387—chat. m. 82, 89.
Hundley, Cole v.—8 S. & M. 473.
Hundly, Sims v.—2 H. 896.
Hunnicutt v. Alabama &c. R. Co. 50 So. 697—mast. & s. 290.
Hunnicutt, Alabama &c. R. Co. v.—53 So. 617.
Hunnicutt, Southern Express Co. v.—54 M. 566.
Hunt v. Anderson, 33 M. 559—dism. 28; ex. & ad. 453.
Hunt v. Belknap, 78 M. 76—lim. of act. 86, 169.
Hunt v. Booth, Freem. Ch. 215—hus. & w. 119, 221; remaind. 17.
Hunt v. Chambliss, 7 S. & M. 532—ev. 402; princ. & s. 194, 200; witn. 105.
Hunt v. Crane, 33 M. 669—cncts. 335; dep. 56; mast. & s. 42.
Hunt v. Drane, 32 M. 243—ex. & ad. 538.
Hunt v. Gorden, 52 M. 194—partners. 313, 327, 332.
Hunt v. Griffin, 49 M. 742—dism. 1, 79.
Hunt v. Johnson, Freem. Ch. 282—eq. 31.
Hunt v. Knox, 34 M. 655—eq. 39; fraud, 13; fraud. conv. 115, 131—princ. & s. 103, 108.
Hunt v. Morris, 44 M. 314—partners. 102, 296.
Hunt v. Nugent, 10 S. & M. 541—app. & e. 257; bills. & n. 403, 489, 510, 542.
Hunt v. Potter, 58 M. 96—ex. & ad. 435.
Hunt v. Shackleford, 55 M. 94—assum. 20; bailm. 3; chat. m. 223; set-off, 48; tresp. 22.
Hunt v. Shackleford, 56 M. 397—chat. m. 106.
Hunt v. Southern R. Co. 40 M. 391—inf. 76.
Hunt v. State, 61 M. 577—crim. l. 1111, 1140, 1142, 1144; jury, 27.
Hunt v. State, 72 M. 413—hom. 112, 300g.
Hunt v. Walker, 40 M. 590—eq. 207, 270, 290, 332, 369.
Hunt v. Wright, 70 M. 298—const. law, 70; states, 65; statut. 88, 145, 285, 286.
Hunt, Cogburn v.—54 M. 675.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Hunt, Cogburn v.—56 M. 718.
Hunt, Cogburn v.—57 M. 681.
Hunt, Cohea v.—2 S. & M. 227.
Hunt, Dowd v.—10 S. & M. 414.
Hunter v. Carmichael, 12 S. & M. 726—app. & e. 67, 69; eq. 421.
Hunter v. Crook, 93 M. 812—sales, 450; wills, 565.
Hunter v. Hunter, W. 194—execution, 37.
Hunter v. Lake Mills, 29 So. 519—sales, 355.
Hunter v. State, 62 M. 540—assa. 67.
Hunter v. State, 74 M. 515—crim. l. 519, 538, 741; hom. 118, 190, 285.
Hunter v. Talbot, 3 S. & M. 754—sales, 203.
Hunter v. Thurman, 25 M. 463—app. & e. 374, 462.
Hunter v. Wilkinson, 44 M. 721—ev. 112, 376; lim. of act. 52; plead. 64, 99, 174, 255, 289.
Hunter, Carmichael v.—4 H. 308.
Hunter, Galloway Coal Co. v.—79 M. 559.
Hunter, Illinois Cent. R. Co. v.—70 M. 471.
Hunter, Jones v.—4 H. 342.
Hunter, Phenix Ins. Co. v.—95 M. 754.
Hunter, Pierce v.—73 M. 754.
Hunter, Rodgers v.—8 S. & M. 640.
Hunter, Southern R. Co. v.—74 M. 444.
Hunt, Finley v.—56 M. 221.
Hunt, Hoggat v.—W. 216.
Huntington v. Grantland, 33 M. 453—disc. 7; eject. 50; eq. 89; execution, 23; pub. lands, 114.
Hunt, Johnson v.—1 Miss. Dec. 111.
Hunt, Johnson v.—79 M. 639.
Hunt, Learned v.—63 M. 373.
Hunt, Merrill v.—52 M. 774.
Hunt, Nutt v.—4 S. & M. 702.
Hunt, Pringle v.—31 M. 351.
Hunt, Southern Express Co. v.—54 M. 664.
Huntington v. Allen, 44 M. 654—adv. pos. 112; eq. 44; execution, 272; judgm. 753, 780; quiet t. 3, 9, 15, 18; records, 9.
Huntington v. Bobbitt, 46 M. 528—lim. of act. 143, 167.
Huntington v. Brantley, 33 M. 451—tax. 625.
Huntington v. Cotton, 31 M. 253—adv. pos. 43; execution, 36, 38.
Huntley v. Bank of Winona, 69 M. 663—schools, 99; tax. 536.
Huntley v. Buckner, 6 S. & M. 70—chat. m. 79.
Hurd v. Germany, 7 H. 675—app. & e. 1140; j. p. 192.
Hurd v. Smith, 5 H. 562—courts, 202b, 202c; eq. 215; judgm. 372; plead. 1.
Hurd v. Tombes, 7 H. 229—courts, 22; j. p. 186, 192.
Hurd, Ford v.—4 S. & M. 683.
Hurd, Smith v.—7 H. 188.
Hurd, Smith v.—8 S. & M. 682.
Hurley v. Board of Mississippi Levee Com'rs, 76 M. 141—eq. 35; lev. 13½.
Hurley v. Corinth, 52 So. 695—int. liq. 10, 146, 147; prohib. 8.
Hurley, Carothers v.—41 M. 71.
Hursey v. Hassam, 45 M. 133—lim. of act. 54; mar. liens, 16, 20, 60, 73; mech. liens, 269, 288, 291; ship. 76; trial, 253.
Hurst v. Strong, 1 H. 123—proc. 36, 155.
Hurst, New Orleans &c. R. Co. v.—36 M. 660.
Hurst, Torrance v.—W. 403.
Hurst, Townsend v.—37 M. 679.
Hurt v. Southern R. Co. 40 M. 391—carr. 303, 314; plead. 193, 364.
Hurt v. State, 25 M. 378—crim. l. 170, 193½, 1190; hom. 315.
Hurt, Hope v.—59 M. 174.
Hurt, McDaniel v.—88 M. 769.
Hurt, McDaniel v.—92 M. 197.
Huston v. Hayter, 6 H. 580—app. & e. 545; excep. 9; execution, 153d.
Hutcheson v. Tucker, 15 So. 132—ex. & ad. 204.
Hutcheson, Bergman v.—60 M. 872.
Hutcheson, Harris v.—65 M. 9.
Hutchins v. Brooks, 31 M. 430—app. & e. 900, 910; ex. & ad. 314d, 337, 358, 388b.
Hutchins v. Lee, W. 293—execution, 145; slaves, 9.
Hutchison v. Minis, 7 S. & M. 388—sales, 263.
Hutchinson v. Simon, 57 M. 628—bills & n. 176, 310; mtg. 234.
Hutchinson Grocery Co. Palmer v.—11 So. 789.
Hutchinson, Murphy v.—93 M. 643.
Hutchinson, Simmons v.—81 M. 351.
Hutchins, Sims v.—8 S. & M. 328.
Hutto v. Thornton, 44 M. 166—eject. 68.
Hyatt v. Leslie, 10 So. 672—attch. 308.
Hyatt v. Southern R. Co. 88 M. 546—mast. & s. 258.
Hyatt, Bingaman v.—Sm. & M. Ch. 437.
Hyatt, Wise v.—68 M. 714.
Hyatt &c. Mfg. Co. Greenville &c. Co. v.—11 So. 471.
Hyde v. Dodd, 16 So. 491—cncts. 353.
Hyde v. Finley, 26 M. 468—trial, 252; usury, 21.
Hyde v. Hoffman, 31 So. 415—mtg. 342e.
Hyde v. State, 52 M. 665—const. law, 140; offic. 37, 54, 70; quo w. 1; tax. 547.

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Hyde v. Warren, 46 M. 13—estop. 26; mtg. 37a, 333.
Hyde, Meridian v.—11 So. 108.
Hyland v. Sharp, 88 M. 567—const. law, 287.
Hyman v. Cameron, 46 M. 725—eq. 116; interpl. 1, 13.
Hyman v. Rollins, 70 M. 412—ex. & ad. 314a.
Hyman v. Seaman, 33 M. 185—execution, 153c, 154b, 243; princ. & s. 154.
Hyman v. Stadler, 63 M. 362—attch. 194, 233; judgm. 629; partners. 198, 208.
Hyman v. State, 74 M. 829—int. liq. 239.
Hyman, Bales v.—57 M. 330.
Hyman, Bates v.—28 So. 567.
Hyman, Creegan v.—93 M. 481.
Hyman-Lewis Co. Stein v.—95 M. 293.

I

Ike v. State, 23 M. 525—ind. 107, 110; slaves, 18.
Iler v. Routh, 3 H. 276—adv. pos. 62, 63, 974; eq. 87, 442, 447; lim. of act. 98.
Iler, Cage v.—5 S. & M. 410.
Illinois Cent. R. Co. v. Abrams, 84 M. 456—mast. & s. 255, 284; plead. 21.
Illinois Cent. R. Co. v. Adams, 78 M. 895—tax. 528, 552.
Illinois Cent. R. Co. v. Adams, 78 M. 977—app. & e. 1238.
Illinois Cent. R. Co. v. Andrews, 61 M. 474—acct. acti. on, 9; j. p. 174.
Illinois Cent. R. Co. v. Armstrong, 93 M. 583—r. r. 233, 306.
Illinois Cent. R. Co. v. Arnola, 78 M. 787—r. r. 358.
Illinois Cent. R. Co. v. Badley, 94 M. 437—garn. 131.
Illinois Cent. R. Co. v. Baldwin, 77 M. 788—eject. 85.
Illinois Cent. R. Co. v. Bethea, 88 M. 119—neg. 82; r. r. 337, 347, 351.
Illinois Cent. R. Co. v. Bishop, 76 M. 810—mast. & s. 129, 198.
Illinois Cent. R. Co. v. Bogard, 78 M. 11—carr. 94, 147, 218; trial, 143, 178.
Illinois Cent. R. Co. v. Bowles, 71 M. 994—excep. 56.
Illinois Cent. R. Co. v. Bowles, 71 M. 1003—mast. & s. 107, 240.
Illinois Cent. R. Co. v. Brookhaven Mach. Co. 71 M. 663—carr. 105, 173; j. p. 32.
Illinois Cent. R. Co. v. Brown, 77 M. 338—carr. 323, 341.
Illinois Cent. R. Co. v. Brown, 39 So. 531—app. & e. 1028; r. r. 282.
Illinois Cent. R. Co. v. Bryant, 70 M. 665—assign. 57; garn. 232; princ. & a. 178.
Illinois Cent. R. Co. v. Butterfield Lumber Co. 95 M. 357—ev. 376.
Illinois Cent. R. Co. v. Cathey, 70 M. 332—app. & e. 197; mast. & s. 86, 265; new. tr. 67; plead. 430.
Illinois Cent. R. Co. v. Clark, 85 M. 691—app. & e. 880.
Illinois Cent. R. Co. v. Clogston, 54 So. 75—r. r. 411.
Illinois Cent. R. Co. v. Comfort, 53 So. 422—mast. & s. 137, 145, 236.
Illinois Cent. R. Co. v. Copiah County, 81 M. 685—const. law, 133, 297; r. r. 96.
Illinois Cent. R. Co. v. Crockett, 78 M. 407—r. r. 382.
Illinois Cent. R. Co. v. Crossett, 10 So. 473—r. r. 451.
Illinois Cent. R. Co. v. Crudup, 63 M. 291—carr. 253½; death, 7, 34, 59, 93.
Illinois Cent. R. Co. v. Daniels, 73 M. 258—mast. & s. 240.
Illinois Cent. R. Co. v. Daniels, 50 So. 721—carr. 286, 323, 327, 347.
Illinois Cent. R. Co. v. Davis, 43 So. 674—carr. 216, 230.
Illinois Cent. R. Co. v. Denham, 82 M. 77—r. r. 102.
Illinois Cent. R. Co. v. Dodds, 53 So. 409—carr. 277a; dam. 91.
Illinois Cent. R. Co. v. Dunnigan, 95 M. 749—carr. 249.
Illinois Cent. R. Co. v. Ely, 83 M. 519—app. & e. 1053; libel, 10, 104; trial, 41.
Illinois Cent. R. Co. v. Emerson, 88 M. 598—mast. & s. 219, 228, 240, 245.
Illinois Cent. R. Co. v. Emerson, 91 M. 230—ev. 569.
Illinois Cent. R. Co. v. Garrison, 81 M. 257—eq. 51.
Illinois Cent. R. Co. v. Gill, 88 M. 417—mast. & s. 286.
Illinois Cent. R. Co. v. Gortikov, 90 M. 787—carr. 253, 254, 356, 382.
Illinois Cent. R. Co. v. Greaves, 75 M. 360—r. r. 447; trial, 244.
Illinois Cent. R. Co. v. Gross, 22 So. 946—carr. 126, 134.
Illinois Cent. R. Co. v. Guess, 74 M. 170—mast. & s. 204, 229, 240, 243, 247.
Illinois Cent. R. Co. v. Handy, 63 M. 609—carr. 413.
Illinois Cent. R. Co. v. Harris, 29 So. 760—app. & e. 1002; dam. 2; death, 74; mast. & s. 160, 198.

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Illinois Cent. R. Co. v. Harris, 81 M. 208—carr. 254, 445.

Illinois Cent. R. Co. v. Harris, 85 M. 15—action, 50; mast. & s. 250; rem. of c. 49.

Illinois Cent. R. Co. v. Harper, 83 M. 560—app. & e. 1171; carr. 267, 283, 350, 356; ev. 272, 417.

Illinois Cent. R. Co. v. Hawkins, 65 M. 200—chat. m. 177; r. r. 429.

Illinois Cent. R. Co. v. Haynes, 63 M. 485—carr. 147, 208, 228; princ. & a. 115.

Illinois Cent. R. Co. v. Haynes, 64 M. 604—carr. 98, 105, 106; witn. 285, 369.

Illinois Cent. R. Co. v. Hoskins, 80 M. 730—eject. 139; em. dom. 135, 218, 266, 301, 318, 323, 325; fixt. 1, 25, 26.

Illinois Cent. R. Co. v. Hunter, 70 M. 471—death, 31, 40; mast. & s. 180, 183.

Illinois Cent. R. Co. v. Johnson, 77 M. 727—death, 31.

Illinois Cent. R. Co. v. Jones, 16 So. 300—app. & e. 521, 882, 110; mast. & s. 110, 198, 278.

Illinois Cent. R. Co. v. Jones, 35 So. 193—r. r. 381.

Illinois Cent. R. Co. v. Jones, 87 M. 489—carr. 185.

Illinois Cent. R. Co. v. Jordan, 63 M. 458—r. r. 417, 442; statut. 199.

Illinois Cent. R. Co. v. Kerl, 77 M. 736—carr. 215.

Illinois Cent. R. Co. v. Kerr, 68 M. 14—carr. 173, 177.

Illinois Cent. R. Co. v. King, 69 M. 852—app. & e. 281, 1074; false imp. 15; mast. & s. 301, 302; new. tr. 7; r. r. 217, 281.

Illinois Cent. R. Co. v. Lancashire Ins. Co. 79 M. 114—carr. 154; judgm. 434.

Illinois Cent. R. Co. v. Langdon, 71 M. 146—carr. 218, 228, 230; ev. 318.

Illinois Cent. R. Co. v. Latham, 72 M. 32—carr. 247; mast. & s. 302c, 306; r. r. 277, 281.

Illinois Cent. R. Co. v. Latimer, 53 So. 955—r. r. 383.

Illinois Cent. R. Co. v. Le Blanc, 74 M. 626—app. & e. 1004; dam. 103, 164; estop. 90; ev. 113, 178, 323; rem. of c. 49, 89; trover, 21, 36, 43.

Illinois Cent. R. Co. v. Le Blanc, 74 M. 650—courts, 118; ease. 1; eject. 36; fixt. 26; imp. 3; judgm. 743, 852; tax, 728, 775.

Illinois Cent. R. Co. v. Lee, 71 M. 895—r. r. 380, 383.

Illinois Cent. R. Co. v. Lucas, 89 M. 411—r. r. 259, 275.

Illinois Cent. R. Co. v. McCalip, 76 M. 360—r. r. 274.

Illinois Cent. R. Co. v. McGowan, 92 M. 603—r. r. 92, 102; trial, 243.

Illinois Cent. R. Co. v. McKay, 69 M. 139—r. r. 462.

Illinois Cent. R. Co. v. McLeod, 78 M. 334—neg. 93; r. r. 323.

Illinois Cent. R. Co. v. Marlett, 75 M. 956—carr. 254, 356.

Illinois Cent. R. Co. v. Massey, 53 So. 385—carr. 303, 333.

Illinois Cent. R. Co. v. Miller, 68 M. 760—waters, 55, 62, 118.

Illinois Cent. R. Co. v. Minor, 69 M. 710—app. & e. 299, 855, 867, 1063, 1064; carr. 280, 284; dam. 209; trial, 144, 252.

Illinois Cent. R. Co. v. Moore, 79 M. 766—carr. 382.

Illinois Cent. R. Co. v. Pearson, 80 M. 26—carr. 277a.

Illinois Cent. R. Co. v. Pendergrass, 69 M. 425—death, 16, 31.

Illinois Cent. R. Co. v. Person, 65 M. 319—r. r. 419, 442.

Illinois Cent. R. Co. v. Peterson, 68 M. 454—carr. 204, 210.

Illinois Cent. R. Co. v. Price, 72 M. 862—app. & e. 197; dam. 132; mast. & s. 106, 147, 153, 219; neg. 119.

Illinois Cent. R. Co. v. Reid, 93 M. 458—carr. 277a.

Illinois Cent. R. Co. v. Ruffin, 3 So. 578—ev. 319.

Illinois Cent. R. Co. v. Sanders, 93 M. 107—fences, 26; licens. 44; ven. & pur. 229.

Illinois Cent. R. Co. v. Sanford, 75 M. 862—const. law, 312; corp. 632; disc. 28, 46; r. r. 33.

Illinois Cent. R. Co. v. Schultz, 87 M. 321—app. & e. 1001.

Illinois Cent. R. Co. v. Scruggs, 69 M 418—carr. 163, 218.

Illinois Cent. R. Co. v. Seamans, 79 M. 106—mast. & s. 113.

Illinois Cent. R. Co. v. Sims, 77 M. 325—anim. 66; bailm. 33; neg. 90.

Illinois Cent. R. Co. v. Smith, 70 M. 344—exemp. 2; garn. 76, 79.

Illinois Cent. R. Co. v. Smith, 85 M. 349—carr. 236.

Illinois Cent. R. Co. v. State, 71 M. 253—r. r. 246, 311.

Illinois Cent. R. Co. v. State, 94 M. 759—app. & e. 750; em. dom. 44; mun. corp. 649; r. r. 99.

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Illinois Cent. R. Co. v. Strauss, 75 M. 367—carr. 327.
Illinois Cent. R. Co. v. Sumrall, 96 M. 860—app. & e. 855; r. r. 234, 327.
Illinois Cent. R. Co. v. Swalm, 83 M. 631—high. 35, 53, 63; r. r. 96.
Illinois Cent. R. Co. v. Swanson, 92 M. 485—appr. 9; carr. 47, 94; j. p. 161.
Illinois Cent. R. Co. v. Teams, 75 M. 147—carr. 230.
Illinois Cent. R. Co. v. Thomas, 75 M. 54—inj. 93; mun. corp. 648.
Illinois Cent. R. Co. v. Trail, 25 So. 863—carr. 323, 324, 339.
Illinois Cent. R. Co. v. Tronstine, 64 M. 834—carr. 139, 163, 397, 408; ev. 120, 123, 243.
Illinois Cent. R. Co. v. Turner, 71 M. 402—neg. 136; r. r. 393, 400.
Illinois Cent. R. Co. v. Tucker, 31 So. 792—app. & e. 1002; 1140.
Illinois Cent. R. Co. v. Varnadore, 15 So. 933—r. r. 282a.
Illinois Cent. R. Co. v. Walker, 63 M. 13—r. r. 447.
Illinois Cent. R. Co. v. Watson, 39 So. 69—death, 99; r. r. 371, 389, 398, 400.
Illinois Cent. R. Co. v. Weathersby, 63 M. 581—r. r. 417, 441.
Illinois Cent. R. Co. v. Weinstein, 55 So. 48—app. & e. 1060; trial, 133.
Illinois Cent. R. Co. v. White, 52 So. 449—carr. 280.
Illinois Cent. R. Co. v. Wilbourn, 74 M. 284—judgm. 600; waters, 59.
Illinois Cent. R. Co. v. Woolley, 77 M. 927—mast. & s. 112.
Illinois Cent. R. Co. Adams v.—38 M. 977.
Illinois Cent. R. Co. Adams v.—92 M. 566.
Illinois Cent. R. Co. Brister v.—84 M. 33.
Illinois Cent. R. Co. Brister v.—88 M. 431.
Illinois Cent. R. Co. Brookhaven Lumber Co. v.—68 M. 432.
Illinois Cent. R. Co. Christian v.—71 M. 237.
Illinois Cent. R. Co. Collins v.—77 M. 855.
Illinois Cent. R. Co. Crouch v.—40 So. 1004.
Illinois Cent. R. Co. Dorrah v.—65 M. 14.
Illinois Cent. R. Co. Fulmer v.—68 M. 355.
Illinois Cent. R. Co. Gage v.—75 M. 17.
Illinois Cent. R. Co. Gilliland v.—81 M. 41.
Illinois Cent. R. Co. Hackney v.—33 So. 723.
Illinois Cent. R. Co. Hatter v.—69 M. 642.
Illinois Cent. R. Co. Hazard v.—67 M. 32.
Illinois Cent. R. Co. Holmes v.—75 M. 371.
Illinois Cent. R. Co. Hoskins v.—78 M. 768.
Illinois Cent. R. Co. Howell v.—75 M. 242.
Illinois Cent. R. Co. Humphries v.—70 M. 453.
Illinois Cent. R. Co. Isbell v.—25 So. 1037.
Illinois Cent. R. Co. Jackson v.—76 M. 607.
Illinois Cent. R. Co. Jamison v.—63 M. 33.
Illinois Cent R. Co. Johnson v.—39 So. 780.
Illinois Cent. R. Co. Jones v.—25 So. 490.
Illinois Cent. R. Co. Jones v.—75 M. 970.
Illinois Cent. R. Co. King v.—69 M. 245.
Illinois Cent. R. Co. Latimer v.—25 So. 1038.
Illinois Cent. R. Co. LeBlanc v.—72 M. 669.
Illinois Cent. R. Co. LeBlanc v.—73 M. 463.
Illinois Cent. R. Co. Levee District v.—71 M. 752.
Illinois Cent. R. Co. Lynn v.—63 M. 157.
Illinois Cent. R. Co. McMaster v.—65 M. 264.
Illinois Cent. R. Co. Mullins v.—93 M. 184.
Illinois Cent. R. Co. Nelson v.—53 So. 619.
Illinois Cent. R. Co. Newberger Cotton Co. v.—75 M. 303.
Illinois Cent. R. Co. Owen v.—77 M. 142.
Illinois Cent. R. Co. Patterson v.—29 So. 93.
Illinois Cent. R. Co. Pickens v.—92 M. 210.
Illinois Cent. R. Co. Pugh v.—23 So 356.
Illinois Cent. R. Co. Pulliam v.—75 M. 627.
Illinois Cent. R. Co. Robertson v.—17 So. 235.
Illinois Cent. R. Co. Rothars v.—25 So. 665.
Illinois Cent. R. Co. Royston v.—67 M. 376.
Illinois Cent. R. Co. Runt v.—88 M. 575.
Illinois Cent. R. Co. Seelbinder v.—73 M. 84.
Illinois Cent. R. Co. Straw v.—73 M. 446.
Illinois Cent. R. Co. Tribette v.—70 M. 182.
Illinois Cent. R. Co. Tribette v.—71 M. 212.
Illinois Cent. R. Co. Tyler v.—61 M. 445.
Illinois Cent. R. Co. White v.—55 So. 593.
Illinois Cent. R. Co. Winterton v.—73 M. 831.
Illinois Cent. R. Co. Young v.—88 M. 446.
Illinois Mach. Co. Cropper v.—54 So. 849.
Ilsley, Henderson v.—11 S. & M. 9.
Ilsley, Smedes v.—68 M. 590.
Imperial Naval Stores Co. Hancock County v.—93 M. 822.
Impson, Barfield v.—1 S. & M. 326.
Incisa, Bate v.—59 M. 513.
Imperial Cotton Oil Co. v. Allen, 83 M. 27—attch. 25.
Independent Order of Sons and Daughters of Jacob of America v. Henderson, 76 M. 326—ins. 768.
Independent Order of Sons and Daughters of Jacob of America v. Moncrief, 96 M. 419—ins. 749; plead. 310.
Independent Order of Sons and Daughters of Jacob of America v. Wilkes, 53 So. 493—app. & e. 216, 1033; considers Ward v.

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David and Jonathan Lodge, 90 M. 116, 43 So. 302, on question of recourse to courts of member of fraternal insurance association.
Independent Order of Sons and Daughters of Jacob, Grant v.—52 So. 698.
Independent Order of Sons and Daughters of Jacob of America, Morgan v.—90 M. 864.
Independent Order of Sons and Daughters of Jacob, Murphy v.—77 M. 830.
Indiana Drug &c. Co. Cox v.—37 So. 835.
Indianola &c. Co. v. Montgomery, 85 M. 304—ded. 63.
Inge v. Interstate B. & L. Assn. 79 M. 18—b. & l. assn. 31.
Inge, Alabama &c. R. Co. v.—22 So. 294.
Ingersoll v. Ingersoll, 42 M. 155—eq. 119; inf. 79, 89, 91; mtg. 479.
Ingersoll v. Jeffords, 55 M. 37—subrog. 16; tax. 536.
Ingersoll v. Kendall, 13 S. & M. 611—sales, 1, 150, 345.
Ingersoll v. Morse, 33 M. 667—atty. & c. 144.
Ingersoll, Anderson v.—62 M. 73.
Ingersoll, Diggs v.—82 M. 493.
Ingersoll, Diggs v.—28 So. 825.
Ingersoll, Doe v.—11 S. & M. 249.
Ingersoll, Reynolds v.—11 S. & M. 249.
Ingraham v. Bowie, 33 M. 17—lim. of act. 89.
Ingraham v. Grigg, 13 S. & M. 22—assign. f. b. c. 31, 36; deeds, 58, 191; fraud. conv. 9, 110, 115.
Ingraham v. Regan, 23 M. 213—eq. 87; lim. of act. 5, 111, 130; statut. 226.
Ingraham v. Russell, 3 H. 304—sales, 442.
Ingraham v. Speed, 30 M. 410—banks, 93; statut. 183.
Ingraham, Cooper v.—45 M. 198.
Ingraham, Edwards v.—31 M. 272.
Ingraham, McDonald v.—30 M. 389.
Ingraham, McIntyre v.—35 M. 25.
Ingraham, Maury v.—28 M. 171.
Ingraham, Miss. Mutual Ins. Co. v.—34 M. 215.
Ingraham, Patterson v.—23 M. 87.
Ingraham, Peck v.—28 M. 246.
Ingraham, Phipps v.—41 M. 256.
Ingram v. State, 62 M. 142—crim. l. 561, 806; hom. 115, 286b.
Ingram v. War, 5 S. & M. 746—partit. 63.
Ingram Day Lumber Co. Clark v.—90 M. 479.
Ingram, Edmonson v.—68 M. 32.
Ingram, Johnson v.—9 So. 822.
Ingram Lumber Co. v. Harvey, 53 So. 347—neg. 33.
Ingram, Miller v.—56 M. 510.
Ingram, Simmons v.—60 M. 886.
Ingram, Turley v.—1 Miss. Dec. 542.
Ingram, Warren v.—96 M. 438.
Inman v. Morris, 63 M. 347—use & o. 6.
Inman, Stiles v.—55 M. 469.
Insurance Co. of North America v. Caruthers, 16 So. 911—ins. 554.
Insurance Co. of North America v. Pitts, 88 M. 587—ins. 323.
Insurance Co. of North America, Lowry v.—75 M. 43.
Insurance Co. of North America, Quackenboss v.—50 So. 444.
Interstate B. & L. Assn. v. Hafter, 76 M. 770—b. & l. assn. 34.
Interstate B. & L. Assn. Inge v.—79 M. 18.
Interstate Cattle Co. v. Lapsley, 24 So. 532—app. & e. 1009.
International Harvester Co. v. Still—53 So. 394—inj. 26.
Inzer, McDaniel v.—52 M. 359.
Iowa City State Bank v. Taylor, 51 So. 1—bills & n. 537.
Irby v. Graham, 46 M. 425—bills & n. 460; partners. 180.
Irby v. State, 91 M. 542—crim. l. 304; ind. 91; int. liq. 199.
Ireland, Emerich v.—55 M. 390.
Ireland, State v.—89 M. 763.
Ireys v. Wallace, 76 M. 277—bills & n. 397.
Ireys, Planters' Compress &c. Co. v.—16 So. 386.
Irion v. Cole, 78 M. 132—eq. 43.
Irion v. Hume, 50 M. 419—attch. 337; ev. 5; plead. 6, 272, 373; replev. 123; slaves, 24.
Irvine v. Burton, 24 So. 962—lim. of act. 100; time, 15.
Irvine v. Jones, 1 H. 497—jury, 148.
Irvine v. Newlin, 63 M. 192—bast. 104; remaind. 10; wills, 505.
Irvine, Humphreys v.—6 S. & M. 205.
Irvine, Jones v.—23 M. 361.
Irving v. Montgomery, 3 H. 191—judgm. 105.
Irving v. State, 92 M. 662—crim. l. 416.
Irving, Leach v.—2 H. 887.
Irwin v. Lewis, 50 M. 363—fraud. conv. 241; home. 18, 208; quiet. t. 32.
Irwin v. Miller, 72 M. 174—agric. 11; land. & t. 249.
Irwin v. Roach, W. 386—abat. & r. 72.
Irwin v. Williams, W. 314—judgm. 110, 134.
Irwin v. Yazoo &c. R. Co. 55 So. 49—em. dom. 153; ev. 440.
Irwing, Green v.—54 M. 450.

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Isaacs v. Hermann, 49 M. 449—assum. 3; fraud, 36; sales, 340, 356.
Isaacs v. Silverberg &c. Co. 87 M. 185—gaming, 31.
Isaacs v. State, 48 M. 234—app. & e. 909; consp. 32; crim. l. 1144, 1184.
Isbell v. Illinois Cent. R. Co. 25 So. 1037—mast. & s. 285; neg. 136.
Isbel, Vance v.—13 S. & M. 371.
Isham v. State, 6 H. 35—witn. 102.
Isom v. First Nat. Bank, 52 M. 902—banks, 130; notice. 1½; trusts, 350, 355.
Isom v. McGehee, 45 M. 712—courts, 52, 200¼; ex. & ad. 469, 508b; judgm. 870, 870b.
Isom v. Mississippi Cent. R. Co. 36 M. 300—const. l. 51; em. dom. 124, 144, 224; jury, 19; statut. 64.
Isom, Southern R. Co. v.—92 M. 82.
Issaquena County v. Anderson, 38 So. 47—counties, 170.
Issaquena County, Anderson v.—75 M. 873.
Issaquena County, Brown v.—54 M. 230.
Itawamba County v. Candler, 62 M. 193—rewards, 5.
Itawamba County, Bourland v.—60 M. 996.
Ives v. Pierson, Freem. Ch. 220—ex. & ad. 137, 388d.
Ives, Montgomery v.—13 S. & M. 161.
Ives, Morrison v.—4 S. & M. 652.
Ives, Stewart v.—1 S. & M. 197.
Ives, Willis v.—1 S. & M. 307.
Ivey v. Lalland, 42 M. 444—cncts. 101.
Ivey v. White, 50 M. 142—mech. liens, 198, 293.
Ivey, Miller v.—35 So. 417.
Ivey, Walker v.—2 Miss. Dec. 59.
Ivy v. State, 84 M. 264—hom. 165, 285; witn. 302.
Ivy v. Walker, 58 M. 253—partners. 103, 182, 297.
Ivy, Hiller v.—37 M. 431.
Ivy, Wilson v.—32 M. 233.
Izod v. Addison, 5 H. 432—execution, 332; motions, 18 sheriffs, 159.

J

Jaap, Stingler v.—83 M. 351.
Jack v. State, 6 S. & M. 494—states, 180.
Jack v. Thompson, 41 M. 49—appr. 7; inf. 76; judgm. 17.
Jack, Ex parte, 22 So. 188—bail, 41.
Jack, Lipscomb v.—20 So. 883.
Jack, New York Life Ins. Co. v.—76 M. 788.
Jacks v. Bridewell, 51 M. 881—eq. 345, 392; lim. of act. 38; witn. 126, 133.
Jackson v. Alabama &c. R. Co. 58 M. 648—app. & e. 69; rem. of c. 99.
Jackson v. Alabama &c. R. Co. 76 M. 703—carr. 354, 383.
Jackson v. Anderson, 51 So. 896—waters, 204.
Jackson v. Bowman, 39 M. 671—cncts. 108.
Jackson v. Crawford, 12 S. & M. 545—witn. 98.
Jackson v. Day, 80 M. 800—alt. inst. 26.
Jackson v. Dilworth, 39 M. 772—lev. 34; pub. lands, 58, 61.
Jackson v. Dunbar, 68 M. 288—abate. & r. 53; app. & e. 1036; land. & t. 203, 224; parties, 85.
Jackson v. Greenville, 72 M. 220—mun. corp. 801.
Jackson v. Illinois Cent. R. Co. 76 M. 607—corp. 432; frds. st. of, 48; mast. & s. 43.
Jackson v. Jackson, 28 M. 674—app. & e. 1031; des. & d. 52, 108.
Jackson v. Laird, 55 So. 41—dedi. 35.
Jackson v. Lemler, 83 M. 37—app. & e. 870; courts, 85; eq. 206, 263, 286; judgm. 704.
Jackson v. McCoy, 56 M. 781—spec. perf. 24, 106.
Jackson v. Mobile &c. R. Co. 89 M. 32—r. r. 327.
Jackson v. Newman, 59 M. 385—licens. 5½, 34; mun. corp. 621; offic. 93; tax. 1.
Jackson v. Port Gibson Bank, 85 M. 645—quiet t. 35.
Jackson v. Preston, 93 M. 366—tax. 242.
Jackson v. Scanland, 65 M. 481—execution, 18; ex. & ad. 519, 524; judgm. 853; lim. of act. 119.
Jackson v. Shlomberg, 70 M. 47—mun. corp. 11, 12.
Jackson v. Smith, 68 M. 53—witn. 133, 139, 143.
Jackson v. Smith, 4 So. 119—sales, 418.
Jackson v. State, 55 M. 530—crim. l. 1035; ind. 34.
Jackson v. State, 56 M. 311—app. & e. 281, 695; crim. l. 405, 539.
Jackson v. State, 66 M. 89—crim. l. 419, 789, 815; hom. 103, 298; witn. 258.
Jackson v. State, 75 M. 145—witn. 277.
Jackson v. State, 79 M. 42—crim. l. 561; hom. 10, 116, 250, 300d.
Jackson v. State, 94 M. 83—crim. l. 730; hom. 215, 216, 218.
Jackson v. State, 13 So. 935—mast. & s. 345a.
Jackson v. State, 16 So. 299—mast. & s. 345.

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Jackson v. Whitfield, 51 M. 202—app. & e. 46, 55, 65; j. p. 145.
Jackson v. Whiting, 84 M. 163—const. law, 62; mun. corp. 12, 26.
Jackson v. Williams, 92 M. 301—em. dom. 6, 101; mun. corp. 265, 281, 300, 304.
Jackson Bank v. Durfey, 72 M. 971—assign. f. b. c. 128; partners. 183.
Jackson Bank v. Williams, 77 M. 398—ins. 584.
Jackson, Barker v.—90 M. 621.
Jackson, Bradstreet v.—81 M. 233.
Jackson, Bridges v.—86 M. 584.
Jackson Building &c. Assn. Sullivan v.—70 M. 94.
Jackson, Carver v.—82 M. 583.
Jackson, Cassedy v.—45 M. 397.
Jackson, Chrisman v.—84 M. 787.
Jackson Cotton Oil Co. State v.—95 M. 6.
Jackson, Cumberland Telephone & Telegraph Co. v.—95 M. 79.
Jackson, Doe v.—1 S. & M. 494.
Jackson, Edwards Hotel &c. R. Co. v.—96 M. 547.
Jackson, Edwards House Co. v.—91 M. 429.
Jackson Electric R. &c. Co. v. Adams, 79 M. 408—eq. 39; mun. corp. 343.
Jackson Electric R. &c. Co. v. Carnahan, 95 M. 66—st. r. r. 103, 118.
Jackson Electric R. &c. Co. v. Lowry, 79 M. 431—carr. 265, 267, 277a.
Jackson Electric &c. Co. v. Waycaster, 92 M. 816—st. r. r. 89.
Jackson Electric &c. R. Co. Adams v.—78 M. 887.
Jackson Electric &c. R. Co. Bridges v.—86 M. 584.
Jackson Electric &c. Co. Rhymes v.—85 M. 140.
Jackson Fertilizer Co. Norman v.—79 M. 747.
Jackson, Fuller v.—52 M. 873.
Jackson, Gibson v.—22 So. 891.
Jackson, Hirschburg Optical Co. v.—63 M. 21.
Jackson, Howard v.—92 M. 720.
Jackson, Johnson v.—27 M. 498.
Jackson, Julienne v.—69 M. 34.
Jackson, Lester v.—69 M. 887.
Jackson, Light &c. Co. v.—73 M. 598.
Jackson Loan &c. Co. v. State, 54 So. 157—app. & e. 811.
Jackson, Lopez v.—79 M. 460.
Jackson, Lopez v.—80 M. 684.
Jackson, Lyons v.—1 H. 474.
Jackson, McGilvery v.—4 H. 245.
Jackson, Millsaps v.—78 M. 537.
Jackson, Millsaps v.—88 M. 504.
Jackson, Mobile &c. R. Co. v.—92 M. 517.
Jackson, Morton v.—1 S. & M. 494.
Jackson, Murphy v.—69 M. 403.
Jackson, Musgrove v.—59 M. 390.
Jackson Naval Stores Co. v. Tootle—96 M. 486—logs, 3.
Jackson, Nugent v.—72 M. 1040.
Jackson, Rohrbacher v.—51 M. 735.
Jackson, Romoneda v.—93 M. 92.
Jackson, Runnells v.—1 H. 358.
Jackson, Smothers v.—92 M. 327.
Jackson, Southern R. Co. v.—38 M. 334.
Jackson, Southern R. Co. v.—49 So. 738.
Jackson, Steithenroth v.—54 So. 955.
Jackson, Sturges v.—88 M. 508.
Jackson, Tutt v.—87 M. 207.
Jackson, Western Union Tel. Co. v.—95 M. 471.
Jackson, Winfield v.—89 M. 272.
Jacobs v. Johnson, 84 M. 450—j. p. 186.
Jacobs v. New York Life Ins. Co. 71 M. 656—app. & e. 69, 75, 78.
Jacobs v. New York Life Ins. Co. 71 M. 658—ins. 130.
Jacobs v. Postal Telegraph Cable Co. 76 M. 278—courts, 119; plead. 204; tel. & t. 67, 78.
Jacob, Sikemeier v.—92 M. 562.
Jacobs, Mack v.—70 M. 429.
Jacobson v. Horne, 52 M. 185—bankr. 433.
Jacobson, Gary v.—55 M. 204.
Jacobs, Sledge v.—58 M. 194.
Jacobs, Stadder v.—12 So. 444.
Jacoway, Daniel v.—Freem. Ch. 59.
Jacoway, Young v.—9 S. & M. 212.
Jacquemine v. State, 48 M. 280—bail, 48; hab. corp. 169.
Jaffray Const. Co. Vicksburg Mfg. &c. Co. v.—94 M. 282.
Jaffray, Holberg v.—64 M. 746.
Jaffray, Holberg v.—65 M. 526.
Jagers v. Griffin, 43 M. 134—ex. & ad. 389; sales, 130.
Jahier v. Rascoe, 62 M. 699—des. & d. 2.
James v. Dowell, 7 S. & M. 333—abat. & r. 4; attch. 92, 253; plead. 91.
James v. Drew, 68 M. 518—bound. 55; partit. 80.
James v. Elder, 23 M. 134—licens. 15; statut. 223.
James v. Fisk, 9 S. & M. 144—ack. 14; eq. 423, 444, 446; hus. & w. 81e, 164, 171, 179; mtg. 485.

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James v. Herring, 12 S. & M. 336—app. & e. 838; slaves, 7a, 7b.
James v. Kirk, 29 M. 206—ev. 345; slaves, 7.
James v. Rowan, 6 S. & M. 393—dower, 7, 11, 68, 69, 74, 81; j. ten. 7.
James v. State, 45 M. 572—crim. l. 552, 562, 1085.
James v. State, 49 M. 420—sheriffs, 122, 160.
James v. State, 55 M. 57—crim. l. 874; tax. 568; trial, 303, 325, 338.
James v. State, 77 M. 370—burg. 28, 40, 48; crim. l. 1036.
James v. Tallahatchie Drainage Commission, 52 So. 453—drains, 12.
James v. Williams, 44 M. 47—app. & e. 5.
James v. Woods, 65 M. 528—j. p. 148, 159.
James, Brown v.—24 So. 908.
James, Cotton States Lumber Co. v.—53 So. 410.
James, Gordon v.—86 M. 719.
James, Harman v.—7 S. & M. 111.
James, Hawkins v.—69 M. 274.
James, Hawkins v.—69 M. 361.
James Heard v.—49 M. 236.
James, Horman v.—7 S. & M. 111.
James, McGowan v.—12 S. & M. 445.
James, North v.—61 M. 761.
James, Pettibone v.—25 M. 495.
James, Pollen v.—45 M. 129.
James, Riley v.—73 M. 1.
James, Scott v.—3 H. 307.
Jameson v. Franklin, 6 H. 376—ev. 249; partners. 213, 249.
James-Sumrall Lumber Co. Jefferson Davis County v.—94 M. 530.
Jamison v. Dulaney, 74 M. 890—inj. 188.
Jamison v. Houston, 15 So. 114—schools, 65.
Jamison v. Illinois Cent. R. Co. 63 M. 33—neg. 7, 94, 136; r. r. 273½, 278, 366, 393; witn. 379.
Jamison v. Jamison, 92 M. 468—excep. 2, 40; wills, 322.
Jamison v. Jamison, 96 M. 288—wills, 163, 166.
Jamison v. Moon, 43 M. 598—dam. 91, 117; det. 19; excep. 1, 8; trial, 332; trover, 46, 65.
Jamison v. Mosely, 69 M. 478—assa. 13, 26, 39; trial, 59.
Jamison v. Senter, 56 M. 194—schools, 143.
Jamison v. Thompson, 65 M. 516—tax. 725.
Jamison, Moseley v.—68 M. 336.
Jamison, Moseley v.—71 M. 456.
Jamison, Mosely v.—66 M. 52.
Jamison, Rutherford v.—65 M. 219.
Jamison, State v.—54 So. 843.
Jamison, Welsh v.—1 H. 160.
Jane v. Alley, 64 M. 446—excep. 32; int. liq. 76.
Janes, Smith v.—65 M. 276.
Jarnagin v. Frank, 59 M. 393—ex. & ad. 464, 507.
Jarnagin, Barnes v.—12 S. & M. 108.
Jarnagin, Pierce v.—57 M. 107.
Jarnigan v. Fleming, 43 M. 710—libel, 1, 58, 94, 100, 101, 124; trial, 219, 248; witn. 320.
Jarrett, Cherry v.—25 M. 221.
Jarrett, Chicago &c. R. Co. v.—59 M. 470.
Jarvis v. Armstrong, 94 M. 145—home. 118a.
Jarvis v. Warren County, 49 M. 603—mand. 154.
Jaudon, Hairston v.—42 M. 380.
Jayne v. Dillon, 28 M. 283—execution, 143, 145; fraud. conv. 131.
Jayne, Barnett v.—1 Miss. Dec. 65.
Jayne, Duncan v.—76 M. 133.
Jayne, Gibson v.—37 M. 164.
Jayne, Lock v.—39 M. 157.
Jayne, Skinner v.—24 M. 567.
Jeanin, Torre v.—76 M. 898.
Jefcoat v. Gunter, 73 M. 539—land. & t. 180.
Jeff v. State, 37 M. 321—crim. l. 312; hom. 145; slaves, 18, 18b.
Jeff v. State, 39 M. 593—crim. l. 312; hom. 257, 286b.
Jefferies v. Harvie, 38 M. 97—garn. 96, 188.
Jeffers, Grand Gulf Bank v.—12 S. & M. 486.
Jeffers, Maury v.—4 S. & M. 57.
Jefferson v. Glover, 46 M. 510—ex. & ad. 2; guard. & w. 35, 147a, 172.
Jefferson v. State, 46 M. 270—crim. l. 967, 1043; ind. 139.
Jefferson v. State, 52 M. 767—app. & e. 502, 528; crim. l. 897, 1088; hom. 115; jury, 109.
Jefferson, American Freehold Land &c. Co. v.—69 M. 770.
Jefferson College v. Dickson, Freem. Ch. 474—est. 1; ex. & ad. 222, 225, 230; mtg. 134, 433.
Jefferson College v. Prentiss, 29 M. 46—mtg. 244, 270.
Jefferson College, Clark v.—2 Miss. Dec. 198.
Jefferson College, Miller v.—5 S. & M. 651.
Jefferson County v. Arrghi, 51 M. 667—mand. 15, 164, 179.
Jefferson County v. Arrighi, 54 M. 668—bridges, 6; counties, 24, 112, 165; mand. 108.
Jefferson County v. Grafton, 74 M. 435—counties, 1, 38, 47, 103, 110; eject. 22.

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Jefferson Davis County v. James-Sumrall Lumber Co. 94 M. 530—const. law, 63; pub. lands, 51, 55a.
Jefferson Davis County v. Long, 94 M. 538—ev. 13.
Jefferson, Ex parte, 62 M. 223—crim. l. 573; hab. corp. 91.
Jeffords, Ingersoll v.—55 M. 37.
Jeffreys, Smith v.—16 So. 377.
Jeffries v. Dancey, 44 M. 693—attch. 155.
Jeffries v. Dowdle, 61 M. 504—ex. & ad. 380; guard. & w. 104; lim. of act. 194.
Jeffries v. Jeffries, 66 M. 216—eq. 288.
Jeffries v. Lawson, 39 M. 791—ev. 265; ex. & ad. 463.
Jeffries v. State, 74 M. 675—crim. l. 923.
Jeffries v. State, 77 M. 757—crim. l. 383, 384, 785, 785a, 789; witn. 405.
Jeffries v. State, 89 M. 643—crim. l. 349; rape, 48, 59.
Jeffries, Byrne v.—38 M. 533.
Jeffries, Futch v.—59 M. 506.
Jeffries, Kearny v.—48 M. 343.
Jeffries, Lawson v.—47 M. 686.
Jeffries, Moore v.—18 So. 272.
Jeffries, Walker v.—45 M. 160.
Jeffries, Yazoo &c. R. Co. v.—55 So. 354.
Jelks v. Barrett, 52 M. 315—deeds, 54; ev. 157, 353; ex. & ad. 141; frds. st. of, 77.
Jelks, Mullen v.—W. 205.
Jelks, Roach v.—40 M. 754.
Jemison, Cole v.—68 M. 510.
Jenison v. McDaniel, 28 M. 83—cncts. 303; land. & t. 187.
Jenkins v. Barber, 85 M. 666—app. & e. 523, 915; atty. & c. 69; mtg. 580.
Jenkins v. Bodley, Sm. & M. Ch. 338—deeds, 38; judgm. 780; ven. & pur. 37, 232, 240.
Jenkins v. Gillespie, 10 S. & M. 31—atty. & c. 83.
Jenkins v. Gowen, 37 M. 444—judgm. 782.
Jenkins v. Hendrich, 23 So. 423—set-off, 35.
Jenkins v. Maegher, 46 M. 84—arb. & a. 34, 36, 49, 82.
Jenkins v. Sherman, 77 M. 884—bills & n. 118, 176, 267, 443; guard. & w. 33, 34, 40, 46.
Jenkins v. State, 30 M. 408—crim. l. 141; ind. 11b.
Jenkins v. State, 33 M. 382—judgm. 17.
Jenkins v. State, 41 M. 582—crim. l. 533, 563, 878.
Jenkins v. State, 82 M. 500—int. liq. 146, 157, 223.
Jenkins v. State, 96 M. 461—lot. 20.
Jenkins v. State, 54 So. 158—crim. l. 260, 568.
Jenkins v. Whitehead, 1 S. & M. 157—new tr. 65.
Jenkins v. Whitehead, 7 S. & M. 577—ven. & pur. 112.
Jenkins v. Wilkerson, 76 M. 368—judgm. 128a, 528.
Jenkins, Baldwin v.—23 M. 206.
Jenkins, Bradford v.—41 M. 328.
Jenkins, Dillingham v.—7 S. & M. 479.
Jenkins, Lee v.—30 M. 592.
Jenkins, State v.—73 M. 523.
Jenkins, Trager v.—75 M. 676.
Jenkins, White v.—79 M. 57.
Jenkins, White v.—33 So. 287.
Jenkins, Wilkinson v.—33 So. 838.
Jenks v. Terry, 88 M. 364—work & lab. 4.
Jenks, Woodville v.—94 M. 210.
Jennings v. Coahoma County, 79 M. 523—tax. 495.
Jennings v. Dennis, 6 S. & M. 379—execution, 99, 112, 146.
Jennings v. Gibson, W. 234—action, 29; det. 1, 17, 25; new tr. 64.
Jennings v. Hammond, 1 S. & M. 174—execution, 141; statut. 276, 277.
Jennings v. Love, 24 M. 249—ex. & ad. 437; lim. of act. 76.
Jennings v. State, 7 So. 462—perj. 1.
Jennings v. Summers, 7 H. 453—garn. 180, 191.
Jennings v. Thomas, 13 S. & M. 617—bills & n. 464, 488, 538.
Jennings v. Wilson, 71 M. 42—sales, 222, 471.
Jennings, American Express Co. v.—86 M. 329.
Jennings, Herron v.—31 So. 965.
Jennings, Johnson v.—72 M. 349.
Jennings, Thomas v.—5 S. & M. 627.
Jennings, Thomas v.—13 S. & M. 617.
Jennings, Yazoo &c. R. Co. v.—90 M. 93.
J. E. North Lumber Co. v. Gary, 83 M. 640—inj. 36, 45.
Jerman, McAllister v.—32 M. 142.
Jesse v. State, 28 M. 100—ars. 4; crim. l. 1031; ind. 110; slaves, 118b.
Jesse French Piano &c. Co. Griggs v.—70 M. 211.
Jeter, Lanehart v.—36 M. 650.
Jiggits v. Jiggits, 40 M. 718—deeds, 208; dower, 37, 44, 56, 74, 83.
Jiggitts v. Bennett, 31 M. 610—dower, 69, 74.
Jimerson v. State, 93 M. 685—ind. 125, 125c.
J. Matthews Apparatus Co. McKean v.—74 M. 119.
J. M. Guffey Petroleum Co. v. Vicksburg Waterworks Co. 89 M. 238—sales, 406.

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Jobe v. Memphis &c. R. Co. 71 M. 734—r. r. 327, 328.
Jobe, Memphis &c. R. Co. v.—69 M. 452.
John v. State, 24 M. 569—ind. 167; slaves, 18b, 18c.
John E. Hall Commission Co. v. Crook, 87 M. 445—app. & e. 833; attch. 8, 9, 253; judges, 25; sales, 99, 404.
John E. Hall Commission Co. v. Foote, 90 M. 422—attch. 217; const. law, 105, 106.
John E. Hall Commission Co. Foote v.—84 M. 445.
Johns v. Harper, 61 M. 142—inf. 113.
Johns v. Johns, 57 M. 530—div. 27, 108, 298; parent & c. 2.
Johns v. McDaniel, 60 M. 486—eject. 21; licens. 57.
Johns v. Sergeant, 45 M. 332—mtg. 339, 354; princ. & a. 73.
Johns v. Smith, 56 M. 727—inf. 32, 73.
Johns v. State, 78 M. 663—crim. l. 59; int. liq. 240.
Johns v. Williams, 66 M. 350—inf. 72; trusts, 337.
Johns, McDaniel v.—45 M. 632.
Johnson v. Alabama &c. R. Co. 69 M. 191—carr. 147, 161, 163, 211, 230.
Johnson v. Bacon, 92 M. 156—ins. 198, 205.
Johnson v. Beard, 7 S. & M. 214—plead. 16.
Johnson v. Blasdale, 1 S. & M. 17—bills & n. 60; princ. & a. 14; schools, 18.
Johnson v. Bobbitt, 81 M. 339—clks. of c. 73; judgm. 244; princ. & s. 68.
Johnson v. Brooks, 31 M. 17—deeds, 58; frds. st. of, 114, 117; ven. & pur. 149.
Johnson v. Cooper, 56 M. 608—courts, 202; em. dom. 179; ex. & ad. 329, 375; guard. & w. 76; home. 120, 134; inf. 76.
Johnson v. Crippen, 62 M. 597—eq. 345.
Johnson v. Davis, 91 M. 708—tresp. 29.
Johnson v. Delome Land &c. Co. 77 M. 15—wills, 125, 459, 596.
Johnson v. Devens, 60 M. 200—inj. 185.
Johnson v. Dick, 27 M. 27—fraud. conv. 13.
Johnson v. Edde, 58 M. 664—ev. 386; exemp. 53; judgm. 784, 895.
Johnson v. Fletcher, 54 M. 628—statut. 267.
Johnson v. Futch, 57 M. 73—counties, 191; eject. 15, 86, 143, 145; land. & t. 203, 212; tax. 301.
Johnson v. Gulf &c. R. Co. 82 M. 452—assign. 71; carr. 94.
Johnson v. Hall, 87 M. 667—deeds, 70; eq. 351, 356.
Johnson v. Helm, 1 Miss. Dec. 170—eject. 8.
Johnson v. Hunt, 1 Miss. Dec. 111—frds. st. of, 90; trial, 169.
Johnson v. Hunt, 79 M. 639—home. 118a, 127.
Johnson v. Illinois Cent. R. Co. 39 So. 780—r. r. 446.
Johnson v. Ingram, 9 So. 822—fraud. conv. 226.
Johnson v. Jackson, 27 M. 498—spec. perf. 63, 66; ven. & pur. 85, 98.
Johnson v. Jennings, 72 M. 349—fact. 2.
Johnson v. Johnson, 74 M. 549—ev. 265, 408.
Johnson v. Jones, 13 S. & M. 580—judgm. 621; new tr. 10; spec. perf. 105; ven. & pur. 114, 119, 123a, 123d, 304, 308a.
Johnson v. Jones, 51 M. 860—app. & e. 359; hus. & w. 85, 148.
Johnson v. Jones, 82 M. 483—hus. & w. 138.
Johnson v. McCabe, 42 M. 255—inf. 79, 89, 91.
Johnson v. Marshall, 48 So. 182—app. & e. 20.
Johnson v. Martin, 68 M. 330—ev. 341; ship. 15.
Johnson v. Miller, 33 M. 553—guard. & w. 147, 147a, 163, 165; wills, 728.
Johnson v. Moyse, 12 So. 483—marshaling, 8; mtg. 215.
Johnson v. Nations, 26 M. 147—mtg. 319.
Johnson v. Outlaw, 56 M. 541—atty. & c. 125; estop. 93; trusts, 103.
Johnson v. Planters' Bank, 4 S. & M. 165—ex. & ad. 225; princ. & s. 107, 124.
Johnson v. Philadelphia, 94 M. 34—mun. corp. 111, 625; nuis. 61.
Johnson v. Pyles, 11 S. & M. 189—atty. & c. 157; lim. of act. 43, 111.
Johnson v. Richardson, 33 M. 462—home. 83.
Johnson v. Smokey, 4 So. 788—judgm. 445.
Johnson v. Standard Oil Co. 71 M. 397—attch. 314; execution, 201.
Johnson v. Stansell, 94 M. 923—wills, 390.
Johnson v. State, W. 392—crim. l. 627; ind. 27, 58, 74, 87.
Johnson v. State, 7 S. & M. 58—gaming, 87.
Johnson v. State, 33 M. 363—gr. jury, 9.
Johnson v. State, 47 M. 671—larc. 28.
Johnson v. State, 54 M. 430—hom. 190.
Johnson v. State, 59 M. 543—crim. l. 90, 187, 201.
Johnson v. State, 63 M. 228—int. liq. 146; statut. 241.
Johnson v. State, 63 M. 313—crim. l. 72½, 788, 857; hom. 174.
Johnson v. State, 66 M. 189—hom. 190.
Johnson v. State, 75 M. 635—hom. 306.
Johnson v. State, 78 M. 627—crim. l. 796, 814; hom. 309, 311.

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Johnson v. State, 80 M. 798—hom. 174; witn. 414.
Johnson v. State, 85 M. 572—hom. 155, 158, 234, 340d.
Johnson v. State, 87 M. 502—forg. 1.
Johnson v. State, 89 M. 773—crim. l. 520, 781.
Johnson v. State, 90 M. 317—crim. l. 407.
Johnson v. State, 94 M. 91—crim. l. 721½.
Johnson v. State, 16 So. 494—crim. l. 789.
Johnson v. State, 26 So. 967—crim. l. 1215.
Johnson v. State, 27 So. 880—crim. l. 763; hom. 108, 194, 292, 300e, 300g.
Johnson v. State, 40 So. 324—hom. 163.
Johnson v. State, 42 So. 166—hom. 300e.
Johnson v. Stone, 69 M. 826—crim. l. 763; ev. 133, 332; replev. 69; trial, 184a, 253; trover, 36.
Johnson v. Success Brick Machinery Co. 93 M. 169—app. & e. 1172; ex. & ad. 225; plead. 135, 258; princ. & s. 124.
Johnson v. Sugg, 13 S. & M. 346—ven. & pur. 266a.
Johnson v. Sutton, 94 M. 544—brok. 49, 56.
Johnson v. Taylor, 3 S. & M. 92—new tr. 161.
Johnson v. Tuggle, 27 M. 836—forc. e. & d. 15, 22; ven. & pur. 299.
Johnson v. Tuttle, 65 M. 492—chat. m. 188.
Johnson v. Walker, 86 M. 757—app. & e. 1049, 1063; bast. 22, 35, 38, 58, 68, 71, 91; oath, 2.
Johnson v. Western Union Tel. Co. 79 M. 58—tel. & t. 67.
Johnson v. White, 13 S. & M. 584—judgm. 585, 748; lim. of act. 45; trover, 10, 28.
Johnson v. Yazoo &c. R. Co., 94 M. 447—carr. 331.
Johnson, Adams v.—41 M. 258.
Johnson, Allen v.—48 M. 413.
Johnson, Board of Levee Commissioners v.—66 M. 248.
Johnson, Bowers v.—10 S. & M. 169.
Johnson, Breckinridge v.—57 M. 371.
Johnson, Brown v.—12 S. & M. 398.
Johnson, Cohea v.—69 M. 46.
Johnson, Cole v.—53 M. 94.
Johnson, Crenshaw Oil Co. v.—94 M. 773.
Johnson, Cummings v.—65 M. 342.
Johnson, Daily v.—48 M. 246.
Johnson, Duncan v.—23 M. 130.
Johnson, Eason v.—69 M. 371.
Johnson, Ex parte, 79 M. 637—aliens, 62.
Johnson, Faison v.—70 M. 214.
Johnson, Fidelity &c. Co. v.—72 M. 333.
Johnson, Illinois Cent. R. Co. v.—77 M. 727.
Johnson, Hamer v.—5 H. 698.
Johnson, Harrison Naval Stores Co. v.—91 M. 747.
Johnson, Hattiesburg Compress Co. v.—81 M. 731.
Johnson, Hoskins v.—31 M. 128.
Johnson, Hunt v.—Freem. Ch. 282.
Johnson, Jacobs v.—84 M. 450.
Johnson, Lewis v.—W. 260.
Johnson, Livermore v.—27 M. 284.
Johnson, Logan v.—72 M. 185.
Johnson, McLeod v.—28 M. 374.
Johnson, McMath v.—41 M. 439.
Johnson, Marlow v.—31 M. 128.
Johnson, Parberry v.—51 M. 291.
Johnson, Parker v.—47 M. 632.
Johnson, Pearson v.—54 M. 259.
Johnson, Planters' Bank v.—7 S. & M. 449.
Johnson, Platner v.—26 M. 142.
Johnson, Porter v.—2 H. 736.
Johnson, Probate Judge v.—1 H. 297.
Johnson, Probate Judge v.—4 H. 680.
Johnson, Randall v.—59 M. 317.
Johnson, Rankin County Sav. Bank v.—56 M. 125.
Johnson, Robertson v.—40 M. 500.
Johnson, Russell v.—39 So. 782.
Johnson, Sloan v.—14 S. & M. 47.
Johnson, Smokey v.—4 So. 787.
Johnson, State v.—W. 392.
Johnson, State v.—25 M. 625.
Johnson, State v.—72 M. 896.
Johnson, State Revenue Agent v.—72 M. 896.
Johnson, Tiffany v.—27 M. 227.
Johnson, Wailes v.—25 M. 421.
Johnson, West Feliciana &c. R. Co. v.—5 H. 273.
Johnson, White v.—23 M. 68.
Johnson, Wolf v.—30 M. 513.
Johnston v. Beard, 7 S. & M. 214—plead. 155, 194, 351; spec. perf. 11; ven. & pur. 145.
Johnston v. Dick, 27 M. 277—fraud. conv. 131, 201.
Johnston v. Gumbel, 19 So. 100—corp. 34, 544.
Johnston v. Horne, 32 M. 151—pub. lands, 114.
Johnston v. Standard Oil Co. 71 M. 397—sales, 149.
Johnston v. State, 7 S. & M. 58—gr. jury, 12.
Johnston v. Stone, 71 M. 593—eq. 51.
Johnston v. Union Bank, 37 M. 526—ex. & ad. 326; ven. & pur. 266a.
Johnston v. Wallace, 53 M. 331—ack. 55.
Johnston, Board of Supervisors v.—7 So. 390.

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Johnston, Hamer v.—Sm. & M. Ch. 563.
Johnston, Hendricks v.—45 M. 644.
Joiner v. Bank, 71 M. 382—app. & e. 1166; judgm. 17c, 348; proc. 36; pros. 161.
Joiner, State v.—23 M. 500.
Jolliff, Ricketts v.—62 M. 440.
Jolly v. State, 8 S. & M. 145—slaves, 10, 19.
Jolly v. State, 13 S. & M. 223—hom. 183.
Jolly, Howe v.—68 M. 323.
Jolly, Keith v.—26 M. 131.
Jolly, State v.—73 M. 42.
Jonas v. Flanniken, 69 M. 577—adv. pos. 42; ten. in c. 20; tax. 615, 735, 777, 802.
Jones v. Alabama &c. R. Co. 72 M. 22—release, 17, 24, 58.
Jones v. Alcorn County, 56 M. 766—elec. 87; offic. 31; pardon, 9.
Jones v. Alexander, 10 S. & M. 627—mech. liens, 260.
Jones v. Bailey, 5 H. 564—judgm. 789.
Jones v. Bank of Carrolton, 71 M. 1023—app. & e. 1009; ex. & ad. 224; witn. 140.
Jones v. Binns, 27 M. 373—relig. soc. 12.
Jones v. Brandon, 59 M. 585—adv. pos. 39; eject. 10.
Jones v. Brandon, 60 M. 556—app. & e. 906; eject. 117; inj. 14, 172.
Jones v. Bright, 33 So. 655—deeds, 205.
Jones v. Burford, 26 M. 194—counties, 52; tax. 618, 623.
Jones v. Clemmer, 54 So. 4—des. & d. 91; j. p. 174.
Jones v. Coker, 53 M. 195—bankr. 427, 435; execution, 171; inj. 175; judgm. 419; parties, 21.
Jones v. Commercial Bank, 5 H. 43—inj. 167; judgm. 143; new tr. 16.
Jones v. Coon, 5 S. & M. 751—courts, 202c; ex. & ad. 484, 509.
Jones v. De Soto County, 60 M. 409—paup. 39, 48.
Jones v. Donald, 26 M. 461—ev. 200; slaves, 5.
Jones v. Edwards, 57 M. 28—libel, 100, 124; trial, 344.
Jones v. Finch, 37 M. 461—ev. 508.
Jones v. Foster, 50 M. 47—eq. 148, 150.
Jones v. Gaddis, 67 M. 761—adv. pos. 14, 41, 53, 100.
Jones v. Gibbs, 51 M. 401—mand. 154, 165; rewards, 1.
Jones v. Grant, 34 M. 592—execution, 235.
Jones v. Gurlie, 61 M. 423—deeds, 45; inf. 91.
Jones v. Gurlie, 62 M. 760—home. 129.
Jones v. Hammet, 2 Miss. Dec. 265—escrows, 1.
Jones v. Harris, 58 M. 293—app. & e. 837; arb. & a. 16, 85; partners. 312.
Jones v. Harris, 59 M. 214—arb. & a. 16.
Jones v. Hart, 62 M. 13—home. 34.
Jones v. Hervey, 66 M. 99—eq. 119.
Jones v. Hicks, 52 M. 682—plgs. 21, 32.
Jones v. Hooper, 50 M. 510; assist. 1, 8; jud. s. 56.
Jones v. Howard, 53 M. 707—parties, 28; partners. 1, 214; set-off, 43.
Jones v. Hughes, 66 M. 413—cncts. 74; frds. st. of, 23.
Jones v. Hunter, 4 H. 342—appr. 11; atty. & c. 111.
Jones v. Illinois Cent. R. Co. 75 M. 970—anim. 2; propty. 1; r. r. 441, 446.
Jones v. Illinois Cent. R. Co. 25 So. 490—dam. 208; r. r. 446.
Jones v. Irvine, 23 M. 361—ex. & ad. 288, 464, 533.
Jones v. Jones, 67 M. 195—div. 58; eq. 15.
Jones v. Jones, 79 M. 261—fraud. conv. 216.
Jones v. Jones, 37 So. 449—witn. 133.
Jones v. Jones, 88 M. 784—ref. of inst. 45.
Jones v. Jones, 94 M. 460—wills, 788.
Jones v. Jones, 55 So. 361—eq. 148, 232; hus. & w. 42.
Jones v. Kansas City &c. R. Co. 75 M. 913—assign. 21; parties, 70.
Jones v. Kennedy, 81 M. 499—dism. 43.
Jones v. Leake, 11 S. & M. 591—attch. 96.
Jones v. Lee County, 12 So. 341—clks. of c. 10; counties, 204.
Jones v. Levy, 92 M. 551—ref. of inst. 5, 36.
Jones v. Loggins, 37 M. 546—cncts. 211; ven. & pur. 85, 96, 232.
Jones v. Loving, 55 M. 109—mun. corp. 170.
Jones v. McDougal, 32 M. 179—trusts, 63½.
Jones v. McGahey, 1 H. 128—trial, 328.
Jones v. McQuien, 71 M. 98—assign. f. b. c. 31, 147.
Jones v. Madison County, 72 M. 777—courts, 93; land. & t. 66; pub. lands, 51, 55; statut. 57; stip. 11.
Jones v. Mathews, 4 So. 547—app. & e. 909, 1173; inf. 89.
Jones v. Melchoir, 71 M. 115—counties, 153, 167, 168; tax. 527.
Jones v. Memphis &c. Packet Co. 21 So. 303—carr. 228.
Jones v. Memphis &c. Packet Co. 31 So. 201—carr. 216, 230; ev. 113.
Jones v. Merrill, 69 M. 747—adv. pos. 45; judgm. 678; life est. 10; tax. 674, 735, 802; ten. in c. 20.

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Jones v. Miles, 1 H. 50—execution, 151, 153; ex. & ad. 454.
Jones v. Millsaps, 71 M. 10—land. & t. 152, 166; plead. 367.
Jones v. Mississippi &c. R. Co. 5 H. 407—app. & e. 462; execution, 153c, 154b.
Jones v. Moody, 59 M. 327—attch. 232, 237; garn. 209.
Jones v. Mosley, 40 M. 261—wills, 167, 277.
Jones v. Patty, 73 M. 179—ex. & ad. 46, 537; ins. 583.
Jones v. Perkins, 29 M. 139—acc. & s. 6.
Jones v. Pierce, 2 Miss. Dec. 695—app. & e. 1003.
Jones v. Porter, 59 M. 628—ack. 20; can. of i. 60; hus. & w. 168.
Jones v. Rogers, 85 M. 802—ev. 82, 84; execution, 220, 229, 334, 342; fraud, 41; lim. of act. 36, 176; plead. 8; quiet. t. 9, 34, 35.
Jones v. Rogers, 38 So. 310—app. & e. 374.
Jones v. Sherman, 56 M. 559—eject. 86; ev. 353; indians, 27; witn. 143.
Jones v. Smith, 33 M. 215—cncts. 265; ex. & ad. 144, 149; trusts, 237, 283; ven. & pur. 100.
Jones v. Somerville, 78 M. 269—des. & d. 69, 72.
Jones v. Stanton, 7 H. 601—execution, 151b, 154b.
Jones v. State, W. 83—hom. 1; slaves, 12, 19.
Jones v. State, 11 S. & M. 315—crim. l. 970, 1139; hom. 141.
Jones v. State, 26 M. 247—larc. 41, 54.
Jones v. State, 30 M. 653—larc. 41.
Jones v. State, 51 M. 718—crim. l. 989; larc. 30, 77.
Jones v. State, 57 M. 684—hom. 286c; jury, 104.
Jones v. State, 58 M. 349—crim. l. 519, 532.
Jones v. State, 60 M. 117—crim. l. 573, 575, 917, 1151, 1166.
Jones v. State, 65 M. 179—witn. 305, 388.
Jones v. State, 66 M. 380—crim. l. 193½, 200, 338.
Jones v. State, 67 M. 111—crim. l. 878, 881, 967, 971, 984; ind. 130; witn. 401.
Jones v. State, 69 M. 406—licens. 16.
Jones v. State, 70 M. 398—crim. l. 260; vag. 4.
Jones v. State, 70 M. 401—crim. l. 793; hom. 221, 340, 341.
Jones v. State, 79 M. 309—hom. 215, 338c.
Jones v. State, 80 M. 181—crim. l. 814, 1172.
Jones v. State, 84 M. 194—crim. l. 561, 789; hom. 113.
Jones v. State, 91 M. 868—crim. l. 1159; hom. 234.
Jones v. State, 95 M. 121—rob. 16.
Jones v. State, 27 So. 382—jury, 32.
Jones v. State, 47 So. 479—crim. l, 1016, 1106.
Jones v. State, 52 So. 791—crim. l. 696, 923, 1162, 1162½; hom. 237.
Jones v. State, 54 So. 724—hom. 282.
Jones v. Stevens, 12 So. 446—land. & t. 252.
Jones v. Sunflower County, 84 M. 98—counties, 114; dist. attys. 7.
Jones v. Warren, 70 M. 227—ex. & ad. 224, 481, 519; witn. 134, 165.
Jones v. Williams, 62 M. 183—courts, 117; ev. 386; excep. 35.
Jones v. Yazoo &c. R. Co. 90 M. 547—mast. & s. 110.
Jones, A. B. Smith Co. v.—75 M. 325.
Jones, Agnew v.—74 M. 347.
Jones, Alabama &c. R. Co. v.—73 M. 110.
Jones, Alabama &c. R. Co. v.—86 M. 263.
Jones, Andrews v.—32 M. 274.
Jones, Archer v.—26 M. 583.
Jones, Belew v.—56 M. 341.
Jones, Belew v.—56 M. 592.
Jones, Bibb v.—7 H. 397.
Jones, Blumer v.—2 Miss. Dec. 518.
Jones, Bond v.—8 S. & M. 368.
Jones, Bunckley v.—79 M. 1.
Jones, Burroughs v.—78 M. 235.
Jones, Burroughs v.—79 M. 214.
Jones, Burroughs v.—87 M. 235.
Jones, Butler v.—7 H. 587.
Jones, Carroll County v.—71 M. 947.
Jones, Chicago &c. R. Co. v.—59 M. 465.
Jones County v. Grisson, 52 So. 629—schools, 9.
Jones, Dalton v.—51 M. 585.
Jones, Davidson v.—26 M. 56.
Jones, Dease v.—23 M. 133.
Jones, Dent v.—50 M. 265.
Jones, Doss v.—5 H. 158.
Jones, Eskridge v.—1 S. & M. 595.
Jones, Ellis v.—70 M. 60.
Jones, Emanuel v.—12 S. & M. 473.
Jones, Fonda v.—42 M. 792.
Jones, Foster v.—17 So. 893.
Jones, Gaddis v.—67 M. 761.
Jones, Garner v.—34 M. 505.
Jones, Gartman v.—24 M. 234.
Jones, Georgia Home Ins. Co. v.—49 M. 80.
Jones, German-American Provision Co. v.—87 M. 277.
Jones, Gill v.—57 M. 367.
Jones, Gowan v.—10 S. & M. 164.
Jones, Goyer Co. v.—79 M. 253.
Jones, Graham v.—7 So. 496.
Jones, Greenwood v.—91 M. 728.

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Jones, Gross v.—89 M. 44.
Jones, Hambrick v.—64 M. 240.
Jones, Hiller v.—66 M. 636.
Jones, Illinois Cent. R. Co. v.—16 So. 300.
Jones, Illinois Cent. R. Co. v.—35 So. 193.
Jones, Illinois Cent. R. Co. v.—87 M. 489.
Jones, Irvine v.—1 H. 497.
Jones, Johnson v.—13 S. & M. 580.
Jones, Johnson v.—51 M. 860.
Jones, Johnson v.—82 M. 483.
Jones, Kansas City &c. R. Co. v.—73 M. 397.
Jones, Keel v.—93 M. 244.
Jones, Kennedy v.—29 So. 819.
Jones, Lowenburg v.—56 M. 688.
Jones, McGee v.—63 M. 453.
Jones, McKee v.—67 M. 405.
Jones, Maddux v.—51 M. 531.
Jones, Maury v.—27 M. 225.
Jones, Monet v.—10 S. & M. 237.
Jones, Mt. Helm Baptist Church v.—79 M. 488.
Jones, Murrell v.—40 M. 565.
Jones, New Orleans &c. R. Co. v.—1 Miss. Dec. 206.
Jones, New Orleans &c. R. Co. v.—3 So. 653.
Jones, Palmer v.—50 M. 657.
Jones, Patty v.—13 So. 931.
Jones, Payne v.—2 Miss. Dec. 183.
Jones, Pevey v.—71 M. 647.
Jones, Powell v.—12 S. & M. 506.
Jones, Robinson v.—65 M. 520.
Jones, Robinson v.—68 M. 794.
Jones, Sessions v.—6 H. 123.
Jones, Smith Co. v.—75 M. 325.
Jones, Stadeker v.—52 M. 729.
Jones, State v.—71 M. 872.
Jones, Terry v.—44 M. 540.
Jonestown v. Ganong, 52 So. 579—judgm. 100, 143; mand. 112, 172, 176; mun. corp. 1037.
Jonestown v. Ganong, 52 So. 692—judgm. 702; mun. corp. 1038.
Jones, Trice v.—52 M. 138.
Jones, Walker v.—44 M. 623.
Jones, Warren v.—70 M. 202.
Jones, Western Union Tel. Co. v.—69 M. 658.
Jones, White v.—83 M. 231.
Jones, Wier v.—84 M. 602.
Jones, Wilkinson County v.—52 So. 453.
Jones, Williams v.—10 S. & M. 108.
Jones, Williams v.—42 M. 270.
Jones, Yazoo &c. R. Co. v.—73 M. 229.
Joor v. Elder, 1 Miss. Dec. 503—land. & t. 154.
Joor v. Williams, 38 M. 546—trusts, 179, 231, 355, 360.
Joor, Giegolt v.—60 M. 817.
Jordan v. Ball, 44 M. 194—ex. & ad. 17.
Jordan v. Bobbitt, 91 M. 1—ex. & ad. 367; lim. of act. 83.
Jordan v. Foxworth, 48 M. 607—plead. 48; replev. 96; trial, 156; work & lab. 30.
Jordan v. Harris, 31 M. 257—sales, 1, 230.
Jordan v. McKenzie, 30 M. 32—lim. of act. 36, 70a.
Jordan v. Neal, 33 So. 17—ev. 397.
Jordan v. Roach, 32 M. 481—est. tail, 1.
Jordan v. State, 32 M. 382—crim. l. 519, 537; ev. 200; slaves, 9, 18a.
Jordan v. State, 87 M. 170—weap. 17a.
Jordan v. Thomas, 31 M. 557—det. 1, 17; ev. 340; plead. 433; wills, 245, 434.
Jordan v. Thomas, 34 M. 72—det. 1; execution, 171; hus. & w. 31d; judgm. 428.
Jordan, Canterberry v.—27 M. 96.
Jordan, Davis v.—5 H. 295.
Jordan, Faler v.—44 M. 283.
Jordan, Foster v.—54 M. 509.
Jordan, Illinois Cent. R. Co. v.—63 M. 458.
Jordan, Marx v.—84 M. 334.
Jordan, Moore v.—65 M. 229.
Jordan, Saunders v.—54 M. 428.
Jordan, Torrey v.—4 H. 401.
Joseph v. Levi, 58 M. 843—attch. 39; chat. m. 188; fraud. conv. 228.
Joseph Bowling Co. Brister v.—29 So. 830.
Josephine v. State, 39 M. 613—crim. l. 15, 183, 184, 185, 359, 405, 784, 867, 1172, 1184; ind. 11b, 57, 170; jury, 131; slaves, 18a, 18c.
Joslin v. Caughlin, 26 M. 134—ex. & ad. 326, 368, 388b.
Joslin v. Caughlin, 30 M. 502—cncts. 263; ex. & ad. 390.
Joslin v. Caughlin, 32 M. 104—ex. & ad. 377; plead. 163.
Joslin v. Coffin, 5 H. 539—judgm. 419; new tr. 16.
Joslin v. State, 75 M. 838—crim. l. 823; hom. 203.
Josselyn v. Stone & Matthews, 28 M. 753—costs, 273; judgm. 277; lim. of act. 11; states, 213.
Josselyn, Hill v.—13 S. & M. 597.
Josselyn, Pattison v.—43 M. 373.
Josselyn, Swann v.—14 S. & M. 106.
Joulian, Barataria Canning Co. v.—80 M. 555.
Jourdan, Wilson v.—79 M. 133.
Journey v. Priestly, 70 M. 584—partners. 193; sales, 242, 471, 478.
Joyce, Moore v.—23 M. 584.

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Joyner v. Miller, 55 M. 208—estop. 90, 94; judgm. 521; replev. 71.
Joyner, McClintock v.—77 M. 678.
Judah v. Brothers, 71 M. 414—tax. 696.
Judah v. Brothers, 72 M. 616—tax. 680.
Judah, Stovall v.—74 M. 747.
Judd, Mattison v.—59 M. 99.
Jullian, Nixon v.—72 M. 570.
Julienne v. Jackson, 69 M. 34—mun. corp. 604, 631.
Just, Healy v.—53 M. 547.
Justice, Barker v.—41 M. 240.
Justice, Leflore v.—1 S. & M. 381.

K

Kahn, Berkson v.—1 Miss. Dec. 179.
Kahn, Boisseau v.—62 M. 757.
Kahn, Melchoir v.—38 So. 347.
Kahn, Wolf v.—62 M. 814.
Kain v. May, 5 S. & M. 368—dism. 76.
Kaiser v. Earhart, 64 M. 492—estop. 30, 44.
Kaiser v. Harris, 62 M. 590—tax. 822.
Kaiser, McNair v.—62 M. 783.
Kamper, McDonald v.—89 M. 221.
Kamper, Mobile &c. R. Co. v.—88 M. 817.
Kane v. Burrus, 2 S. & M. 313—excep. 27, 56; new. tr. 149, 156.
Kane v. Mackin, 9 S. & M. 387—app. & e. 544; deeds, 58; eject. 90; execution, 19, 321.
Kane v. Preston, 24 M. 133—execution, 221; sheriffs, 87.
Kane, Tooley v.—Sm. & M. Ch. 518.
Kansas City &c. R. Co. v. Cantrell, 70 M. 329—app. & e. 999; parties, 4; r. r. 437.
Kansas City &c. R. Co. v. Chiles, 86 M. 361—carr. 346; ev. 110, 429; r. r. 398; release, 15, 54, 58.
Kansas City &c. R. Co. v. Deaton, 9 So. 828—r. r. 416, 443.
Kansas City &c. R. Co. v. Doggett, 67 M. 250—app. & e. 1010, 1033; neg. 122; r. r. 441, 446.
Kansas City &c. R. Co. v. Fite, 67 M. 373—carr. 105, 277, 277b, 294, 303, 319.
Kansas City &c. R. Co. v. Hawkins, 82 M. 209—r. r. 443.
Kansas City &c. R. Co. v. Heard, 87 M. 378—carr. 228.
Kansas City &c. R. Co. v. Holland, 68 M. 351—carr. 163, 208, 214.
Kansas City &c. R. Co. v. Jones, 73 M. 397—r. r. 102.
Kansas City &c. R. Co. v. Lackey, 72 M. 881—em. dom. 92; waters, 55.
Kansas City &c. R. Co. v. Lilly, 8 So. 644—carr. 41, 136; cncts. 328; trial, 252.
Kansas City &c. R. Co. v. Mabry, 67 M. 131—costs, 21.
Kansas City &c. R. Co. v. McShan, 81 M. 460—carr. 333.
Kansas City &c. R. Co. v. Myers, 7 So. 821—r. r. 443.
Kansas City &c. R. Co. v. Nichols, 38 So. 371—carr. 265, 266.
Kansas City &c. R. Co. v. Riley, 68 M. 765—carr. 356.
Kansas City &c. R. Co. v. Smith, 72 M. 677—waters, 51, 52.
Kansas City &c. R. Co. v. Spencer, 72 M. 491—ev. 483; r. r. 102, 103, 104, 411.
Kansas City &c. R. Co. v. Wiygul, 82 M. 223—nav. wat. 20.
Kansas City &c. R. Co. Adams v.—74 M. 331.
Kansas City &c. R. Co. Allen v.—32 So. 3.
Kansas City &c. R. Co. Bank of Tupelo v.—16 So. 572.
Kansas City &c. R. Co. Bell v.—68 M. 19.
Kansas City &c. R. Co. Blair v.—76 M. 478.
Kansas City &c. R. Co. Bucy v.—22 So. 296.
Kansas City &c. R. Co. Cantrell v.—69 M. 435.
Kansas City &c. R. Co. Cantrell v.—24 So. 871.
Kansas City &c. R. Co. Gallegly v.—83 M. 171.
Kansas City &c. R. Co. Harkness v.—33 So. 77.
Kansas City &c. R. Co. Hickman v.—66 M. 164.
Kansas City &c. R. Co. Hopson v.—87 M. 789.
Kansas City &c. R. Co. Jones v.—75 M. 913.
Kansas City &c. R. Co. Loyd v.—88 M. 422.
Kansas City &c. R. Co. Lusby v.—73 M. 360.
Kansas City &c. R. Co. Martin v.—77 M. 720.
Kansas City &c. R. Co. New Albany v.—76 M. 111.
Kansas City &c. R. Co. Rivers v.—86 M. 571.
Kansas City &c. R. Co. St. Clair v.—76 M. 473.
Kansas City &c. R. Co. St. Clair v.—77 M. 739.
Karpe, Nicholson v.—58 M. 34.
Katz, Hahn v.—24 So. 964.
Kaufman v. Foster, 89 M. 388—app. & e. 202; judgm. 863.
Kaufman v. Simons, 80 M. 189—app. & e. 160, 167; assign. f. b. c. 70, 105, 342; ev. 168.

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Kaufman v. Whitney, 50 M. 103—fraud. conv. 73, 95, 103; hus. & w. 47; inj. 116.
Kausler v. Ford, 47 M. 289—marshaling, 4; nova. 10; ven. & pur. 261, 262, 266, 292.
Kayse v. Randle, 35 So. 422—app. & e. 998.
Kea, Mobile &c. R. Co. v.—96 M. 195.
Kearny v. Jeffries, 48 M. 343—deeds, 63; disc. 3; eq. 345, 346.
Kearney v. State, 68 M. 233—crim. l. 380, 489, 763c, 773; hom. 166, 188, 294.
Kearney v. State, 68 M. 239—hom. 285.
Kearney, Barfield v.—W. 504.
Kearney, Finucane v.—Freem. Ch. 65.
Kearney, Sheehan v.—82 M. 688.
Keaton v. Miller, 38 M. 630—app. & e. 931; eq. 325, 327; gifts, 5, 42; marshaling, 5; parent & c. 9.
Keegan, Magee v.—35 M. 244.
Keel v. Jones, 93 M. 244—estop. 94.
Keene v. Lowenthal, 83 M. 204—ev. 265; spec. perf. 65, 121.
Keenan v. Harkins, 82 M. 709—anim. 47; counties, 56.
Keene, Freeman v.—49 So. 567.
Keerl v. Bridges, 10 S. & M. 612—partners. 198; paymt. 17.
Keeton, Gaines v.—68 M. 477.
Keeton, Penn Mut. Life Ins. Co. v.—95 M. 708.
Kehl v. Hope Oil Mill &c. Co. 77 M. 762—mal. pros. 71.
Keill, Gray v.—14 S. & M. 186.
Keirn v. Andrews, 59 M. 39—princ. & s. 106, 156.
Keirn v. Carson, 12 S. & M. 431—app. 3; atty. & c. 78.
Keirn v. Warfield, 60 M. 799—tresp. 22, 30, 45, 47, 68.
Keirn, Land v.—52 M. 341.
Keirn, McAfee v.—7 S. & M. 780.
Keirn, Shelton v.—45 M. 106.
Keith v. Jolly, 26 M. 131—ex. & ad. 296, 299, 314f.
Keith v. Miles, 39 M. 442—guard. & w. 30, 69.
Keith, Allen v.—26 M. 232.
Keith, Edge v.—13 S. & M. 295.
Keithler v. State, 10 S. & M. 192—crim. l. 399, 429, 508, 538, 757, 834, 841, 995, 1088, 1111; dist. attys. 2; hom. 249, 305; ind. 33, 34, 57; witn. 117.
Keith, Maitland v.—30 M. 499.
Keith, Miller v.—26 M. 166.
Kell v. Rogers, 28 M. 83—wills, 371½.
Keller v. Scott, 2 S. & M. 81—atty. & c. 97; judgm. 874.
Keller v. Toulme, 7 So. 508—elec. 165.
Keller, Aaron v.—2 Miss. Dec. 710.
Kelley, Baker v.—41 M. 696.
Kelley, Burns v.—41 M. 339.
Kell, Fowler v.—14 S. & M. 68.
Kellogg v. Budlong, 7 H. 340—app. & e. 999; assum. 3; plead. 433.
Kellogg v. Freeman, 50 M. 127—garn. 132, 144; interpl. 4.
Kellogg v. Hamilton, 10 So. 479—trover, 65.
Kellogg v. Kellogg, 63 M. 631—hus. & w. 168.
Kellogg v. State, 43 M. 57—bailm. 80; recogn. 2.
Kellogg, Montgomery v.—43 M. 486.
Kells v. Helm, 56 M. 700—party w. 7, 9.
Kell, Sessions v.—30 M. 458.
Kellum v. State, 64 M. 226—app. & e. 701; crim. l. 875.
Kelly v. Alred, 65 M. 495—home. 134, 136; wills, 27.
Kelly v. Brooks, 57 M. 225—app. & e. 436, 454, 1169; eq. 344, 419, 422.
Kelly v. Brown, 32 M. 202—app. & e. 281, 689.
Kelly v. Continental Casualty Co. 87 M. 438—plead. 246.
Kelly v. Davis, 37 M. 76—ex. & ad. 78, 301, 495; judgm. 525; wills, 265, 424, 431.
Kelly v. Harrison, 69 M. 856—app. & e. 909; judgm. 17c, 396, 482; lim. of act. 29, 115, 122, 130; proc. 161, 164.
Kelly v. Howard, 54 So. 16—death, 101; interpl. 11.
Kelly v. Miller, 39 M. 17—app. & e. 999; 1002, 1007; courts, 202c; trial, 404; wills, 41, 294; witn. 131.
Kelly v. Mills, 41 M. 267—execution, 169, 269, 270; fraud. conv. 154; judgm. 780, 785, 788; mtg. 151; trusts, 63½; ven. & pur. 233, 260, 262.
Kelly v. Reid, 57 M. 89—chat. m. 49.
Kelly v. State, 3 S. & M. 518—crim. l. 47, 52, 636, 985, 990, 1152, 1166½, 1188; hom. 2; ind. 23, 71, 78; slaves, 19.
Kelly v. State, 68 M. 343—hom. 231, 286c.
Kelly v. State, 79 M. 168—courts, 69; elec. 180, 283; judges, 30; quo. w. 27, 53.
Kelly v. Wagner, 61 M. 299—estop. 81, 82; quiet. t. 7.
Kelly v. Weaver, 37 M. 631—eq. 48; usury, 20, 91.
Kelly v. Wimberly, 61 M. 548—mand. 108; offic. 104.
Kelly, Attala County v.—68 M. 40.
Kelly Banking Co. v. Robinson-Norton Co. 71 M. 141—garn. 92, 94.
Kelly, Barrier v.—82 M. 233.
Kelly, Brooks v.—63 M. 616.

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Kelly, Cain v.—57 M. 830.
Kelly, Dunn v.—57 M. 825.
Kelly, Edwards v.—83 M. 144.
Kelly, Ellis v.—33 M. 695.
Kelly, Harvey v.—41 M. 490.
Kelly, Hebron v.—75 M. 74.
Kelly, Hebron v.—77 M. 48.
Kelly, Martin v.—59 M. 652.
Kelly, Parker v.—10 S. & M. 184.
Kelly, Pullman Co. v.—86 M. 87.
Kelly, Ray v.—82 M. 597.
Kelly, Ridge v.—88 M. 209.
Kelly, Sellars v. 45 M. 323.
Kelly, Smith v.—23 M. 167.
Kelly, Speed v.—59 M. 47.
Kelly, State v.—80 M. 803.
Kelly, State v.—81 M. 1.
Kelly, Traweek v.—60 M. 652.
Kelly, Wear &c. Co. v.—84 M. 236.
Kelly, Weir-Booger Dry Goods Co. v.—80 M. 64.
Kelly, Wragg v.—42 M. 231.
Kelly, Wray v.—53 So. 492.
Kelly, Yazoo &c. R. Co. v.—53 So. 779.
Kelly &c. Co. Searles v.—88 M. 228.
Kelsey v. Smith, 1 H. 68—ex. & ad. 48, 120a.
Kembrough, Hester v.—12 S. & M. 659.
Kemp v. Hazlehurst, 80 M. 443—mun. corp. 917.
Kemp v. State, 89 M. 445—ind. 192.
Kemp v. State, 24 So. 695—counties, 101.
Kempe v. Pintard, 32 M. 324—ex. & ad. 377; hus. & w. 138.
Kemper County v. Neville, 95 M. 56—app. & e. 790.
Kemp, Shoults v.—57 M. 218.
Kendal, Commercial Bank v.—13 S. & M. 278.
Kendall v. Canton, 53 M. 526—mun. corp. 67; offic. 51.
Kendall, Ingersoll v.—13 S. & M. 611.
Kendrick v. Kyle, 78 M. 278—bills & n. 117, 480, 496; statut. 276; usury, 2.
Kendrick v. State, 55 M. 436—crim. l. 789, 829, 835; hom. 116, 171, 191, 300f.
Kendrick v. Watkins, 54 M. 495—judgm. 196; land. & t. 229½; plead. 223; replev. 69, 103.
Kendrick, Nickles v.—76 M. 334.
Kendrick, Pearson v.—74 M. 235.
Kendrick, Pearson v.—75 M. 416.
Kendricks, Nickles v.—73 M. 711.
Kendrick, Southern R. Co. v.—40 M. 374.
Kenley v. Kenley, 2 H. 751—div. 27; hus. & w. 31c, 221, 282.
Kennard v. Alston, 62 M. 763—lim. of act. 84, 86.
Kennard, Townsend v.—1 Miss. Dec. 222.
Kenneday v. Price, 57 M. 771—ack. 23, 28, 55; estop. 30; hus. & w. 119, 129, 198.
Kennedy v. East Union Lumber &c. Co., 92 M. 405—eq. 422.
Kennedy v. Gaines, 51 M. 625—guard. & w. 87, 90; inf. 89.
Kennedy v. Jones, 29 So. 819—bills & n. 505.
Kennedy v. Sanders, 90 M. 524—adv. pos. 95; app. & e. 171; quiet. t. 29; tax. 656, 688, 787, 810.
Kennedy, Gaines v.—53 M. 103.
Kennedy, Jones v.—81 M. 499.
Kennedy, Miss. Cent. R. Co. v.—41 M. 551.
Kennedy, Miss. Cent. R. Co. v.—41 M. 671.
Kennedy, Paxton v.—70 M. 865.
Kennedy, State v.—96 M. 978.
Kennedy, Stokes v.—58 M. 614.
Kennedy, Windsor v.—52 M. 164.
Kenoye v. Brown, 82 M. 607—ten. in c. 35.
Kent v. Allbritain, 4 H. 317—chat. m. 56, 300.
Kent v. Louisville &c. R. Co. 67 M. 608—r. r. 446.
Kent v. Yazoo &c. R. Co. 77 M. 494—mast. & s. 101, 270.
Kent, McKee v.—24 M. 131.
Kent, Silver v.—60 M. 124.
Kerl v. Smith, 96 M. 827—ev. 460; sales, 316, 470.
Kerl, Illinois Cent. R. Co. v.—77 M. 736.
Kerningham v. Scanland, 6 H. 540—execution, 154b.
Kernosky v. Hoyle, 52 So. 481—mar. liens, 11.
Kerr v. Bowers, 1 S. & M. 584—eq. 31, 418; garn. 79; judgm. 17, 17b; notice, 4.
Kerr v. Bowers, 3 S. & M. 641—eq. 31; judgm. 17, 17b; notice, 4.
Kerr v. Brandon, 2 H. 810—princ. & s. 124.
Kerr v. Calvit, W. 115—cncts. 31, 47, 341; ev. 390; ven. & pur. 309.
Kerr v. Farish, 52 M. 101—eject. 16, 18, 90, 95.
Kerr v. Freeman, 33 M. 292—deeds, 121; ev. 92; quiet. t. 9, 43.
Kerr v. Kuykendal, 44 M. 137; ev. 400; pub. lands, 114; ven. & pur. 161, 165.
Kerr v. Laird, 27 M. 544—ex. & ad. 104.
Kerr v. Moore, 54 M. 286—agric. 10, 15; app. & e. 41; mast. & s. 82.
Kerr v. Robertson, 5 H. 278—excep. 9.
Kerr, Bell v.—80 M. 77.
Kerr, Howe v.—69 M. 311.
Kerr, Illinois Cent. R. Co. v.—68 M. 14.
Kerr, Stam v.—31 M. 199.

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Kerr, Torrence v.—27 M. 786.
Kersey, Burford v.—48 M. 642.
Kershaw v. Merchants' Bank, 7 H. 386—execution, 153e, 351; judgm. 883; plead. 7, 67, 142, 384; set-off, 3, 22, 30, 50.
Ketchum v. Brennan, 53 M. 596—app. & e. 204; hus. & w. 87, 206; replev. 96; sales, 234, 242, 319, 324, 478.
Key v. Cross, 23 M. 598—bills & n. 47.
Keyer v. State, 78 M. 450—crim. l. 814.
Keyes, Mobley v.—13 S. & M. 677.
Keyes, Smither v.—30 M. 179.
Key, McCarty v.—87 M. 248.
Key, Rembert v. 58 M. 533.
Keyser, Excelsior Mfg. Co. v.—62 M. 155.
Keys, Rushing v.—4 S. & M. 191.
Key, State v.—93 M. 115.
Keystone Lumber Co. Yazoo &c. R. Co. v.—90 M. 391.
Keystone Lumber Yard v. Yazoo &c. R. Co. 94 M. 192—app. & e. 194; carr. 100; plead. 311.
Keystone Lumber Yard v. Yazoo &c. R. Co. 96 M. 116—disc. 3, 39.
Keystone Lumber Yard v. Yazoo &c. R. Co. 53 So. 8—carr. 100; lim. of act. 35.
Keystone Lumber &c. Co. v. Devine, 18 So. 925—app. & e. 642.
Keystone Lumber & Imp. Co. v. McGrath, 21 So. 301—tresp. 9, 56, 74.
Kibble v. Butler, 14 S. & M. 207—app. & e. 671; det. 20, 25; excep. 10; execution, 198.
Kibble v. Butler, 27 M. 586—app. & e. 1236; eq. 66.
Kidd v. Manley, 28 M. 156—eq. 327; ev. 345.
Kidd, Brown v.—34 M. 291.
Kiern v. Warfield, 60 M. 799—mast. & s. 302b.
Kiestler v. Vicksburg &c. R. Co. 1 Miss. Dec. 329—bound. 10; eject. 107.
Kiernan v. Cameron, 66 M. 442—app. & e. 1238.
Kiernan v. Germain, 61 M. 498—land. & t. 154, 194.
Kiernan v. Germaine, 62 M. 75—app. & e. 65.
Kilcrease v. Lum, 36 M. 569—mtg. 479; ven. & pur. 228.
Kilcrease v. Shelby, 23 M. 161—des. & d. 52, 82; ex. & ad. 65, 288; hus. & w. 115; lim. of act. 5.
Kilgore, McBride v.—55 M. 242.
Kilgore, Shotwell v.—26 M. 125.
Killcrease v. Killcrease, 7 H. 311—ex. & ad. 26, 71; hus. & w. 10.
Killian, Weir v.—59 M. 520.
Killingsworth v. Commercial Bank, 9 S. & M. 628—banks, 181.
Kilpatrick v. Bush, 23 M. 199—ex. & ad. 154, 519; witn. 92, 94.
Kilpatrick v. Byrne, 25 M. 571—judgm. 799; lim. of act. 5.
Kilpatrick v. Dye, 4 S. & M. 289—app. & e. 1145; assign. 53; inj. 43; judgm. 754; ven. & pur. 308, 343.
Kilpatrick v. Graves, 51 M. 432—relig. soc. 15.
Kilpatrick v. Kilpatrick, 23 M. 124—execution, 265, 270; jud. s. 61; ven. & pur. 268.
Kilpatrick, Cummins v.—23 M. 106.
Kilpatrick, Porter v.—24 M. 414.
Kimball v. Alcorn, 45 M. 145—app. & e. 71, 462, 476, 838, 870, 986; eq. 421; inj. 207; statut. 215.
Kimball v. Alcorn, 45 M. 151—offic. 14, 40; states, 53; statute. 88.
Kimball v. Kimball, 1 H. 532—des. & d. 10; hus. & w. 31f, 111.
Kimball v. Louisville &c. R. Co. 94 M. 396—judgm. 591.
Kimball v. Mitchell, 57 M. 632—excep. 56, 57.
Kimbro, Alexander v.—49 M. 529.
Kimbrough v. Curtis, 50 M. 117—cov. 26; eq. 247, 323; gaming, 5; spec. perf. 24; ven. & pur. 39, 279.
Kimbrough v. Ragsdale, 69 M. 674—app. & e. 197; dism. 66; plead. 430; trial, 194.
Kimbrough, Caldwell v.—91 M. 877.
Kimbrough, Hudson v.—74 M. 341.
Kimmons, Roberts v.—65 M. 332.
Kinard v. State, 57 M. 132—lewd. 1; marr. 38; misceg. 1.
Kinard, Barber v.—4 So. 120.
Kinard, Heflin v.—67 M. 522.
Kincannon, Hepburn v.—74 M. 691.
King v. Bishop, 62 M. 553—trusts, 24.
King v. Cooper, W. 359—ex. & ad. 97; trial, 58.
King v. Elliott, 5 S. & M. 428—banks, 39, 207; corp. 88; garn. 27; paymt. 12.
King v. Illinois Cent. R. Co. 69 M. 245—r. r. 217.
King v. Levy, 13 So. 282—partners. 145; princ. & a. 150; trial, 252.
King v. Levy, 13 So. 283—partners. 145; princ. & a. 150.
King v. Railroad Co. 69 M. 245—false imp. 1, 15; mast. & s. 301.
King v. Rowan, 82 M. 1—app. & e. 1001; wills, 299, 303, 332.
King v. State, 5 H. 730—crim. l. 193½; gr.

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jury, 40; ind. 12, 33, 34, 189; jury, 100, 116, 131.
King v. State, 58 M. 737—crim. l. 829; int. liq. 131, 239.
King v. State, 65 M. 576—crim. l. 366, 375; hom. 188, 193.
King v. State, 66 M. 502—crim. l. 21, 312, 369, 370, 371, 372, 678; int. liq. 131, 136, 176, 200, 224, 230.
King v. State, 74 M. 576—crim. l. 364, 683, 789; hom. 14, 15, 144.
King v. State, 83 M. 375—mast. & s. 345.
King v. State, 23 So. 766—crim. l. 761, 805; hom. 116, 300a.
King v. State, 48 So. 228—hom. 340d.
King v. State, 54 So. 657—crim. l. 197, 294, 678; int. liq. 173.
King v. Sturges, 56 M. 606—home. 81, 177.
King v. Talbert, 36 M. 367—ex. & ad. 81, 121; wills, 473.
King v. Terry, 6 H. 513—execution, 153d, 155.
King v. Vicksburg R. &c. Co. 88 M. 456—em. dom. 89, 266; nuis. 3, 51.
King v. Wooldridge, 78 M. 179—corp. 545.
King v. Yazoo &c. R. Co. 87 M. 270—carr. 333.
King, Alabama &c. R. Co. v.—93 M. 379.
King, Barton v.—41 M. 288.
King, Blanton v.—2 H. 856.
King, Dedeaux v.—92 M. 38.
King, Doe v.—3 H. 125.
King, East v.—77 M. 739.
Kingendall v. Perry, 25 M. 228—ex. & ad. 449.
King, Fly v.—71 M. 537.
King, Gaston v.—63 M. 326.
King, Gresham v.—65 M. 387.
King, Illinois Cent. R. Co. v.—69 M. 852.
King, Little v.—3 So. 258.
King, Marshall v.—24 M. 85.
King, Martin v.—3 H. 125.
King, Mineral Co. v.—54 So. 250.
King, Meyer v.—72 M. 1.
King, Montague v.—37 M. 441.
Kingsland v. Massey, 69 M. 296—mech. liens, 213.
Kingsland, Clark v.—1 S. & M. 248.
King, Spear v.—6 S. & M. 276.
King, Stampley v.—51 M. 728.
Kingston Lumber Co. Edwards v.—92 M. 598.
Kingston Lumber Co. Peirce v.—90 M. 216.
King, Walker v.—1 H. 17.
King, Wimborn v.—35 M. 157.
Kinley v. Fitzpatrick, 4 H. 59—sales, 259, 443.
Kinnare v. Gregory, 55 M. 612—ded. 16; high. 160; princ. & a. 122; trial, 252.
Kinney v. Mobile &c. R. Co. 56 So. 165—plead. 412.
Kinney v. Paine, 68 M. 258—banks, 77, 80, 166, 171; princ. & a. 145.
Kinney, Cannon v.—Sm. & M. Ch. 555.
Kinstra, Morrison v.—55 M. 71.
Kinzie, Bronson v.—1 H. 311.
Kirby v. Coldwell, 26 M. 103—attch. 196; sheriffs, 99.
Kirby v. State, 78 M. 175—judges, 47.
Kirby, State v.—96 M. 629.
Kirk v. Seawell, 2 S. & M. 571—bills & n. 460; dism. 23; judgm. 195; plead. 204.
Kirk v. State, 13 S. & M. 406—crim. l. 1032, 1184; ind. 33; wills, 303.
Kirk v. State, 69 M. 215—lot. 3.
Kirk v. Taliaferro, 8 S. & M. 754—mech. liens, 26, 56, 292.
Kirk, James v.—29 M. 206.
Kirkland v. Carr, 35 M. 584—app. & e. 999, 1050; fact. 31; witn. 91.
Kirkland v. Texas Express Co. 57 M. 316—clks. of c. 64; jud. s. 40; partit. 77; proc. 96.
Kirkland v. Lowe, 33 M. 423—assign. 2; insolv. 6.
Kirkland, Patterson v.—34 M. 423.
Kirkland, Smith v.—89 M. 647.
Kirkland, Wilson v.—W. 155.
Kirkman v. Mays, 12 So. 443—adv. pos. 114.
Kirkman, Deminds v.—1 S. & M. 644.
Kirkman, Garnett v.—33 M. 389.
Kirkman, Garnett v.—41 M. 94.
Kirkman, Waul v.—13 S. & M. 599.
Kirkman, Waul v.—25 M. 609.
Kirkman, Waul v.—27 M. 823.
Kirkpatrick v. Miller, 50 M. 521—assum. 1; cov. 107; mon. paid, 1.
Kirkpatrick, McWillie v.—28 M. 802.
Kirkpatrick, Steen v.—84 M. 63.
Kirk, Strickland v.—51 M. 795.
Kirkwood, Hamer v.—25 M. 95.
Kirkwood, Pascagoula v.—86 M. 630.
Kitchens v. Harrall, 54 M. 474—app. & e. 862, 1169; des. & d. 88; eq. 102, 419, 422; ex. & ad. 3; ven. & pur. 275.
Kitchens, Spratley v.—55 M. 578.
Kitchens, Weir v.—52 M. 74.
Kitrell, Gordon v.—21 So. 922.
Kitteringham v. McClutchie, 41 So. 65—assa. 39.

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Kittle v. Yazoo &c. R. Co. 92 M. 381—app. & e. 984; costs, 105, 119.
Kittredge, Peterson v.—65 M. 33.
Kittredge, Prim v.—W. 390.
Kittrell v. State, 89 M. 666—crim. l. 59; ind. 170; int. liq. 166, 173, 196.
Kittrell, McCartey v.—55 M. 253.
Klaus v. Moore, 77 M. 701—frds. st. of, 82; lim. of act. 83; mtg. 96, 152.
Klaus v. State, 54 M. 644—guard. & w. 182a; inf. 80.
Klein v. Buck, 73 M. 133—inj. 59.
Klein v. French, 57 M. 662—ex. & ad. 86, 99, 114, 435, 477.
Klein v. McNamara, 54 M. 90—ev. 462; frds. st. of, 56; hus. & w. 167, 231; mtg. 34, 35, 37, 38.
Klein v. Rector, 57 M. 538—sales, 42, 94, 316.
Klein v. Richardson, 64 M. 41—fraud. conv. 154.
Klein v. Smith County, 54 M. 254—counties, 166, 170, 210, 213; lim. of act. 39; mand. 109, 114, 143, 154, 158.
Klein v. Smith County, 58 M. 540—counties, 166, 170, 210, 213; mand. 108.
Klein v. Warren County, 51 M. 878—counties, 170.
Klein, Hanover Nat. Bank v.—64 M. 141.
Klein, Murphy v.—71 M. 908.
Klein, Warren County v.—51 M. 807.
Klein, Tierney v.—67 M. 173.
Kliffield v. State, 4 H. 304—crim. l. 58, 762; ind. 81, 203; int. liq. 200.
Kline v. Hazzlerigg, 21 So. 11—trial, 41.
Kline v. State, 44 M. 317—ind. 110, 111, 158; mast. & s. 345a; Sunday, 29.
Kline, Alabama &c. R. Co. v.—69 M. 168.
Kline, McIntyre v.—30 M. 361.
Kline, Randall v.—44 M. 313.
Kline, Rodgers v.—56 M. 80.
Kling, Newman v.—73 M. 312.
Klotz v. Butler, 56 M. 333—hus. & w. 231.
Klyce v. Broyles, 37 M. 524—cov. 107; spec. perf. 96.
Klyce v. State, 78 M. 450—crim. l. 789; hom. 53, 286c. 309.
Klyce v. State, 79 M. 652—crim. l. 1023; jury, 103.
Knapp, Louisville Nat. Bank v.—61 M. 485.
Kneale v. Lopez, 93 M. 201—mast. & s. 125; trial, 190.
Knickerbocker Life Ins. Co. v. Harlan, 56 M. 512—ins. 349.
Knight v. State, 64 M. 802—crim. l. 21, 312; ind. 160; tresp. 76, 84, 87.
Knight v. State, 74 M. 140—crim. l. 560, 789, 834; larc. 54.
Knight v. Whitehead, 26 M. 245—hus. & w. 11, 118, 138.
Knight v. Yarborough, 7 S. & M. 179—interpl. 23, 33; paymt. 10, 12.
Knight, Goodbar v.—89 M. 124.
Knight, Yeager v.—60 M. 730.
Knoop v. Columbus Compress Co. 84 M. 239—bailm. 31.
Knott v. Brewster, 27 So. 758—anim. 97; trial, 139.
Knott, Lyon v.—26 M. 548.
Knotts v. Bailey, 54 M. 235—wills, 732, 820.
Knowland v. Sartorius, 46 M. 56—appr. 11; eq. 66, 457, 463; tax. 817.
Knowles v. Summey, 52 M. 377—app. & e. 880; proc. 106.
Knowles, Prussell v.—4 H. 90.
Knox v. Bank of United States, 26 M. 655—acct. 20, 22; banks, 181; jud. s. 3; mtg. 515.
Knox v. Exporters' Cotton Oil Co. 56 So. 185—mast. & s. 258, 260.
Knox v. State, 52 So. 695—crim. l. 595.
Knox v. Vallandingham, 13 S. & M. 526—princ. & s. 194.
Knox, Hunt v.—34 M. 655.
Knox, Moore v.—46 M. 602.
Knox, New York Hospital v.—57 M. 609.
Knut v. Nutt, 83 M. 365—cncts. 103; U. S. 111.
Knut, Nutt v.—84 M. 465.
Koch v. Bridges, 45 M. 247—execution, 220; statut. 187, 227.
Koen v. Brill, 75 M. 870—home. 106; inj. 14; marshaling, 3.
Kohlbrunner v. State, 67 M. 368—int. liq. 111.
Kohlheim v. Harrison, 34 M. 457—adv. pos. 76; lim. of act. 44; mtg. 424.
Kohlheimer v. State, 39 M. 548—crim. l. 170, 186.
Kohlheim, Wilson v.—46 M. 346.
Kohlman v. Bank, 71 M. 843—attch. 296; parties, 57; sheriffs, 122, 134.
Kola Lumber Co. Eaton v.—46 M. 70.
Kolb v. Bennett Land Co. 74 M. 567—brok. 7, 56; cncts. 10; princ. & a. 26, 32, 36.
Kolb, Swanzy v.—46 So. 549.
Koon, Davany v.—45 M. 71.
Koon, Gumbel v.—59 M. 264.
Kornegay v. Georgia State B. & L. Assn. 91 M. 551—b. & l. assn. 33.
Korter v. Gulf &c. R. Co. 87 M. 482—r. r. 393; witn. 397.

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Kortrecht, Partee v.—54 M. 166.
Kosciusko v. Slomburg, 68 M. 469—mun. corp. 616.
Kosciusko, Comfort v.—88 M. 611.
Kosciusko Oil Mill &c. Co. v. Wilson Cotton Oil Co. 90 M. 551—monop. 13.
Kountz v. Price, 40 M. 341—bills & n. 140; cncts. 140; eq. 326; princ. & a. 171, 175; Sunday, 10, 15.
Koyse v. Randle, 83 M. 168—high. 183.
Kramer v. Holster, 55 M. 244—app. & e. 476; execution, 158; judgm. 386; j. p. 153; supersed. 4.
Kramer, Andrews v.—77 M. 151.
Kraner v. State, 61 M. 158—crim. l. 671; hom. 171; trial, 50.
Kranfield, Mobile &c. R. Co. v.—92 M. 494.
Krauss, Moses v.—90 M. 618.
Krebs, Strong v.—63 M. 338.
Kretchmar, Citizens' Bank v.—91 M. 608.
Kretschmar v. First Nat. Bank, 90 M. 363—assign. f. b. c. 312.
Kretschmar v. Stone, 90 M. 375—corp. 563.
Kriger v. Bank, 72 M. 462—corp. 75, 243.
Kriger, Davis v.—69 M. 39.
Krippendorf v. Wolf, 70 M. 81—home. 61; hus. & w. 49½.
Krosmopolski v. Paxton, 58 M. 581—action, 70; replev. 56.
Kuhn v. Warren County, 54 So. 442—tax. 470, 493.
Kuhn, Adams v.—72 M. 277.
Kuhn, Alabama &c. R. Co. v.—78 M. 114.
Kuhn, Fisher v.—54 M. 480.
Kuhn, Hoffman v.—57 M. 746.
Kuhn, McKinney v.—59 M. 186.
Kuhn, State v.—72 M. 276.
Kurtz, Curry v.—33 M. 24.
Kuykendall, Adams v.—83 M. 571.
Kuykendall, Cocke v.—41 M. 65.
Kuykendall, Kerr v.—44 M. 137.
Kyle v. Calmes, 1 H. 121—ev. 91.
Kyle v. Rhodes, 71 M. 487—deeds, 38; eq. 345; inj. 38; spec. perf. 108.
Kyle v. Stinson, 13 S. & M. 301—costs, 108, 119.
Kyle, Cox v.—75 M. 667.
Kyle, Kendrick v.—78 M. 278.
Kyle, Moody v.—34 M. 506.
Kyle, Northern Bank v.—7 H. 360.
Kyzer v. Middleton, 61 M. 360—land. & t. 274.
Kyzer, Adams v.—61 M. 407.

L

L. A. Becker Co. v. Clardy, 96 M. 301—princ. & a. 103; sales, 23.
L. A. Becker Co. v. D. A. Davis Drug Co. 93 M. 803—frds. st. of, 90.
Lacey, Harper v.—62 M. 5.
Lacey, Smith v.—86 M. 295.
Lachs, Anderson v.—59 M. 111.
Lackey v. St. Louis &c. R. Co. 94 M. 893—r. r. 112.
Lackey, Kansas City &c. R. Co. v.—72 M. 881.
Lackey, Moore v.—53 M. 85.
Laclede Bank, Savage v.—62 M. 586.
Lacock, Hughes v.—63 M. 112.
Lacoste v. Pipkin, 13 S. & M. 589—bailm. 32; slaves, 19.
Lacoste, Dixon v.—1 S. & M. 70.
Lacoste, Land v.—5 H. 471.
Lacy, Pierce v.—23 M. 193.
Ladd v. Alcorn, 71 M. 395—ack. 28; chat. m. 89.
Ladd v. Craig, 94 M. 659—ev. 25; ex. & ad. 414; jud. s. 3, 31, 47.
Ladd, Badley v.— 70 M. 688.
Ladd, Downs v.—4 H. 40.
Ladd, French v.— 57 M. 678.
Ladner v. Ladner, 2 Miss. Dec. 607—quiet. t. 52.
Ladner v. Ogden, 31 M. 332—eq. 204, 359, 367.
Ladnier v. Ladnier, 64 M. 368—fraud. conv. 309; j. p. 89, 118; trial, 194.
Ladnier v. Ladnier, 75 M. 777—deeds, 37; ev. 452.
Ladnier v. Ladnier, 90 M. 475—frds. st. of, 84.
Ladnier v. Stewart, 38 So. 748—app. & e. 1009; estop. 32; perp. 1; ven. & pur. 228, 243; witn. 311.
Lafayette County v. Hall, 68 M. 719—counties, 95, 99; princ. & s. 79.
Lafayette County v. Hall, 70 M. 678—counties, 101; penal. 16; ref. of inst. 493, 494.
Lafayette County, Bank of Oxford v.—79 M. 152.
Lafayette County, Hall v.—69 M. 529.
Lafayette County, Sullivan v.—58 M. 790.
Lafayette County, Sullivan v.—61 M. 271
Lagrone v. Railroad Co. 67 M. 592—mast. & s. 186, 198.
Lagrone v. Trice, 57 M. 227—j. p. 142.
Lagrone, Trice v.—57 M. 839.
Laidlaw v. Organ, 2 Wheat. (U. S.) 178—fraud, 15.
Laird v. Elliott, 1 S. & M. 608—new tr. 95.
Laird, Bozeman v.—91 M. 719.
Laird, Clanton v.—12 S. & M. 568.
Laird, Jackson v. 55 So. 41.

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Laird, Kerr v.—27 M. 544.
Laird, Shelton v.—68 M. 175.
Laizer, Bourgeois v.—77 M. 146.
Lake v. Aberdeen, 57 M. 260—courts, 190; j. p. 142; mun. corp. 605, 623.
Lake v. Brannin, 90 M. 737—mech. liens, 99.
Lake v. Brown, 7 H. 661—set-off, 50.
Lake v. Dillard, 55 M. 63—hus. & w. 151.
Lake v. Hastings, 24 M. 490—bills & n. 455, 474, 489; plead. 382.
Lake v. Munford, 4 S. & M. 312—banks, 77; trial, 51; witn. 95.
Lake v. Perry, 95 M. 550—can. of i. 34; estop. 52; inf. 8, 11, 29, 31, 56, 58; judgm. 660½.
Lake v. Perry, 54 So. 945—ten. in c. 31.
Lake, Azlin v.—57 M. 693.
Lake, Darcey v.—46 M. 109.
Lake, Dorcet v.—46 M. 109.
Lake, Green v.—54 M. 540.
Lake, Green v.—60 M. 451.
Lake, Hughes v.—63 M. 552.
Lake, Morris v.—9 S. & M. 521.
Lake Mills, Hunter v.—29 So. 519.
Lalland, Ivey v.—42 M. 444.
Lamar v. State, 63 M. 265—consp. 44; crim. l. 598, 834; hom. 146, 244, 286b, 300b, 338.
Lamar v. State, 64 M. 428—trial, 228.
Lamar v. State, 64 M. 687—crim. l. 918.
Lamar v. State, 65 M. 93—crim. l. 1171, 1172; new tr. 41.
Lamar v. Williams, 39 M. 342—abat. & r. 76; bailm. 32; judgm. 198, 527; slaves, 5; trial, 192, 252, 296; witn. 133.
Lamar, Austin v.—23 M. 189.
Lamar, Coleman v.—40 M. 775.
Lamar, Miller v.—43 M. 383.
Lamb v. Rowan, 81 M. 369—app. & e. 484.
Lamb v. Rowan, 83 M. 45—partners. 74, 308, 317, 331, 333, 336.
Lamb v. Russel, 81 M. 382—corp. 545; garn. 213; proc. 155.
Lamb, Baugh v.—40 M. 493.
Lambdin, Rucker v.—12 S. & M. 230.
Lamb, Drane v.—56 M. 757.
Lambert, Natchez &c. R. Co. v.—70 M. 779.
Lambert, Natchez &c. R. Co. v.—54 So. 836.
Lambeth v. Elder, 44 M. 80—execution, 263, 268; ex. & ad. 368, 508a.
Lambeth v. State, 23 M. 322—hom. 20a, 211, 218, 221.
Lambeth, Boyd v.—24 M. 433.
Lamb Hardwood Lumber Co. Rainey v.—91 M. 690.
Lamb, Pittman v.—53 M. 594.
Lamb, Rowan v.—83 M. 45.
Lambuth, Yazoo &c. R. Co. v.—74 M. 758.
Lamkin v. Nye, 43 M. 241—bills & n. 130; lim. of act. 119, 148; plead. 25.
Lamkin, Hiller v.—54 M. 14.
Lamkin, New Orleans &c. R. Co. v.—78 M. 502.
Lamkin, Otken v.—56 M. 758.
Lamkin, Warren County v.—93 M. 123.
Lampley v. Scott, 24 M. 528—bailm. 2, 10, 31; ev. 99, 270.
Lampkin, Curry v.—51 M. 91.
Lampton v. Edwards, 54 So. 245—app. & e. 843; bonds, 79; states, 146, 168.
Lampton v. State, 11 So. 656—abduc. 1, 14.
Lancashire Ins. Co. Illinois Cent. R. Co. v.—79 M. 114.
Lancaster, Gale v.—44 M. 413.
Lancaster, Griffin v.—59 M. 340.
Lancaster, McNutt v.—9 S. & M. 570.
Lance v. Calhoun, 85 M. 375—partners. 251.
Lanctot, Strouse v.—27 So. 606.
Land v. Allen, 65 M. 455—atty. & c. 103; counties, 136, 165.
Land v. Elliott, 1 S. & M. 608—eq. 12.
Land v. Keirn, 52 M. 341—judgm. 678; Indians, 14.
Land v. Lacoste, 5 H. 471—bills & n. 313; estop. 86.
Land v. Land, Sm. & M. Ch. 158—courts, 489; Indians, 14.
Land v. Land, 14 S. & M. 99—hus. & w. 2.
Land v. Williams, 12 S. & M. 362—judgm. 296.
Land, Prewett v.—36 M. 495.
Landau v. Sykes, 54 So. 3—chat. m. 116.
Land Co. Goodsell v.—72 M. 580.
Landrum v. State, 63 M. 107—crim. l. 763.
Landrum, Yazoo &c. R. Co. v.—89 M. 399.
Landsdale v. Shackleford, W. 149—princ. & a. 94.
Lane v. State, 82 M. 555—big. 2.
Lane v. Wheless, 46 M. 666—app. & e. 807; judgm. 17, 299.
Lane, Capitol State Bank v.—52 M. 677.
Lane, Cooke v.—3 S. & M. 763.
Lane, Doe v.—3 S. & M. 763.
Lane, Duncan v.—8 S. & M. 744.
Lanehart v. Jeter, 36 M. 650—ex. & ad. 66; hus. & w. 11; wills, 720.
Lane, Haber v.—45 M. 608.
Lane, Mandeville v.—28 M. 312.
Lane, Mason v.—5 H. 11.
Lane, Phillips v.—4 H. 122.
Lane, Robinson v.—14 S. & M. 161.
Lane, Ross v.—3 S. & M. 695.
Lane, Sample v.—45 M. 556.

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Lane, Truly v.—7 S. & M. 325.
Lane, Vick v.—56 M. 681.
Lane, Yazoo &c. R. Co. v.—46 So. 959.
Lang v. Fatheree, 7 S. & M. 404—judgm. 195; lim. of act. 130.
Langan v. Bowman, 12 S. & M. 715—ex. & ad. 17.
Langan v. Hewett, 13 S. & M. 122—partners. 147, 157, 217.
Langdon, Illinois Cent. R. Co. v.—71 M. 146.
Langford v. Leggett, 54 So. 856—agric. 11.
Langford v. Weathersby, 1 Miss. Dec. 238—chat. m. 45, 49.
Langford, Leek Milling Co. v.—81 M. 728.
Lang, Gribble v. 11 So. 6.
Langley, Standley v.—25 M. 252.
Lang, Lizana v.—90 M. 469.
Langstaff v. Stix, 64 M. 171—can. 74; sales, 296.
Langstaff Hardware Co. v. Wallace, 28 So. 871—judgm. 247.
Langston v. Abney, 43 M. 161—abat. & r. 73; ex. & ad. 73, 454; judgm. 780, 863, 870b.
Langston, Patterson v.—69 M. 400.
Lanier v. Booth, 50 M. 410—ease. 3, 4, 7, 36, 61.
Lanier v. State, 57 M. 102—assa. 47; const. l. 106; courts, 93; crim. l. 1165; hom. 84, 342; weap. 17b.
Lanier v. Trigg, 6 S. & M. 641—abat. & r. 85; banks, 98; bills & n. 428, 474, 484; plead. 291; tender, 22.
Lanier, North Am. Trust Co. v.—78 M. 418.
Lanier, Warren County v.—87 M. 606.
Lanning, Southern R. Co. v.—83 M. 161.
Lansdale, McCready v.—58 M. 877.
Lansford, Garner v.—12 S. & M. 558.
Lapice v. Gereaudeau, W. 480—hus. & w. 2, 27a; mtg. 2.
Lapice, Hughes v.—5 S. & M. 451.
Lapiece v. Hughes, 24 M. 69—bills & n. 301; judgm. 143; new tr. 16; paymt. 17; proc. 147.
Lapsley, Interstate Cattle Co. v.—24 So. 532.
Laraussini v. Carquett, 24 M. 151—elect. rem. 3.
Lard, Simmons v.—W. 159.
LaRochelle, Vick v.—57 M. 602.
LaRoche, Poindexter v.—7 S. & M. 699.
Larson v. Larson, 82 M. 116—div. 201; inj. 26; judgm. 17b.
Larson, Moseley v.—86 M. 288.
Lasch, Lum v.—93 M. 81.
Lashly, Bryan v.—13 S. & M. 284.
Lasky v. Southern Express Co. 92 M. 268—carr. 159, 160.
Latham v. Morgan, Sm. & M. Ch. 611—deeds, 113; ven. & pur. 116, 123b.
Latham, Illinois Cent. R. Co. v.—72 M. 82.
Latham, Waddell v.—71 M. 351.
Latham, Wallace v.—52 M. 291.
Latimer v. Illinois Cent. R. Co. 25 So. 1038—mast. & s. 30.
Latimer, Illinois Cent. R. Co. v.—53 So. 955.
La Tourette v. Price, 28 M. 702—bankr. 434.
Laud v. Muirhead, 31 M. 89—mech. liens, 180, 187.
Laud v. Wallace, 31 M. 630—cncts. 262.
Lauderdale v. Hallock, 7 S. & M. 622—eq. 5; mtg. 112.
Lauderdale v. Hallock, 7 S. & M. 622—ev. 433, 460.
Lauderdale County v. Alford, 65 M. 68—counties, 101; disc. 16; eq. 3, 43; subrog. 36; tax. 568b.
Lauderdale County v. East Miss. Mills Co. 16 So. 210—pub. lands, 54.
Lauderdale County v. East Mississippi Mills, 18 So. 94—land. & t. 66; pub. lands, 51, 55; stip. 11.
Lauderdale County, Wright v.—71 M. 800.
Laughlin v. O'Reily, 92 M. 121—partit. 15, 32.
Laughlin, Emanuel v.—3 S. & M. 342.
Laughlin, O'Reily v.—92 M. 1.
Laughman v. Thompson, 6 S. & M. 259—bills & n. 455; ex. & ad. 389, 440.
Laura v. State, 26 M. 174—consp. 23; crim. l. 44, 1088; slaves, 18.
Laurel v. Rowell, 84 M. 435—em. dom. 85.
Laurel v. Turner, 80 M. 530—garn. 17, 122, 131, 234.
Laurel v. Turner, 96 M. 631—judges, 16.
Laurel Cotton Mills v. Gulf &c. R. Co. 84 M. 339—carr. 27, 32, 69.
Laurel Cotton Mills, Gulf &c. R. Co. v.—91 M. 166.
Laurel, Holifield v.—96 M. 59.
Laurel Imp. Co. Alford v.—86 M. 375.
Laurel Mercantile Co. v. Mobile &c. R. Co. 87 M. 675—neg. 136.
Laurel Nat. Bank, Advance Lumber Co. v.—86 M. 419.
Laurel Oil &c. Co. Shaw v.—92 M. 340.
Laurent, Greenville v.—75 M. 456.
Laurissini v. Corquette, 25 M. 177—deeds, 108; eject. 13.
Lavenburg v. Harper, 27 M. 299—trial, 222, 231.
Lavinge v. Russ, 36 M. 326—land. & t. 271.
Lavins v. State, 3 So. 78—bail. 75.
Law, Love v.—57 M. 596.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Lawrence v. Featherstone, 10 S. & M. 345—attch. 131, 138, 160, 175, 210, 217, 232.
Lawrence v. Hand, 23 M. 103—fraud. conv. 29, 254; mtg. 186, 362.
Lawrence v. Harris, 18 So. 125—cncts. 190.
Lawrence v. Mangiem, 30 M. 171—lim. of act. 150, 193.
Lawrence County v. Brookhaven, 51 M. 68—counties, 210, 213, 222; plead. 144.
Lawrence County, Brookhaven v.—2 Miss. Dec. 455.
Lawrence County, Brookhaven v.—55 M. 187.
Lawrence County, Chamberlain v.—71 M. 949.
Lawrence, Fatheree v.—30 M. 416.
Lawrence, Fatheree v.—33 M. 585.
Lawrence Lumber Co. v. Lyon, 93 M. 859—fraud, 138; partners. 210.
Lawrence, Pullman Palace Car Co. v.—74 M. 782.
Lawrence, Vicksburg &c. R. Co. v.—78 M. 86.
Lawson v. Bonner, 88 M. 235—app. & e. 1173; partit. 12, 78, 114.
Lawson v. Jeffries, 47 M. 686—const. law, 25, 51, 92; new tr. 177; states, 18c; war, 10.
Lawson v. Shotwell, 27 M. 680—div. 57, 95, 200; judgm. 713.
Lawson v. State, 62 M. 556—assa. 47.
Lawson v. State, 87 M. 562—crim. l. 1173.
Lawson, Bissinger v.—57 M. 36.
Lawson, Fitz v.—28 M. 790.
Lawson, Jeffries v.—39 M. 791.
Lawson, Nelson v.—71 M. 819.
Lawson, Shotwell v.—30 M. 27.
Lawson, Welch v.—32 M. 170.
Lawton, Fitch v.—6 H. 371.
Lay v. Filmore, 75 M. 493—plead. 93.
Layeochia, Verhallen v.—79 M. 370.
Layton v. State, 56 M. 791—crim. l. 785; trial, 252.
Lazar v. Caston, 67 M. 275—deeds, 114; eject. 115; home. 198, 208.
Lazarus v. Trible, 1 S. & M. 575—land. & t. 229k.
Lazier, State v.—25 So. 153.
Lea v. Clarksdale Bank &c. Co. 72 M. 317—hus. & w. 151.
Lea v. Cutrer, 51 So. 808—corp. 88.
Lea v. Guice, 13 S. & M. 656—app. & e. 994, 1001; partners. 162, 164, 249; trial, 59.
Lea v. State, 64 M. 201—crim. l. 1033, 1144; ind. 125j; int. liq. 219.
Lea v. State, 64 M. 278—perj. 25, 34.
Lea v. State, 64 M. 294—crim. l. 598; gaming, 94; ind. 34, 124; witn. 344.
Lea, Brunson v.—5 S. & M. 149.
Lea, Fowlkes v.—84 M. 509.
Leach v. Blow, 8 S. & M. 221—bills & n. 123, 489.
Leach v. Cooley, 6 S. & M. 93—citiz. 1; slaves, 10.
Leach v. Irving, 2 H. 887—j. p. 206.
Leach v. Shelby, 58 M. 681—app. & e. 202, 520; eq. 372; ev. 432; fraud. conv. 254, 277; inf. 84, 96; witn. 52.
Leach v. Stanton, 2 H. 908—app. & e. 1050.
Leach, Fisher v.—10 S. & M. 313.
Leach, Lowenstein v.—16 So. 493.
Leach, Memphis Grocery Co. v.—71 M. 959.
Leachman v. Musgrove, 45 M. 511—const. law, 1; judges, 9; offic. 36; statut. 180; war, 31.
Leak v. Cook, 52 M. 799—agric. 10, 13.
Leak, Cole v.—31 M. 131.
Leake v. Caffey, 19 So. 716—deeds, 99; mtg. 411.
Leake v. Gulf &c. R. Co. 91 M. 398—carr. 320.
Leake, Cole v.—27 M. 767.
Leake County v. McFadden, 57 M. 618—counties, 47; em. dom. 48; fer. 9.
Leake County, Beaman v.—42 M. 237.
Leake County, Colbert v.—60 M. 142.
Leake County, Cotton v.—27 M. 367.
Leake, Jones v.—11 S. & M. 591.
Leake, Nelson v.—25 M. 199.
Lear v. Friedlander, 45 M. 559—ex. & ad. 219, 481; nova. 4; paymt. 18.
Learnard, Merrell v.—1 H. 150.
Learned v. Corley, 43 M. 687—death, 4; eject. 140, 143; imp. 4; statut. 180; ven. & pur. 231.
Learned v. Holmes, 49 M. 290—eq. 10, 39; fraud, 31; inj. 26.
Learned v. Hunt, 63 M. 373—inj. 211; nuis. 19; waters, 59.
Learned v. Matthews, 40 M. 210—app. & e. 1133; courts, 199; ex. & ad. 336, 341, 349, 375; lim. of act. 70a; powers, 16.
Learned v. Ogden, 80 M. 769—app. & e. 1053; curt. 12; life est. 13; lim. of act. 70a, 72a; remaind. 13; waste, 9, 14; woods, 1.
Learned, Bessemer Sav. Bank v.—47 M. 119.
Learned, Brand v.—38 So. 43.
Leath v. Wright, 2 H. 774—app. & e. 934.
Leather v. State, 26 M. 73—gr. jury, 3.
Leatherberry, White v.—82 M. 103.
Leatherbury v. McInnis, 85 M. 160—ten. in c. 38.
Leatherman, Prosser v.—4 H. 237.
Leathers, Carson v.—57 M. 650.
Leathers, Persin v.—19 So. 582.
Leathers, Person v.—67 M. 548.

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Leathers, Stricker v.—68 M. 803.
Leavenworth v. Crittenden, 62 M. 573—app. & e. 228; fixt. 6, 14; forc. e. & d. 30; judgm. 951; j. p. 159.
Leavenworth v. Greenville &c. Co. 82 M. 578—ev. 451; tax. 419.
Leavenworth, Crittenden v.—62 M. 32.
LeBlanc v. Illinois Cent. R. Co., 72 M. 669—adv. pos. 74; can. of i. 25; tax. 143, 231, 389, 696, 699.
LeBlanc v. Illinois Cent. R. Co. 73 M. 463—app. & e. 1221; judgm. 299.
LeBlanc, Illinois Cent. R. Co. v.—74 M. 626.
LeBlanc, Illinois Cent. R. Co. v.—74 M. 650.
Lecharle v. Bowers, 3 S. & M. 641—frds. st. of, 24.
Ledbetter v. State, 61 M. 22—crim. l. 761.
Ledbetter, Freeman v.—43 H. 165.
Ledbetter, Harvey v.—48 M. 95.
Ledbetter, Lodham v.—1 H. 43.
Ledbetter, Perkins v.—68 M. 327.
Ledyard v. Henderson, 46 M. 260—judgm. 386.
Ledyard, McIntyre v.—Sm. & M. Ch. 91.
Lee v. Bennett, 31 M. 119—app. & e. 900, 909; ex. & ad. 17; wills, 27, 205.
Lee v. Boykin, 13 S. & M. 528—costs, 273.
Lee v. Caswell, 92 M. 357—hus. & w. 243.
Lee v. Dozier, 40 M. 477—app. & e. 496, 510, 1176; cncts. 35; cov. 107; judgm. 18, 572; plead. 32, 87, 272.
Lee v. Dozier, 40 M. 581—frds. st. of, 114.
Lee v. Gardiner, 26 M. 521—abate. & r. 59, 65; assign. 80; debt, act. 1; det. 11; ev. 332; ex. & ad. 117, 400, 450, 451, 453, 537c; judgm. 12, 910, 911; parties, 4.
Lee v. Griffin, 31 M. 632—subrog. 5.
Lee v. Hampton, 79 M. 321—mast. & s. 8, 42.
Lee v. Hawks, 68 M. 669—frds. st. of, 139, 144; tresp. 9.
Lee v. Hooker, 7 S. & M. 601—new tr. 96, 102, 149.
Lee v. Jenkins, 30 M. 592—inf. 90.
Lee v. Montgomery, W. 109—eq. 61; inj. 9.
Lee v. Newman, 55 M. 365—ev. 390; frds. st. of, 17, 56; ven. & pur. 275, 280.
Lee v. Peters, 1 S. & M. 503—attch. 112.
Lee v. Portwood, 41 M. 109—bailm. 6; sales, 234.
Lee v. State, 45 M. 114—crim. l. 517, 1174; gr. jury, 17; ind. 11b; jury, 82, 103.
Lee v. State, 51 M. 566—crim. l. 508, 637, 711; trial, 112.
Lee v. State, 51 M. 665—bail, 80, 93; judgm. 564.
Lee v. State, 75 M. 625—crim. l. 720, 782.
Lee v. Styles, 95 M. 623—bridges, 34.
Lee, Ash v.—51 M. 101.
Lee, Board of Levee Com'rs v.—85 M. 508.
Lee, Butler v.—54 M. 476.
Lee County v. Gilbert, 70 M. 791—paup. 48.
Lee County, Beard v.—51 M. 542.
Lee County, Freeman v.—66 M. 1.
Lee County, Jones v.—12 So. 341.
Lee County, Reese v.—49 M. 639.
Lee County, Thomas v.—53 So. 585.
Lee, Davis v.—26 M. 505.
Lee, Hutchins v.—W. 293.
Lee, Illinois Cent. R. Co. v.—71 M. 895.
Lee, Liverman v.—86 M. 370.
Lee, McNeill v.—79 M. 455.
Lee, Mason v.—96 M. 186.
Lee, Matthews v.—25 M. 417.
Lee, Moore v.—51 M. 375.
Lee Mut. Life Ins. Assn. Stewart v.—64 M. 499.
Lee, Richards v.—91 M. 657.
Lee, State v.—72 M. 281.
Lee, Stinson v.—68 M. 113.
Lee, White v.—52 So. 206.
Lee, Woodhouse v.—6 S. & M. 161.
Lee, Yazoo-Mississippi Delta v.—85 M. 508.
Lee &c. Fire Ins. Co. v. State, 60 M. 395—ind. 8; ins. 7, 29.
Leech v. Gilmore, 2 Miss. Dec. 583—eq. 360; lim. of act. 185.
Leech v. Hirshman, 90 M. 723—deeds, 70.
Leech v. Irving, 2 H. 887—cert. 60.
Leek v. Flint, 33 So. 494—plead. 261.
Leek Milling Co. v. Langford, 81 M. 728—cncts. 327; dam. 21.
Lees, Cobb v.—60 M. 343.
LeFevre, Rigby v.—58 M. 639.
Leflore v. Justice, 1 S. & M. 381—app. & e. 1001; new tr. 13; sales, 265, 343.
LeFlore v. Miller, 64 M. 204—sales, 478.
Leflore, Co-operative Life Assn. v.—53 M. 1.
Leflore County v. Allen, 80 M. 298—counties, 228; crim. l. 43; deeds, 71, 75, 121; des. & d. 1; lim. of act. 39, 70a.
Leflore County v. Allen, see Allen v. Leflore County.
Leflore County v. Bush, 76 M. 551—pub. lands, 55.
Leflore County v. Cannon, 81 M. 334—counties, 121; waters, 53.
Leflore County v. Carroll County, 61 M. 220—counties, 16, 187.
Leflore County v. State, 70 M. 769—anim. 47, 91; elec. 95; mand. 73, 154.
Leflore County, Allen v.—78 M. 671.
Leflore County, Allen v.—80 M. 298.

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Leflore County, Bowles v.—85 M. 387.
Leflore County, Turner v.—93 M. 188.
Leflore County, Young v.—81 M. 466.
Leflore, Miller v.—32 M. 634.
Leflore, Robinson v.—59 M. 148.
Lefoldt, White v.—78 M. 173.
Lefoldt, Yazoo &c. R. Co. v.—87 M. 317.
Leftwich v. Orne, Freem. Ch. 207—eq. 141, 249.
Leftwitch v. Coleman, 3 H. 167—cov. 26.
Legard v. Gholson, 24 M. 692—mon. recd. 1, 12.
Leggett v. Burkhalter, 30 M. 421—inj. 148.
Leggett v. Morris, 6 S. & M. 723—judgm. 428; new tr. 96.
Leggett v. Ryan, 55 M. 379—costs, 127.
Leggett v. Simmons, 7 S. & M. 348—slaves, 16.
Leggett, Hazlip v.—6 S. & M. 326.
Leggett, Langford v.—54 So. 856.
Leggett, Magee v.—48 M. 139.
Leggett, Petty v.—38 So. 549.
Legori v. State, 8 S. & M. 697—int. liq. 207, 223.
Lehman v. George, 56 So. 167—ex. & ad. 225.
Lehman v. Porter, 73 M. 216—int. liq. 34.
Lehman v. Powe, 95 M. 446—eq. 410; ex. & ad. 415b, 415d, 416.
Lehman, Ex parte, 60 M. 967—clks. of c. 8; offic. 66.
Lehman, Murray v.—61 M. 283.
Lehr v. Hall, 5 H. 54—ex. & ad. 537h; judgm. 951.
Lehr v. Rogers, 3 S. & M. 468—execution, 75, 221, 333; sheriffs, 87.
Lehr v. Tarball, 2 H. 905—ev. 346; ex. & ad. 35.
Leigh v. Harrison, 69 M. 923—execution, 40, 41; life est. 1, 3, 28; wills, 73, 471, 685.
Leigh, Carothers v.—60 M. 258.
Leigh, Lowndes County v.—69 M. 754.
Leigh, Rittenhouse v.—57 M. 697.
Leinkauf v. Barnes, 66 M. 207—hus. & w. 149; statut. 194.
Leinkauf v. Brinker, 62 M. 255—ev. 152; fraud. conv. 289.
Leinkauff, Brinker v.—64 M. 236.
Leiper v. Hoffman, 26 M. 615—slaves, 13, 22.
Leland v. State, 82 M. 132—larc. 69.
Leland, Anderson v.—46 M. 290.
Leland, Anderson v.—48 M. 253.
Lemle, Gay v.—32 M. 309.
Lemler, Jackson v.—83 M. 37.
Lemly v. State, 69 M. 628—crim. l. 1069.
Lemly v. State, 70 M. 241—int. liq. 122.
Lemmon v. Dunn, 61 M. 210—eq. 115, 117; mtg. 338.
Lemon v. Peyton, 64 M. 161—int. liq. 6, 25, 32; judges, 41; prohib. 6.
Lemon v. Rogge, 11 So. 470—ven. & pur. 275, 317; wills, 613.
Lemon v. State, 95 M. 526—crim. l. 883.
Lemon, Crow v.—69 M. 799.
Lemon, Holmes v.—15 So. 141.
Lemonius v. Mayer, 71 M. 514—gaming, 2, 32; statut. 202.
Lemon, Stokes v.—96 M. 868.
Lengsfield v. Richardson, 52 M. 443—cncts. 326; usury, 61; ven. & pur. 322, 324; witn. 197.
Lenoir v. Bridges, 2 Miss. Dec. 554—life est. 10; tax. 631.
Lenoir v. Moore, 61 M. 400—bills & n. 539; paymt. 60.
Lenoir v. People's Bank, 87 M. 559—app. & e. 1007; ev. 358.
Lenoir, Allen v.—53 M. 321.
Leonard v. Cameron, 39 M. 419—ex. & ad. 380.
Leonard v. Canton, 35 M. 189—int. liq. 9; mun. corp. 58, 977; paymt. 85.
Leonard, Arnold v.—12 S. & M. 258.
Leonard, Building &c. Assn. v.—74 M. 810.
Leonard, District Grand Lodge I. O. O. F. v. —92 M. 777.
Leonard, Home &c. Assn. v.—77 M. 39.
Lepnick v. Gaddis, 72 M. 200—neg. 42.
Lesley v. Rosson, 39 M. 368—frds. st. of, 62; partners. 313.
Leslie, Dickerson v.—94 M. 627.
Leslie, Hyatt v.—10 So. 672.
Lesser, Shorter v.—54 So. 155.
Lessley v. Phipps, 49 M. 790—const. law, 113, 180; home. 154.
Lessley, Bonner v.—61 M. 392.
Lessly v. Ogden, 83 M. 442—eq. 351, 875.
Lester v. Barnett, 33 M. 584—app. & e. 704.
Lester v. Harris, 41 M. 668—app. & e. 185, 892; courts, 185.
Lester v. Jackson, 69 M. 887—mun. corp. 221.
Lester v. Miller, 76 M. 309—int. liq. 29, 32.
Lester v. Mississippi Home Ins. Co. 19 So. 99 —ins. 283, 323.
Lester v. Watkins, 41 M. 647—appr. 7; atty. & c. 69.
Lester, Brown v.—13 S. & M. 392.
Lester, Sillers v.—48 M. 513.
Letchford v. Cary, 52 M. 791—eject. 8; home. 34, 184; ten. in c. 3.
Letchford, McLean v.—60 M. 169.
Letninger, Cantrell v.—44 M. 437.

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Levee Commissioners v. Brinkley, 19 So. 296—em. dom. 125.
Levee Commissioners v. Dillard, 76 M. 641—ev. 543; jury, 53.
Levee Commissioners v. Harkleroads, 62 M. 807—app. & e. 31; lev. 19.
Levee Commissioners v. Hemingway, 66 M. 289—lev. 34.
Levee Commissioners, Allen v.—57 M. 163.
Levee Commissioners, Brown v.—50 M. 468.
Levee Commissioners, Griffin v.—71 M. 767.
Levee Commissioners, Hughes v.—27 So. 744.
Levee Commissioners, Lowe v.—19 So. 346.
Levee Commissioners, Nugent v.—58 M. 197.
Levee Commissioners, Richardson v.—68 M. 589.
Levee District v. Illinois Cent. R. Co. 71 M. 752—lim. of act. 11, 84.
Levey v. Dyess, 51 M. 501—land. & t. 160; plead. 204.
Levi, Buckingham v.—23 M. 590.
Levi, Joseph v.—58 M. 843.
Levy v. Brown, 56 M. 83—atty. & c. 101, 103.
Levy v. Darden, 38 M. 57—hus. & w. 179, 230.
Levy v. Gray, 56 M. 318—estop. 70; trial, 253.
Levy v. Holberg, 67 M. 526—ven. & pur. 232.
Levy v. Holberg, 71 M. 66—ev. 272, 376; trial, 187, 194.
Levy v. Marx, 18 So. 575—attch. 179; fraud. conv. 266.
Levy v. Rossel, 82 M. 68—app. & e. 101.
Levy v. Rossel, 82 M. 527—exemp. 92; rec. 67.
Levy v. Royston, 84 M. 15—can. of i. 42; fraud. conv. 24.
Levy v. State, 89 M. 394—int. liq. 223.
Levy, Allen v.—59 M. 613.
Levy, Anding v.—57 M. 51.
Levy, Anding v.—60 M. 487.
Levy, Barber v.—73 M. 484.
Levy, Cross v.—2 Miss. Dec. 116.
Levy, Cross v.—57 M. 634.
Levy, Desmond v.—12 So. 26.
Levy, Desmond v.—12 So. 481.
Levy, Hiller v.—66 M. 30.
Levy, Hooker v.—18 So. 385.
Levy, Jones v.—92 M. 551.
Levy, King v.—13 So. 282.
Levy, King v.—13 So. 283.
Levy, McMath v.—74 M. 450.
Levy, Mississippi Cotton Compress &c. Co. v. 83 M. 774.
Levy, Shackelford v.—63 M. 125.
Levy, Weille v.—74 M. 34.
Levy, Winn v.—2 H. 902.
Lewellen, Hogue v.—42 M. 302.
Lewenberg, Heatherington v.—61 M. 372.
Lewenthal, Decell v.—57 M. 331.
Lewenthall v. Mississippi Mills, 55 M. 101—attch. 1.
Lewenthall v. State, 51 M. 645—counties, 113; guard. & w. 177; tax. 567, 568b, 568c.
Lewenthal, State v.—55 M. 589.
Lewis v. Black, 27 M. 425—app. & e. 1025, 1040; libel, 7, 26, 35, 79, 94, 95, 123; plead. 233.
Lewis v. Boguechitto, 76 M. 356—tax. 801.
Lewis v. Buckley, 73 M. 58—lim. of act. 181.
Lewis v. Capital State Bank, see Capital State Bank v. Lewis.
Lewis v. Cline, 5 So. 112—judgm. 403; partners. 197, 218.
Lewis v. Dunlop, 57 M. 130—garn. 132.
Lewis v. Farrish, 1 H. 547—new tr. 52; slaves, 7.
Lewis v. Garrett, 5 H. 434—jury, 27; sheriffs, 106, 122, 159; tax. 569.
Lewis v. Gilmer, 3 S. & M. 560—sales, 465, 471.
Lewis v. Johnson, W. 260—clks. of c. 64; judgm. 874.
Lewis v. Lusk, 35 M. 401—wills, 473, 851.
Lewis v. Lusk, 35 M. 696—ex. & ad. 114.
Lewis v. McCracken, 89 M. 229—replev. 23.
Lewis v. Miller, 13 S. & M. 110—app. & e. 100; cmpt. 66.
Lewis v. Mutual Reserve &c. Assn. 27 So. 649—ins. 379.
Lewis v. Planters' Bank, 3 H. 267—bills & n. 399, 403.
Lewis v. Robertson, 13 S. & M. 558—banks, 77; corp. 88.
Lewis v. Seibles, 65 M. 251—eject. 24; tax. 734a.
Lewis v. Starke, 10 S. & M. 120—bills & n. 261; chat. m. 249, 257; liens, 16; mtg. 414; princ. & s. 147.
Lewis v. State, 9 S. & M. 115—crim. l. 855; hom. 203, 213, 216; jury, 109; slaves, 18c.
Lewis v. State, 41 M. 686—bail, 80.
Lewis v. State, 49 M. 354—ars. 18; crim. l. 967; ind. 107, 110.
Lewis v. State, 2 Miss. Dec. 567—hom. 332.
Lewis v. State, 65 M. 468—action, 18; clks. of c. 73; plead. 110.
Lewis v. State, 85 M. 35—burg. 40; crim. l. 508, 671, 1152; jury, 78, 85, 109; witn. 345.
Lewis v. State, 91 M. 505—civ. r. 10.
Lewis v. State, 93 M. 697—crim. l. 377, 381, 814, 829.
Lewis v. Vicksburg &c. R. Co. 67 M. 82—tax. 231, 616.

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Lewis v. Washington County, 62 M. 160—counties, 47; pub. lands, 55.
Lewis v. White, 69 M. 352—home. 84.
Lewis v. Woods, 4 H. 86—spec. perf. 92.
Lewis, Aldrich v.—60 M. 229.
Lewis, Anderson v.—Freem. Ch. 178.
Lewis, Barr v.—71 M. 727.
Lewis, Boguechetto v.—75 M. 741.
Lewis, Brooke v.—1 H. 207.
Lewis, Cameron v.—56 M. 76.
Lewis, Cameron v.—56 M. 601.
Lewis, Cameron v.—59 M. 134.
Lewis, Capital State Bank v.—64 M. 727.
Lewis, Commercial Bank v.—13 S. & M. 226.
Lewis, Connell v.—W. 251.
Lewis, Dennison v.—6 H. 517.
Lewis, Dozier v.—27 M. 679.
Lewis, Ellison v.—57 M. 588.
Lewis-Herman Co. Lowenberg v.—94 M. 916.
Lewis, Irwin v.—50 M. 363.
Lewis, Lusk v.—32 M. 297.
Lewis, McNulty v.—8 S. & M. 520.
Lewis, Mallett v.—61 M. 105.
Lewis, Natchez v.—90 M. 310.
Lewis, Olive v.—45 M. 203.
Lewis, Parish v.—Freem. Ch. 299.
Lewis, Peine v.—64 M. 96.
Lewis, Perry v.—49 M. 443.
Lewis, Robinson v.—68 M. 69.
Lewis, Starke v.—23 M. 151.
Lewis, Vicksburg &c. R. Co. v.—68 M. 29.
Lexington v. Hoskins, 96 M. 163—adv. pos. 8; ev. 372.
Lexington v. Sargent, 64 M. 621—cert. 24; int. liq. 76.
Lexington v. Union Nat. Bank, 75 M. 1—banks, 261; mun. corp. 918, 927, 928, 931, 932, 952.
Lexington Lodge, No. 24, F. & A. M. v. Beall, 94 M. 521—party w. 4, 8, 10.
L'Hote v. Boyet, 85 M. 636—corp. 566.
Lichtenstein v. Dial, 68 M. 54—assign. f. b. c. 389; rec. 195.
Lick v. State, 42 M. 316—int. liq. 44, 61.
Lick, Wilczinski v.—68 M. 596.
Liddell v. Sims, 9 S. & M. 596—cncts. 92, 211; cov. 26; eq. 340; ven. & pur. 30, 112, 123.
Liddell, Western Union Tel. Co. v.—68 M. 1.
Lidell, O'Brien v.—10 S. & M. 371.
Lieber, Schwartz v.—79 M. 257.
Lieber, Schwartz v.—32 So. 954.
Lienkauf Banking Co. v. Haney, 93 M. 613—bills & n. 117; sales, 478.
Ligard v. Gholson, 24 M. 691—judgm. 862.
Light, Brame v.—95 M. 26.
Lightcap, Richardson v.—52 M. 508.
Lightcap, Yazoo City v.—82 M. 148.
Light &c. Co. v. Jackson, 73 M. 598—dam. 75; mun. corp. 226, 250, 255.
Light &c. Co. Wilkinson v.—78 M. 389.
Ligon v. Allen, 56 M. 632—acct. acti. on, 1; bankr. 152.
Ligon v. Barton, 88 M. 135—deeds, 55; estop. 73; subrog. 17; ven. & pur. 231.
Ligon v. Bishop, 43 M. 527—attch. 154; ex. & ad. 445.
Ligon v. Foster, 63 M. 241—trusts, 169.
Ligon v. Spencer, 58 M. 37—dower, 33, 46.
Ligon, Alabama &c. R. Co. v.—74 M. 176.
Ligon, Citizens' Mut. Ins. Co. v.—59 M. 305.
Ligon, Cook v.—54 M. 368.
Ligon, Cook v.—54 M. 625.
Ligon, Cook v.—54 M. 652.
Ligon, Greenwood v.—10 S. & M. 615.
Ligon, Terrell v.—W. 170.
Ligon, Vicksburg &c. R. Co. v.—1 Miss. Dec. 507.
Ligon, Wheeler v.—62 M. 560.
Lile v. Hopkins, 12 S. & M. 299—assign. 97; judgm. 844; sales, 264.
Liles v. Cawthorn, 78 M. 559—app. & e. 45; counties, 47; waters, 58, 59.
Lillard v. Planters' Bank, 3 H. 78—bills & n. 461, 472; parties, 81; plead. 293.
Lillybeck, Weatherbee Bros. v.—86 M. 156.
Lilly, Bolen v.—85 M. 344.
Lilly, Evans v.—95 M. 58.
Lilly, Kansas City &c. R. Co. v.—8 So. 644.
Lilly, Turner v.—56 M. 576.
Lilly, Tyer v.—81 M. 606.
Lincoln, Anderson v.—5 H. 279.
Lincoln County v. Brookhaven, 90 M. 5—high. 123.
Lincoln County, Conerly v.—55 So. 963.
Lincoln, Cox v.—2 Miss. Dec. 128.
Lincoln, First State Bank v.—53 So. 387.
Lindenmayer v. Gunst, 70 M. 693—lim. of act. 39, 86; tresp. 35.
Linder v. Aaron, 5 H. 581—attch. 77, 110, 132.
Lindsey v. Attorney General, 33 M. 508—com. l. 14; ev. 44; offic. 30; quo. w. 1, 24, 27, 33, 45, 48.
Lindsey v. Bates, 42 M. 397—liens, 13; mtg. 234, 247, 432; partners. 241; ven. & pur. 254, 257, 261, 273.
Lindsey v. Goforth, 22 So. 828—paymt. 72.
Lindsey v. Henderson, 27 M. 502—app. & e. 181, 652; eject. 65; excep. 24; execution, 23; judgm. 788; pub. lands, 114.
Lindsey v. Herd, W. 18—j. p. 170.
Lindsey v. Lindsey, 34 M. 432—auc. 8; sales, 40; slaves, 7a; ven. & pur. 32.

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Lindsey v. Marshall, 12 S. & M. 587—schools, 18.
Lindsey v. Platner, 23 M. 576—trusts, 102.
Lindsey v. Sellers, 26 M. 169—bills & n. 106; cncts. 70, 103; new tr. 160.
Lindsey, Been v.—2 S. & M. 581.
Lindsey, Cook v.—34 M. 451.
Lindsey, Wenans v.—1 H. 577.
Lindsley v. Coahoma County, 69 M. 815—counties, 2; courts, 45, 88.
Lindsley, Alliston v.—12 S. & M. 656.
Lindzey v. State, 65 M. 542—const. law, 197, 200; weap. 3.
Linecum, Goode v.—1 H. 281.
Link, Williams v.—64 M. 641.
Lintol, Rulon v.—2 H. 891.
Lipscomb v. Jack, 20 So. 883—mtg. 38; parties, 28.
Lipscomb v. Postell, 38 M. 476—app. & e. 523; ev. 162; ex. & ad. 535, 537h; judgm. 667, 678; princ. & s. 66.
Lipscomb v. State, 75 M. 559—courts, 204; crim. l. 695, 763, 784, 1170, 1184; hom. 200, 203, 213, 214, 215, 218, 267.
Lipscomb v. State, 76 M. 223—crim. l. 540, 575, 592, 608, 633, 662, 697, 1144, 1156, 1165, 1168; sheriffs, 25, 85.
Lipton Co. Bonds v.—85 M. 209.
Lisle, Marsh v.—34 M. 173.
Lisloff v. Hart, 25 M. 245—deeds, 181; des. & d. 93; fraud. conv. 107; parent & c. 10; ven. & pur. 220, 228.
Lissa v. Posey, 64 M. 352—eject. 26; execution, 263, 268; judgm. 788; records, 9; ven. & pur. 275.
Lisso, Scharff v.—63 M. 213.
Litford v. State, 93 M. 419—jury, 116.
Littelle v. Creek Lumber Co. 54 So. 841—corp. 444.
Little v. Hamlin, 27 So. 528—corp. 549.
Little v. King, 3 So. 258—execution, 201.
Little v. Nelson, 61 M. 672—garn. 143, 180.
Little v. State, 87 M. 512—crim. l. 364; hom. 122.
Little v. Teague, 60 M. 115—mtg. 143.
Little, Baldwin v.—64 M. 126.
Little, Bledsoe v.—4 H. 13.
Little, Buck v.—24 M. 463.
Littlefield, Satterwhite v.—13 S. & M. 302.
Littlefield, White v.—7 H. 406.
Littlejohn v. Gordon, 32 M. 235—lim. of act. 167.
Littlejohn v. State, 59 M. 273—crim. l. 786, 815, 1173; larc. 75, 85.
Littlejohn, Opperman v.—54 So. 77.
Littlejohn, Western Union Tel. Co.—72 M. 1025.
Little, Myers v.—60 M. 203.
Little, Owen v.—W. 326.
Little, Surget v.—5 S. & M. 319.
Little, Surget v.—24 M. 118.
Little, Tallahatchie County v.—93 M. 88.
Little, Vicksburg Bank v.—67 M. 159.
Littlewort v. Davis, 50 M. 403—eq. 152; ev. 462; mtg. 31, 37; schools, 18, 77.
Livelar v. State, 53 So. 681—int. liq. 248.
Liverman v. Lee, 86 M. 370—partit. 109, 111, 114; subrog. 16; witn. 143.
Livermore v. Johnson, 27 M. 284—lim. of act. 36, 101, 183; trusts, 95.
Liverpool &c. Co. v. Cochran, 77 M. 348—ins. 282; ven. & pur. 54.
Liverpool &c. Ins. Co. v. Farnsworth, 72 M. 555—ins. 330, 377, 646.
Liverpool &c. Ins. Co. v. McGuire, 52 M. 227—ev. 507; ins. 115, 279, 323; rem. of c. 86.
Liverpool &c. Ins. Co. v. Sheffy, 71 M. 919—ins. 335, 336, 376, 383.
Liverpool &c. Ins. Co. v. Sorsby, 60 M. 302—app. & e. 154; ins. 336, 558, 560, 668.
Liverpool &c. Ins. Co. v. Threefoot, 71 M. 392—garn. 143.
Liverpool &c. Ins. Co. v. Van Os, 63 M. 431—app. & e. 881, 882; ins. 146, 149, 153, 161, 326, 378, 624, 645, 646; trial, 270.
Liverpool &c. Ins. Co. Swan v.—52 M. 704.
Livingston, Alabama &c. R. Co. v.—84 M. 1.
Livingston, Conwill v.—61 M. 641.
Livingston, McNutt v.—7 S. & M. 641.
Livingston, Matlock v.—9 S. & M. 489.
Livingston, Merchants' Wharfboat Assn. v.—3 So. 251.
Lizana v. Lang, 90 M. 469—assa. 8, 12, 39.
Lizano v. Pass Christian, 96 M. 640—mun. corp. 111, 183.
Lloyd v. Goodwin, 12 S. & M. 233—replev. 8, 69, 74; witn. 91.
Lloyd v. State, 70 M. 251—crim. l. 366; hom. 171.
Lloyd, Alexander v.—70 M. 662.
Lloyd, Barnes v.—1 H. 584.
Lloyd, Grant v.— 12 S. & M. 191.
L. M. Nicholson Co. Cowgill &c. Milling Co. v.—24 So. 880.
Loan Association, Cunningham v.—73 M. 516.
Lobbin, Moore v.—26 M. 304.
Lobdell v. Mason, 71 M. 937—forc. e. & d. 15; frds. st. of, 57; princ. & a. 117.
Lobdell, Glass v.—W. 105.

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Lochte v. Astin, 69 M. 271—deeds, 38, 114; tax. 734a, 764.
Lochte v. Mitchell, 28 So. 877—assa. 39.
Lock v. Jayne, 39 M. 157—ack. 49; deeds, 201, 207; ev. 74, 343, 345.
Lockard, Rushing v.—58 M. 660.
Locke v. Brady, 30 M. 21—execution, 99; judgm. 295, 870b, 870f, 870g.
Locke v. Friedman, 90 M. 3—jud. s. 43.
Locke v. Williams, 36 M. 187—ex. & ad. 314b.
Locke, Anderson v.—64 M. 283.
Locke, Rice v.—59 M. 189.
Lock, Gibson v.—58 M. 298.
Lockhart v. Camfield, 48 M. 470—ack. 54; eject. 8, 13; ev. 368, 590; hus. & w. 194; trial, 140, 194, 205.
Lockhart v. Luker, 36 M. 68—trial, 219; witn. 53.
Lockhart, Hamilton v.—41 M. 460.
Lockhart, Lucas v.—10 S. & M. 466.
Lockman v. Miller, 22 So. 822—eq. 340, 344; ev. 332; quiet. t. 37.
Lockridge, Cowden v.—60 M. 385.
Lockwood v. Rainey, 19 So. 294—garn. 48, 130.
Lodge No. 95 B. P. O. E. State v.—13 So. 255.
Loeb v. Chicago &c. R. Co. 60 M. 933—chat. m. 235; paymt. 5; r. r. 429.
Loeb v. Duncan, 63 M. 89—int. liq. 75.
Loeb v. Morton, 63 M. 280—attch. 217; j. p. 86; partners. 194, 208, 220; princ. & a. 145.
Loeb, Burns v.—59 M. 167.
Loeb, Stadeker v.—67 M. 200.
Loeb, Willis v.—59 M. 169.
Lofland, Martin v.—8 S. & M. 352.
Lofland, Martin v.—10 S. & M. 317.
Loftin v. State, 1 Miss. Dec. 105—crim. l. 1169; hom. 174.
Loftin v. State, 11 S. & M. 358—crim. l. 1006, 1018, 1076.
Lofton v. State, 79 M. 723—hom. 10, 300g.
Logan v. Johnson, 72 M. 185—trusts, 89.
Logan v. State, 50 M. 269—crim. l. 897; gr. jury, 19; jury, 83, 84, 97, 100, 101, 103, 132, 133.
Logan v. State, 53 M. 431—crim. l. 935, 1144; statut. 183.
Logan v. State, 40 So. 323—crim. l. 290, 291, 937.
Loggins, Burks v.—39 M. 462.
Loggins, Jones v.—37 M. 546.
Loggins, Ramoneda v.—89 M. 225.
Logue, Marx v.—71 M. 905.
Lohrey v. State, 91 M. 853—larc. 51.
Lombard v. Lombard, 57 M. 171—courts, 88, 93; des. & d. 6, 53; dower, 22.
Lombard v. Martin, 39 M. 147—frds. st. of, 26, 158; guar. 3; princ. & s. 9, 10; trial, 228, 252.
Lombard v. Whiting, W. 229—atty. & c. 101, 126; sheriffs, 125; statut. 244.
Lombard, Fowlkes v.—11 So. 724.
Lombard, Harris v.—60 M. 29.
Lombard, Vicksburg v.—51 M. 111.
Lombat, Mobley v.—7 H. 318.
London Assurance Co. v. Cowan, 71 M. 928—ins. 182, 677.
London Assur. Co. Gowan v.—19 So. 298.
London Assur. Co. Cowan v.—73 M. 321.
London Guarantee &c. Co. v. Miss. Cent. R. Co. 52 So. 787—app. & e. 1056; cust. & u. 21; ins. 376, 383, 512, 565, 668.
Long v. Eaves, 56 So. 178—gaming, 12.
Long v. Hickingbottom, 28 M. 772—hus. & w. 111, 146; sales, 263, 269.
Long v. McGregor, 65 M. 70—eq. 25; usury, 95.
Long v. Mayes, 94 M. 735—wills, 564, 730, 733.
Long v. Schackelford, 25 M. 559—app. & e. 906, 925; cncts. 54; judgm. 894.
Long v. Stanley, 79 M. 298—alt. inst. 24; quiet. t. 43; tax. 796.
Long v. State, 52 M. 23—crim. l. 594, 636, 1085; hom. 18, 32, 112, 115, 116, 167, 244, 276, 300a, 300f, 308, 341.
Long v. State, 81 M. 448—burg. 30; crim. l. 244, 416, 547, 718.
Long v. State, 94 M. 230—crim. l. 260.
Long v. State, 56 So. 185—seduct. 46.
Long v. United States Bank, Freem. Ch. 375—execution, 153, 153c, 154, 154a, 155.
Longacre v. State, 2 H. 637—sheriffs, 163.
Long, Early v.—89 M. 285.
Long, Fatheree v.—5 H. 661.
Long, Goddard v.—5 S. & M. 782.
Long, Hannah v.—14 So. 520.
Longino v. Delta Bank, 75 M. 407—guard. & w. 23.
Longino v. Delta Bank, 76 M. 395—execution, 32.
Long, Jefferson Davis County v.—94 M. 538.
Long, Morgan v.—73 M. 406.
Loomis v. Commercial Bank, 4 H. 660—j. p. 31, 192.
Loomis, Scott v.—13 S. & M. 635.
Loper v. State, 3 H. 429—cert. 35; crim. l. 141, 145, 897, 1011, 1031, 1088, 1105.
Lopez v. Jackson, 79 M. 460—app. & e. 553.
Lopez v. Jackson, 80 M. 684—dam. 215; trial, 190.
Lopez, Clark v.—75 M. 932.

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Lopez, Kneale v.—93 M. 201.

Lorance v. Platt, 67 M. 183—judgm. 236, 716.

Lorch, Haise v.—47 M. 685.

Lord, Moore v.—50 M. 229.

Loring v. Willis, 4 H. 383—forc. e. & d. 5, 15, 17; trial, 252.

Lott v. Collins, 1 Miss. Dec. 311—judgm. 71; replev. 127.

Lott v. Michel, 16 So. 794—execution, 172.

Lott v. Payne, 82 M. 218—ease. 12; eject. 19.

Lott v. State, 83 M. 609—hom. 88.

Lott, Craft v.—87 M. 590.

Loughridge v. Bowland, 52 M. 546—attch. 326; fraud. conv. 154, 164, 212, 241; judgm. 491; lim. of act. 56; ven. & pur. 229, 231, 232.

Loughbridge v. State, 3 So. 667—int. liq. 205.

Loughridge, Moffatt v.—51 M. 211.

Louisiana Nat. Bank v. Knapp, 61 M. 485—exch. of prop. 2; ven. & pur. 254a, 275.

Louisville Banking Co. v. Paine, 67 M. 678—banks, 167.

Louisville &c. R. Co. v. Bigger, 66 M. 319—carr. 120, 163, 216, 218.

Louisville &c. R. Co. v. Blythe, 69 M. 939—const. l. 51; em. dom. 70, 179; guard. & w. 2, 76; r. r. 63, 140.

Louisville &c. R. Co. v. Brewer, 1 Miss. Dec. 42—r. r. 443.

Louisville &c. R. Co. v. Buford, 73 M. 494—adv. pos. 24, 67, 96, 100; lev. 28e; tax. 679a.

Louisville &c. R. Co. v. Caster, 5 So. 388—r. r. 417, 446.

Louisville &c. R. Co. v. Conroy, 63 M. 562—carr. 316; mast. & s. 195, 198, 203; r. r. 291.

Louisville &c. R. Co. v. Cooper, 68 M. 368—r. r. 273½, 375, 380.

Louisville &c. R. Co. v. Crayton, 69 M. 152—app. & e. 1055; carr. 317, 381; crim. l. 941; ev. 111; new trial, 104.

Louisville &c. R. Co. v. Crominarity, 86 M. 464—r. r. 328, 337.

Louisville &c. R. Co. v. Day, 67 M. 227—app. & e. 1140, 1172; estop. 92.

Louisville &c. R. Co. v. Dick, 95 M. 111—r. r. 315.

Louisville &c. R. Co. v. Dickson, 63 M. 380—em. dom. 124, 225.

Louisville &c. R. Co. v. Douglass, 69 M. 723—mast. & s. 302, 302d, 306; r. r. 281.

Louisville &c. R. Co. v. Durfree, 69 M. 439—r. r. 326.

Louisville &c. R. Co. v. French, 69 M. 121—r. r. 233, 234, 246, 311, 357.

Louisville &c. R. Co. v. Gulf of Mexico Land &c. Co. 82 M. 180—adv. pos. 34, 102; ven. & pur. 18.

Louisville &c. R. Co. v. Hart, 2 Miss. Dec. 384—r. r. 452.

Louisville &c. R. Co. v. Hirsch, 69 M. 126—neg. 94, 136; r. r. 274, 357, 359, 393.

Louisville &c. R. Co. v. Hopson, 73 M. 773—em. dom. 124.

Louisville &c. R. Co. v. McCaskell, 53 So. 348—app. & e. 82, 882, 1066; courts, 8.

Louisville &c. R. Co. v. McCollister, 66 M. 106 costs, 211; judgm. 16; j. p. 69, 122, 170.

Louisville &c. R. Co. v. McDonald, 79 M. 641—excep. 40; nav. wat. 26.

Louisville &c. R. Co. v. Mask, 64 M. 738—carr. 271, 277, 294, 372; jury, 53, 92.

Louisville &c. R. Co. v. Maybin, 66 M. 83—carr. 354, 382, 364; parent & c. 13; witn. 269.

Louisville &c. R. Co. v. Natchez &c. R. Co. 67 M. 399—ev. 507; r. r. 471, 482, 485.

Louisville Banking Co. v. Paine, 67 M. 678—banks, 80.

Louisville &c. R. Co. v. Patterson, 69 M. 421—carr. 266.

Louisville &c. R. Co. v. Petty, 67 M. 255—mast. & s. 198.

Louisville &c. R. Co. v. Phillips, 12 So. 825—r. r. 408.

Louisville &c. R. Co. v. Pool, 72 M. 487—j. p. 189; r. r. 436, 439; venue, 12.

Louisville &c. R. Co. v. Ryan, 64 M. 399—em. dom. 129, 199, 246; ev. 323.

Louisville &c. R. So. v. Saucier, 1 So. 511—r. r. 417, 435.

Louisville &c. R. Co. v. Smith, 67 M. 15—r. r. 251, 441, 443.

Louisville &c. R. Co. v. State, 66 M. 662—civ. r. 7; com. 47.

Louisville &c. R. Co. v. Stewart, 78 M. 600—dam. 105; ev. 113.

Louisville &c. R. Co. v. Suddoth, 70 M. 265—app. & e. 1063; r. r. 447; trial, 267.

Louisville &c. R. Co. v. Tate, 70 M. 348—r. r. 446; trial, 187, 194b; witn. 317.

Louisville &c. R. Co. v. Taylor, 68 M. 361—tax. 231, 248.

Louisville &c. R. Co. v. Telegraph Co. 68 M. 806—em. dom. 170, 238.

Louisville &c. R. Co. v. Thomas, 1 Miss. Dec. 317—r. r. 41; witn. 253.

Louisville &c. R. Co. v. Thomas, 87 M. 600—app. & e. 1033; death, 45; mast. & s. 113, 265, 278, 285, 289, 290.

Louisville &c. R. Co. v. Thompson, 64 M. 584—dam. 132; r. r. 304, 326; trial, 131.

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Louisville &c. R. Co. v. Van Eaton, 11 So. 111—r. r. 443.
Louisville &c. R. Co. v. Van Eaton, 14 So. 267—trial, 113.
Louisville &c. R. Co. v. Whitehead, 71 M. 451—trial, 187, 194b.
Louisville &c. R. Co. v. Williams, 69 M. 631—neg. 7; r. r. 273½, 359, 375.
Louisville &c. R. Co. Adams v.—13 So. 932.
Louisville &c. R. Co. Armistead Lumber Co. v.—11 So. 472.
Louisville &c. R. Co. Balfour v.—62 M. 508.
Louisville &c. R. Co. Beck v.—65 M. 172.
Louisville &c. R. Co. Bedford v.—65 M. 385.
Louisville &c. R. Co. Cage v.—7 So. 509.
Louisville &c. R. Co. Cameron v.—69 M. 78.
Louisville &c. R. Co. Coffee v.—76 M. 569.
Louisville &c. R. Co. Davis v.—69 M. 136.
Louisville &c. R. Co. Day v.—69 M. 589.
Louisville &c. R. Co. Dowd v.—68 M. 159.
Louisville &c. R. Co. Evans v.—70 M. 527.
Louisville &c. R. Co. Fairchild v.—94 M. 887.
Louisville &c. R. Co. George v.—88 M. 306.
Louisville &c. R. Co. Hatchett v.—1 Miss. Dec. 38.
Louisville &c. R. Co. Higgins v.—64 M. 80.
Louisville &c. R. Co. Hopson v.—71 M. 503.
Louisville &c. R. Co. Howard v.—67 M. 247.
Louisville &c. R. Co. Kent v.—67 M. 608.
Louisville &c. R. Co. Kimball v.—94 M. 396.
Louisville &c. R. Co. McMurtray v.—67 M. 601.
Louisville &c. R. Co. Madden v.—66 M. 258.
Louisville &c. R. Co. Millsaps v.—69 M. 423.
Louisville &c. R. Co. Miss. Home Ins. Co. v.—70 M. 119.
Louisville &c. R. Co. Mitchell v.—1 Miss. Dec. 154.
Louisville &c. R. Co. Peters v.—48 So. 296.
Louisville &c. R. Co. Reid v.—16 So. 675.
Louisville &c. R. Co. Rose v.—70 M. 725.
Louisville &c. R. Co. Shotwell v.—69 M. 541.
Louisville &c. R. Co. Sinai v.—71 M. 547.
Louisville &c. R. Co. Smith v.—62 M. 510.
Louisville &c. R. Co. State v.—51 So. 918.
Louisville &c. R. Co. State v.—53 So. 454.
Louisville &c. R. Co. Theobold v.—66 M. 279.
Louisville &c. R. Co. Troutman v.—95 M. 183.
Louisville &c. R. Co. Weightman v.—70 M. 563.
Louisville &c. R. Co. Weiss v.—7 So. 390.
Louisville &c. R. Co. White v.—72 M. 12.
Louisville &c R. Co. Wilczinski v.—66 M. 595.
Louisville &c. R. Co. Williamson v.—6 So. 205.
Loury v. Herbert, 25 M. 101—ex. & ad. 181.
Love v. Buchanan, 40 M. 758—ev. 449; wills, 505.
Love v. Law, 57 M. 596—land. & t. 66, 114, 243.
Love v. Pass, 14 S. & M. 158—eq. 53; judgm. 405, 428, 431; new tr. 96.
Love v. Shoape, W. 508—alt. inst. 1.
Love v. State, 8 So. 465—ind. 32; land. & t. 253.
Love v. Stone, 56 M. 449—app. & e. 171; dep. 110; estop. 118; witn. 127, 140, 157.
Love v. Taylor, 26 M. 567—ack. 19, 23, 56; bills & n. 327; statut. 184.
Love v. Yazoo City, 91 M. 535—mun. corp. 44, 223, 914.
Love, Jennings v.— 24 M. 249.
Lovejoy, Nations v.—80 M. 401.
Lovejoy, Sherman v.—30 M. 105.
Lovelady v. Davis, 33 M. 577—ex. & ad. 114, 523.
Lovelady v. Harkins, 6 S. & M. 412—app. & e. 664; attch. 110, 157.
Lovell, Griffin v.—42 M. 402.
Lovell, State v.—70 M. 309.
Love Mfg. Co. v. Queen City Mfg. Co. 74 M. 290—corp. 545.
Love Mfg. Co. Weems v.—74 M. 831.
Love, Moore v.—57 M. 765.
Love, Moore v.—2 Miss. Dec. 724.
Love, Yazoo &c. R. Co. v.—59 M. 109.
Loving, Jones v.—55 M. 109.
Low v. Coleman, 14 So. 267—chat. m. 235.
Low, Coleman v.—13 So. 227.
Lowe v. Alabama &c. R. Co. 81 M. 9—r. r. 441, 443.
Lowe v. Barnett, 38 M. 329—wills, 630.
Lowe v. Levee Commissioners, 19 So. 346—lev. 11.
Lowe, Alabama &c. R. Co. v.—73 M. 203.
Lowe, Kirkland v.—33 M. 423.
Lowenberg v. Lewis-Herman Co.—94 M. 916; chat. m. 138; partners. 141.
Lowenberg v. Tironi, 62 M. 19—abate. & r. 50.
Lowenberg, Parry Mfg. Co. v.—88 M. 532.
Lowenburg v. Jones, 56 M. 688—assign. 117, 120; carr. 177, 196; parties, 4.
Lowe, North v.—63 M. 31.
Lowenstein v. Aaron, 69 M. 341—attch. 47, 290, 293; ev. 107.
Lowenstein v. Abramsohn, 76 M. 890—attch. 368; eq. 15; fraud. conv. 294.
Lowenstein v. Bew, 68 M. 265—attch. 34.

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Lowenstein v. Goodbar, 69 M. 808—cncts. 268; princ. & a. 14; sales, 1, 36, 95.
Lowenstein v. Hooker, 71 M. 102—assign. f. b. c. 218, 221.
Lowenstein v. Leach, 16 So. 493—assign. f. b. c. 354.
Lowenstein v. Powell, 68 M. 73—app. & e. 340; attch. 184; trial, 169.
Lowenstein, New Orleans &c. R. Co. v.—11 So. 187.
Lowenstein, Scully v.—56 M. 652.
Lowenstein, Taylor v.—50 M. 278.
Lowenthal, Home Ins. Co. v.—36 So. 1042.
Lowenthal, Keene v.—83 M. 204.
Lower, Griffin v.—37 M. 458.
Lowery v. Craig, 30 M. 19—hus. & w. 115.
Lowery, Bohn v.—77 M. 424.
Lowery, McRae v.—80 M. 47.
Lowery, Moore v.—74 M. 413.
Lowery, Palmer v.—1 Miss. Dec. 579.
Lowndes County v. Leigh, 69 M. 754—counties, 47, 54; hab. corp. 24, 59.
Lowndes County, Hendricks v.—49 M. 612.
Lowndes County, Williams v.—27 M. 621.
Lowrey, Walton v.—74 M. 484.
Lowry v. Holden, 41 M. 410—courts, 198.
Lowry v. Houston, 3 H. 394—det. 3; ex. & ad. 118; hus. & w. 10, 11, 31f, 111.
Lowry v. Insurance Co. of North America, 75 M. 43—ins. 624.
Lowry v. Lowry, W. 207—interest, 4.
Lowry v. McDonald, Sm. & M. Ch. 620—ex. & ad. 367, 388d; jud. s. 52.
Lowry v. McMillan, 35 M. 147—ex. & ad. 307, 312, 315, 509.
Lowry v. Tullis, 32 M. 147—clks. of c. 3.
Lowry, Boyd v.—53 M. 352.
Lowry, Clary v.—51 M. 879.
Lowry, Garvin v.—7 S. & M. 24.
Lowry, Harper v.—6 H. 268.
Lowry, Jackson Electric R. &c. Co. v.—79 M. 431.
Lowry, Mann v.—58 M. 73.
Lowry, Vicksburg &c. R. Co. v.—61 M. 102.
Loyd v. Doll, 11 So. 608—guard. & w. 182c, 182f.
Loyd v. Kansas City &c. R. Co. 88 M. 422—carr. 59.
Loye, Oliver v.—59 M. 320.
Lucas v. Goff, 33 M. 629—evid. 586; wills, 136, 141, 302.
Lucas v. Lockhart, 10 S. & M. 466—execution, 41; ex. & ad. 121; trusts, 29; wills, 471, 673, 675.
Lucas v. Mortgage Co. 72 M. 366—estop. 68, 93, 104.
Lucas v. State, 71 M. 471—crim. l. 1184; ind. 191.
Lucas v. Stewart, 3 S. & M. 231—judgm. 789, 800.
Lucas v. Wauls, 12 S. & M. 157—bills & n. 375; eq. 25; judgm. 415, 431.
Lucas, Doty v.—43 M. 337.
Lucas, Illinois Cent. R. Co. v.—89 M. 411.
Lucas, Thornton v.—29 So. 400.
Lucas, Wallace v.—42 So. 607.
Luce, Adams v.—87 M. 220.
Luckett v. Henderson, 12 S. & M. 334—bills & n. 125; ev. 402, 419; usury, 112.
Luckett v. State, 51 M. 799—bail, 48; hab. corp. 40, 69.
Luckett, Allen v.—94 M. 868.
Luckett, Brock v.—4 H. 459.
Luckett, Gould v.—47 M. 96.
Luckett, Williams v.—77 M. 394.
Luckey v. Dykes, 2 S. & M. 60—wills, 857.
Luckey, State v.—51 M. 528.
Luker v. State, 14 So. 259—ars. 37; crim. l. 549.
Luker, Lockhart v.—36 M. 68.
Lum v. Fauntleroy, 80 M. 757—arb. & a. 82; judgm. 817, 937.
Lum v. Lasch, 93 M. 81—wills, 53, 55.
Lum v. Reed, 53 M. 71—app. & e. 482; eject. 120, 121.
Lum v. Reed, 53 M. 73—app. & e. 935; courts, 202c; eject. 16, 113; ex. & ad. 388; judgm. 17; land. & t. 279; partit. 40.
Lum v. Springer, 24 M. 479—guard. & w. 182d.
Lum v. State, 66 M. 389—bail, 44; crim. l. 1076.
Lum v. Steamboat Buckeye, 24 M. 564—attch. 3, 104.
Lum v. Vicksburg, 72 M. 950—mun. corp. 4, 88; statut. 94, 259; tax. 482.
Lumber Co. Pine Grove Lumber Co. v.—71 M. 944.
Lumber Mineral Co. v. King, 54 So. 250—app. & e. 553.
Lumber Mineral Co. v. Ramshur, 54 So. 313—guar. 91.
Lumberman's Indemnity Exch. Adams v.—55 So. 882.
Lumber Mineral Co. Harvey v.—96 M. 627.
Lumbley v. Gilruth, 65 M. 23—land. & t. 246.
Lumbley v. Thomas, 65 M. 97—agric. 11.
Lum, Commercial Bank v.—7 H. 414.
Lum, Kilcrease v.—36 M. 569.
Lum, Norcum v.—33 M. 299.
Lumpkin, Davis v.—57 M. 506.
Lumpkin, Stewart v.—51 So. 801.

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Lunch, McAfee v.—26 M. 257.
Lundy v. Case, 44 M. 669—app. & e. 963; crim. l. 596, 936, 937, 1151; new tr. 88.
Lundy, Cedar Rapids Bank v.—51 So. 4.
Lundy, Prophet v.—63 M. 603.
Lundy, Sigman v.—66 M. 522.
Lunenberger v. State, 74 M. 379—crim. l. 258; int. liq. 231.
Lusby v. Cobb, 80 M. 715—wills, 435, 441, 499.
Lusby v. Kansas City &c. R. Co. 73 M. 360—courts, 88; em. dom. 59; r. r. 54; tresp. 22.
Lusk v. Lewis, 32 M. 297—corp. 372; slaves, 1, 4, 7; wills, 215, 222, 308, 654, 688, 855.
Lusk v. McNamer, 24 M. 58—gifts, 5; sales, 234; slaves, 7; trusts, 203.
Lusk v. State, 64 M. 845—ars. 38; consp. 48; crim. l. 970, 1184; ind. 23.
Lusk v. Swayze, 35 M. 155—des. & d. 86.
Lusk, Copiah County v.—77 M. 136.
Lusk, Lewis v.—35 M. 401, 696.
Lutric, Grisham v.—76 M. 444.
Lutz v. Hartman Mercantile Co. 41 M. 1039—mtg. 312.
Lutz, Pendleton v.—78 M. 322.
Lyebrook v. Hall, 73 M. 509—adv. pos. 14, 62; land. & t. 67.
Lyell, Belknap v.—89 M. 197.
Lyle v. Clark, 24 So. 966—deeds, 178; subrog. 16; ven. & pur. 212.
Lyle v. McInnis, 17 So. 510—trial, 190.
Lyles v. Barnes, 40 M. 608—app. & e. 5, 857; courts, 185.
Lyles, Allen v.—35 M. 513.
Lyles, Garner v.—35 M. 176.
Lyles, Moody v.—44 M. 121.
Lyle, Wallace v.—37 So. 460.
Lyman, Carter v.—33 M. 171.
Lynch v. Commissioners of Sinking Fund, 4 H. 377—bills & n. 460; dism. 23; judgm. 96, 246.
Lynch v. State, 78 M. 347—hawk. p. 4.
Lynch v. Thompson, 61 M. 354—app. & e. 880; partners. 15, 128, 213.
Lynch, Miller v.—38 M. 344.
Lynch, Wheeler v.—89 M. 157.
Lyne v. State, 36 M. 617—crim. l. 424, 428, 519.
Lynn v. Gridly, W. 548—judgm. 799, 800a.
Lynn v. Illinois Cent. R. Co. 63 M. 157—plead. 204.
Lynn v. State, 36 M. 617—crim. l. 1169.
Lynn, Baum v.—72 M. 932.
Lyon v. Knott, 26 M. 548—des. & d. 2; hus. & w. 2, 10, 111.
Lyon v. Sanders, 23 M. 530—bills & n. 91, 139, 445; cncts. 93.
Lyon, Brannon v.—86 M. 401.
Lyon, Brown v.—81 M. 438.
Lyon, Bufkin v.—68 M. 255.
Lyon Co. Fresno Package Co. v.—53 So. 585.
Lyon, Hall v.—59 M. 218.
Lyon, Lawrence Lumber Co. v.—93 M. 859.
Lyons v. Jackson, 1 H. 474—app. & e. 1107; dism. 23; partners. 198, 206.
Lyons v. Steele, 86 M. 261—ins. 12.
Lyons, Melvin v.—10 S. & M. 78.
Lyon, Southern Pac. R. Co. v.—54 So. 728.
Lyons, State Nat. Bank v.—52 M. 181.
Lyons, Western Union Tel. Co. v.—93 M. 590.
Lyons, Whitworth v.—39 M. 467.
Lyon, Whitfield v.—93 M. 443.

M

Mabry v. Matheny, 10 S. & M. 323—bills & n. 440.
Mabry v. State, 71 M. 716—crim. l. 693, 806, 835, 1173; hom. 166, 167, 171; jury, 39, 52, 103, 109; trial, 194.
Mabry, Kansas City &c. R. Co. v.—67 M. 131.
McAdams v. Massey, 1 S. & M. 660—plead. 434.
McAdory v. Turner, 56 M. 666—j. p. 128; judgm. 407, 409, 507; land. & t. 279; replev. 127; plead. 85.
McAdory, Turner v.—58 M. 27.
McAfee v. Keirn, 7 S. & M. 780—Indians, 14; pub. lands, 34, 114.
McAfee v. Lynch, 26 M. 257—deeds, 108; eq. 43, 61; ind. 14.
McAfee v. Patterson, 2 S. & M. 593—dism. 42; judgm. 870, 870g; plead. 431.
McAfee v. Southern R. Co. 36 M. 669—states, 124; statut. 159, 225.
McAfee, Alabama &c. R. Co. v.—71 M. 70.
McAfee, Fulton v.—5 H. 751.
McAfee, Otey v.—38 M. 348.
McAffee v. Russell, 29 M. 84—offic. 95.
McAlexander v. Coopwood, 25 So. 488—dism. 48; forc. e. & d. 13.
McAlexander v. Puryear, 48 M. 420—app. & e. 999.
McAlister v. Moss Point, 96 M. 686—int. liq. 206, 207.
McAlister, Hawkins v.—86 M. 84.
McAllister v. Clopton, 51 M. 257—eq. 182, 192; mech. liens, 198.
McAllister v. Clopton, 60 M. 207—judgm. 748; sheriffs, 127.
McAllister v. Honea, 71 M. 256—chat. m. 48; deeds, 140; fraud. conv. 115.

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McAllister v. Jerman, 32 M. 142—usury, 27, 100, 130.
McAllister v. Mitchner, 68 M. 672—deeds, 67, 179, 181.
McAllister v. Moye, 30 M. 258—cov. 107; inf. 76, 79, 80; spec. perf. 97; ven. & pur. 153.
McAllister, Moore v.—34 M. 500.
McAllister v. Plant, 49 M. 628—eq. 392.
McAllister v. Plant, 54 M. 106—corp. 388, 440; mtg. 411; r. r. 119, 162, 166, 170, 183, 186, 188.
McAllister, Strauss v.—5 So. 625.
McAllun, Hopper v.—87 M. 441.
McAndrew, French v.—61 M. 187.
McAnulty v. Bingaman, 6 H. 382—execution, 185, 193, 199; fraud. conv. 154.
McAnulty v. Hodges, 33 M. 579—ex. & ad. 365.
McArthur, Mobile &c. R. Co. v.—43 M. 180.
McAuley v. Markis, W. 357—cncts. 112; gaming, 19; judgm. 415, 521.
McBain v. Rodgers, 29 So. 91—garn. 17.
McBean, Tegarden v.—33 M. 283.
McBeath, Meridian v.—80 M. 485.
McBee, Parker v.—61 M. 134.
McBeth v. State, 50 M. 81—crim. l. 967; hom. 142, 291; ind. 180; names, 1.
McBride v. Kilgore, 55 M. 242—j. p. 92.
McBride v. State, 70 M. 716—attch. 225; const. law, 306; eq. 2; fraud. conv. 245; int. liq. 111, 179.
McBride, Fullerton v.—90 M. 420.
McBride, Hemphill v.—12 S. & M. 620.
McBride, New Orleans &c. R. Co. v.—38 M. 32.
McCaa v. Russom, 52 M. 639—ex. & ad. 425; quiet. t. 16, 30; ref. of inst. 26.
McCaa v. State, 38 So. 228—hom. 292.
McCaa, Capers v.—41 M. 479.
McCaa, Commercial Bank v.—8 S. & M. 720.
McCabe, Johnson v.—42 M. 255.
McCain v. White, 67 M. 243—anim. 89, 95; fences, 11.
McCaleb v. Burnett, 55 M. 83—guard. & w. 79; home. 127, 142.
McCaleb v. Pradat, 25 M. 257—bound. 37; deeds, 109; eq. 9; frds. st. of, 158; quiet. t. 3; princ. & a. 126.
McCaleb v. State, 96 M. 144—bail, 90.
McCaleb, Freeland v.—2 H. 756.
McCaleb, Prodot v.—24 M. 169.
McCalip, Illinois Cent. R. Co. v.—76 M. 360.
McCall v. Nave, 52 M. 494—acc. & s. 6; acct. st. 18; assum. 23; lim. of act. 29, 146, 193; plead. 48.
McCall v. State, 29 So. 1003—hom. 118; witn. 388.
McCall, Trotter v.—26 M. 410.
McCallum v. State, 30 So. 47—chat. m. 230, 231, 232.
McCallum, Osborn v.—38 So. 609.
McCandless, Coopwood v.—54 So. 1007.
McCandless, Morton v.—68 M. 810.
McCandless, Shaw v.—36 M. 296.
McCanless, Goar v.—60 M. 244.
McCann v. State, 9 S. & M. 465—crim. l. 849, 851, 924, 1142.
McCann v. State, 13 S. & M. 471—crim. l. 338, 552, 572; hom. 127, 234.
McCann, Harris v.—75 M. 805.
McCants, Western Union Tel. Co. v.—46 So. 535.
McCardle, Tyler v.—9 S. & M. 230.
McCargo v. State, 1 So. 161—atty. & c. 28.
McCargo, Collins v.—6 S. & M. 128.
McCarley v. Tippah County, 58 M. 483—deeds, 96; estop. 91; lim. of act. 22; mtg. 338; seals, 5.
McCarlie v. Atkinson, 77 M. 594—libel, 76.
McCarroll v. Alexander, 48 M. 128—trusts, 77.
McCarroll, Green v.—24 M. 427.
McCarroll, Gwinn v.—1 S. & M. 351.
McCartey v. Kittrell, 55 M. 253—judgm. 24, 700; parties, 75.
McCarthy v. State, 56 M. 284—app. & e. 640; crim. l. 990, 996; judgm. 295.
McCarthy, Blake v.—56 M. 654.
McCartney, Fowler v.—27 M. 509.
McCarty v. Key, 87 M. 248—chat. m. 157; mast. & s. 82; replev. 26.
McCarty v. State, 26 M. 299—crim. l. 63, 631, 1031, 1088; jury, 78, 80, 131; larc. 3.
McCarty v. State, 37 M. 411—ind. 176; r. r. 255.
McCarty, Nobles v.—61 M. 456.
McCary, Ray v.—26 M. 404.
McCaskell, Louisville &c. R. Co. v.—53 So. 348.
McCaughan v. Hardy, 78 M. 598—witn. 157.
McCaughan v. Picard, 21 So. 796—execution, 195.
McCaughan, Heirn v.—32 M. 17.
McCaughan, Washington v.—34 M. 304.
McCaughan, Weems v.—7 S. & M. 422.
McCaughn v. Brown, 76 M. 496—partners. 250.
McCaughn v. Milliot, 78 M. 976—ship. 113.
McCaughn v. Young, 85 M. 277—adv. pos. 16, 31, 53, 58, 69, 74; app. & e. 927; mtg. 349, 369a.

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McCauley v. Greenville, 37 So. 818—mun. corp. 810.
McCavock v. Whitfield, 45 M. 452—hus. & w. 228.
McCearley v. State, 52 So. 796—ind. 74.
McCearly v. Swayze, 65 M. 351—ferries, 9.
McCerrin v. Alabama &c. R. Co. 72 M. 1013—neg. 107; plead. 34; r. r. 417, 439.
McCerrin, Alabama &c. R. Co. v.—75 M. 687.
McClanahan v. Barrow, 27 M. 664—adv. pos. 11; des. & d. 10; eject. 21, 22; execution, 263.
McClanahan v. Brack, 46 M. 246—appr. 7; attch. 154, 157, 232; proc. 167.
McCleary v. Anthony, 54 M. 708—acct. acti. on, 15; j. p. 174; tresp. 20, 62, 74; woods, 11.
McCleary v. State, 52 So. 796—crim. l. 945.
McClelland v. State, 54 So. 251—witn. 372, 1169.
McClellan, Hardy v.—53 M. 507.
McClellan, Pittman v.—55 M. 299.
McClendon v. Whitten, 95 M. 124—lim. of act. 34.
McClintock v. Joyner, 77 M. 678—land. & t. 83, 84, 86.
McClintock v. Rogers, 12 S. & M. 702—judgm. 794.
McCloud v. McCullers, 84 M. 20—garn. 83.
McClure v. Houston, 10 S. & M. 392—new tr. 155, 159, 165.
McClure, Avery v.—94 M. 172.
McClure, Mandell v.—14 S. & M. 11.
McClure, West v.—85 M. 296.
McClurg, Woodberry v.—78 M. 831.
McClusky v. Trussel, 90 M. 544—mtg. 358.
McClutchie, Kitteringham v.—41 So. 65.
McCollister, Louisville &c. R. Co. v.—66 M. 106.
McComas v. Minor, W. 513—eq. 290.
McComb v. Ellett, 8 S. & M. 505—execution, 153c, 154b, 155e; judgm. 385, 486, 577.
McComb v. Gilkey, 29 M. 146—estop. 22; ev. 461; guard. & w. 42, 76, 79, 87, 97; statut. 66, 82, 246.
McComb v. Turner, 14 S. & M. 119—app. & e. 204; guard. & w. 59.
McComb City v. Pike County, 86 M. 647—high. 123; tax. 913.
McComb City v. Pike County, 91 M. 736—tax. 913.
McComb City, Berry v.—69 M. 882.
McComb City Drug Co. White v.—86 M. 498.
McComb City, Naul v.—70 M. 699.
McComb &c. Power Co. Temple v.—89 M. 1.
McConnico, Co-Operative Life Assn. v.—53 M. 233.
McCoombs, Petit v.—41 M. 628.
McCord v. Shaw, 27 So. 602—ev. 387; tax. 435.
McCorkle v. Brown, 9 S. & M. 167—mtg. 309; spec. perf. 7, 96; ven. & pur. 274.
McCorkle v. Yarrell, 55 M. 576—forc. e. & d. 6.
McCorkle, Avent v.—45 M. 221.
McCormick v. Altneave, 73 M. 86—hus. & w. 228.
McCormick v. Blum, 75 M. 81—mast. & s. 82.
McCormick v. McCormick, 40 M. 760—crops, 1; ex. & ad. 42; replev. 8.
McCormick, Gaggett v.—73 M. 552.
McCormick, Western Union Tel. Co. v.—27 So. 606.
McCown v. Mayer, 65 M. 537—chat. m. 10, 12; sales, 9, 12.
McCoy v. McKowen, 26 M. 487—mast. & s. 302; princ. & a. 159.
McCoy v. Nichols, 4 H. 31—ex. & ad. 325, 453, 509; judgm. 870b, 910; lim. of act. 16, 76, 83.
McCoy v. Rives, 1 S. & M. 592—trial, 329.
McCoy v. State, 91 M. 257—crim. l. 59, 364, 427, 829, 1170; hom. 142, 157, 188, 250, 340c.
McCoy, Canton &c. R. Co v.—1 Miss. Dec. 47.
McCoy, Crisler v.—33 M. 445.
McCoy, Greenlee v.—30 M. 588.
McCoy, Jackson v.—56 M. 781.
McCoy, Rickie v.—13 S. & M. 54.
McCoy, Sardis &c. R. Co. v.—85 M. 391.
McCracken, Lewis v.—89 M. 229.
McCrary v. Sands, 1 Miss. Dec. 226—int. liq. 57, 66.
McCraven v. McGuire, 23 M. 100—ack. 14; app. & e. 204.
McCray, Blake v.—65 M. 443.
McCrea v. Walker, 4 H. 455—courts, 200½; eq. 22.
McCready v. Lansdale, 58 M. 877—eject. 15; deeds, 37; tax. 734.
McCreary v. Hoopes, 25 M. 428—atty. & c. 63, 126; statut. 244.
McCreary v. O'Flinn, 63 M. 204—int. liq. 76.
McCreary v. Rhodes, 63 M. 308—int. liq. 76, 80; j. p. 205.
McCreary, Callender v.—4 H. 356.
McCreary, Clarke v.—12 S. & M. 347.
McCreary, Stevenson v.—12 S. & M. 9.
McCrory v. State, 25 So. 671—crim. l. 761, 790; hom. 300b.

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McCrory, McKenzie v.—88 M. 86.
McCrosky v. Riggs, 9 S. & M. 107—sheriffs, 3.
McCrosky v. Riggs, 12 S. & M. 712—sheriffs, 159.
McCrossin, Swayze v.—13 S. & M. 317.
McCroy v. Toney, 66 M. 233—frds. st. of, 57; land. & t. 23.
McCue v. Massey, 90 M. 124—parties, 95.
McCullers, McCloud v.—84 M. 20.
McCulloch v. Stone, 64 M. 378—const. law, 53; lev. 28g; mand. 85, 174; tax. 143, 198, 679a.
McCullom v. Box, 8 S. & M. 619—courts, 199; eq. 452; ex. & ad. 510a.
McCullough v. Henderson, 24 M. 92—lim. of act. 152.
McCullough v. State, 28 So. 946—crim. l. 687, 1170; hom. 233.
McCullough, Funk v.—24 M. 481.
McCully, Bates v.—27 M. 584.
McCurdy, Abraham v.—15 So. 137.
McCutchen v. Blanton, 59 M. 116—inj. 12; nuis. 19.
McCutchen v. Dougherty, 44 M. 419—interest, 38; lim. of act. 114; proc. 134.
McCutchen v. Miller, 31 M. 65—lis pens. 6, 25.
McCutchen v. Rice, 56 M. 455—bills & n. 69, 83; partners. 258; princ. & a. 64; witn. 139.
McCutchen, Cowen v.—43 M. 207.
McCutchen, Holcomb v.—30 So. 754.
McCutchen, Metcalfe v.—60 M. 145.
McCutchen, Vicksburg &c. R. Co. v.—52 M. 645.
McDaniel v. Allen, 64 M. 417—wills, 629, 634.
McDaniel v. Hurt, 88 M. 769—app. & e. 1138.
McDaniel v. Hurt, 92 M. 197—app. & e. 781; inj. 20.
McDaniel v. Inzer, 52 So. 359—ref. of inst. 45.
McDaniel v. Johns, 45 M. 632—deeds, 4, 24; life est. 3; wills, 88.
McDaniel v. State, 8 S. & M. 401—crim. l. 376, 381, 602, 814, 917, 1091, 1151; hom. 8, 10, 20a, 124, 145, 146, 151, 163, 200, 203, 211, 216, 221, 286b, 308; larc. 3, 73; rob. 2, 7.
McDaniel, Dalsheimer v.—69 M. 339.
McDaniel, Ex parte, 8 So. 645—convt. 8; statut. 160.
McDaniel, Griffin v.—63 M. 121.
McDaniel, Jenison v.—28 M. 83.
McDaniel, Johns v.—60 M. 486.
McDaniel, Monroe County v.—68 M. 203.
McDaniel, Morrison v.—30 M. 213.
McDavitt, Mitchell v.—70 M. 608.
McDaniel, Rogers v.—3 H. 172.
McDaniel, State v.—78 M. 1.
McDaniel, Vick v.—3 H. 337.
McDaniel, Yale v.—69 M. 337.
McDonald v. Green, 9 S. & M. 138—app. & e. 1097; ven. & pur. 123c, 314.
McDonald v. Ingraham, 30 M. 389—bankr. 389½, 418; judgm. 4.
McDonald v. Kamper, 89 M. 221—mtg. 338.
McDonald v. McDonald, 68 M. 689—app. & e. 77; witn. 112.
McDonald v. Murphree, 45 M. 705—tax. 608.
McDonald v. Myles, 12 S. & M. 279—new tr. 85.
McDonald v. Sanford, 88 M. 633—home. 208.
McDonald v. State, 68 M. 728—int. liq. 36, 39, 205.
McDonald v. State, 28 So. 750—crim. l. 553, 786.
McDonald v. State, 78 M. 369—crim. l. 141; hom. 286a.
McDonald v. Vinson, 56 M. 497—lim. of act. 105, 167; mtg. 386, 411.
McDonald, Baum v.—11 So. 680.
McDonald, Bishop v.—27 M. 371.
McDonald, Byers v.—54 So. 664.
McDonald, Byrd v.—28 So. 847.
McDonald Cotton Co. v. Mayo, 38 So. 372—sales, 333, 339.
McDonald, Doe v.—27 M. 610.
McDonald, Foley v.—46 M. 238.
McDonald, Foute v.—27 M. 610.
McDonald, Green v.—13 S. & M. 445.
McDonald, Louisville &c. R. Co. v.—79 M. 641.
McDonald, Lowry v.—Sm. & M. Ch. 620.
McDonald, New Orleans &c. R. Co. v.—53 M. 240.
McDonald, Niolon v.—71 M. 337.
McDonald, Puckett v.—6 H. 269.
McDonald, Rhodes v.—24 M. 418.
McDonald, Slaydon v.—82 M. 504.
McDonald, Sowell v.—58 M. 251.
McDonald, Watkins v.—41 So. 376.
McDougal v. People's Savings Bank, 2 Miss. Dec. 323—eq. 360; hus. & w. 171.
McDougal v. People's Sav. Bank, 62 M. 663—estop. 70; hus. & w. 87, 198.
McDougal, Jones v.—32 M. 179.
McDougall, Gordon v.—84 M. 715.
McDougall, Miller v.—44 M. 682.
McDougal, Russell v.—3 S. & M. 234.

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McDowell v. Bonner, 62 M. 278—guard. & w. 29.
McDowell v. Brooks, 18 So. 657—app. & e. 851, 1169.
McDowell v. Cook, 6 S. & M. 420—bills & n. 436.
McDowell v. State, 68 M. 348—larc. 40.
McDowell v. State, 74 M. 373—larc. 40.
McDowell, Bates v.—58 M. 815.
McDowell, Sanders v.—4 H. 9.
McDowell, State v.—72 M. 138.
McDowell, Steele v.—9 S. & M. 193.
McDowell, Walker v.—4 S. & M. 118.
McDuff v. Beauchamp, 50 M. 531—abate. & r. 45; hus. & w. 14, 119.
McDuff, Moody v.—58 M. 751.
McDugle v. Filmer, 79 M. 53—j. p. 78, 195.
McDugle v. Filmer, 82 M. 200—judgm. 909; j. p. 129, 134.
McEachen, Gilbert v.—38 M. 469.
McEachin, Gordon v.—57 M. 834.
McElmore v. State, 81 M. 422—high. 108; statut. 216.
McElory, People's Loan Assn. v.—72 M. 434.
McElroy, Abbott v.—10 S. & M. 100.
McElroy, Agnew v.—10 S. & M. 552.
McElroy, McNeill v.—15 So. 786.
McElroy, Marks v.—67 M. 545.
McElroy, Wilson v.—2 S. & M. 241.
McElveen, Mississippi B. & L. Assn. v.—56 So. 187.
McElween, Briscoe v.—43 M. 556.
McEwen v. State, 3 S. & M. 120—const. law, 191; crim. l. 263; judgm. 105; plead. 25; recogn. 2.
McEwen v. State, 16 So. 242—crim. l. 785b.
McFadden v. Buckley, 53 So. 351—trial, 170.
McFadden, Leake County v.—57 M. 618.
McFarland v. Goins, 50 So. 493—const. law, 206, 214.
McFarland v. McFarland, 64 M. 449—eq. 15, 351; hus. & w. 283, 285.
McFarland v. Smith, W. 172—action, 30; tresp. 20.
McFarland v. Wilson, 2 S. & M. 269—execution, 348; sheriffs, 87.
McFarland, Humphreys v.—48 So. 182.
McFarlane v. Randle, 41 M. 411—508a; ev. 385, 463; guard. & w. 137, 160, 163, 175.
McFerrin, Root v.—37 M. 17.
McGahey, Jones v.—1 H. 128.
McGatagan, Semple v.—10 S. & M. 98.
McGaughey v. Eades, 78 M. 853—ex. & ad. 183.
McGaughy, Bennett v.—3 H. 192.
McGavock v. Whitfield, 45 M. 452—guard. & w. 52; hus. & w. 79, 85, 230; plead. 87, 217, 289; princ. & s. 141.
McGee v. Beall, 63 M. 455—app. & e. 840; counties, 58; excep. 35; int. liq. 75, 80.
McGee v. Caruthers, 2 S. & M. 443—app. & e. 626.
McGee v. Ford, 5 S. & M. 769—ex. & ad. 294.
McGee v. Holmes, 63 M. 50—tax. 674c, 735; ten. in c. 20.
McGee v. Jones, 63 M. 453—counties, 58; excep. 38.
McGee v. Metcalf, 12 S. & M. 535—princ. & s. 106, 124.
McGee v. State, 22 So. 890—crim. l. 365, 369.
McGee v. Wallis, 57 M. 638—eject. 57, 139; eq. 66; execution, 263; ex. & ad. 388b.
McGee, Baines v.—1 S. & M. 208.
McGee, Baldwin v.—14 So. 451.
McGee, Barnes v.—1 S. & M. 208.
McGee, Edwards v.—31 M. 143.
McGee, Ellis v.—63 M. 168.
McGee, Holmes v.—12 S. & M. 411.
McGee, Holmes v.—64 M. 129.
McGee, Mitchell v.—48 So. 234.
McGehe v. Handley, 5 H. 625—execution, 19, 99.
McGehee v. Field, 2 Miss. Dec. 25—j. p. 131.
McGehee v. Fitts, 65 M. 357—execution, 265; tax. 821.
McGehee v. McGehee, 42 M. 747—dower, 86.
McGehee v. McGehee, 74 M. 386—wills, 184, 470.
McGehee v. Martin, 53 M. 519—app. & e. 202; eject. 112; tax. 656.
McGehee v. State, 62 M. 772—hom. 89.
McGehee v. White, 31 M. 41—deeds, 54; eq. 338, 345; hus. & w. 70.
McGehee v. Woodville, 59 M. 648—ded. 1, 17, 63; mun. corp. 225; schools, 65.
McGehee, Cotten v.—54 M. 510, 621.
McGehee, Ford v.—Freem. Ch. 460.
McGehee, Isom v.—45 M. 712.
McGehee, Miller v.—60 M. 903.
McGehee, Nimrocks v.—52 So. 626.
McGehee, Oswald v.—28 M. 340.
McGehee, Pinson v.—44 M. 229.
McGehee, Tigner v.—60 M. 185, 242.
McGill v. Bone, 13 S. & M. 592—garn. 85.
McGill v. Bone, 26 M. 446—garn. 234.
McGill v. Howard, 61 M. 411—chat. m. 172; replev. 12.
McGill, Thompson v.—Freem. Ch. 401.
McGilvrey v. Jackson, 4 H. 245—j. p. 190.
McGimpsey, Montgomery v.—7 S. & M. 557.
McGimpsey, Wiggins v.—13 S. & M. 532.
McGinley, Bone v.—7 H. 671.

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McGinty, Holmes v.—44 M. 94.
McGinty, Parmele v.—52 M. 475.
McGinty, State v.—41 M. 435.
McGlathery, Simpson v.—52 M. 723.
McGlothlin v. Meaux, 38 So. 317—app. & e. 1027; logs, 1.
McGoneau, Fant v.—57 M. 779.
McGowan v. Brooks, 16 So. 436—deeds, 68.
McGowan v. James, 12 S. & M. 445—app. & e. 518, 859; eq. 119, 419, 422.
McGowan v. McGowan, 48 M. 553—eq. 150, 152; ex. & ad. 144, 365, 380.
McGowan, Fennell v.—58 M. 261.
McGowan, Illinois Cent. R. Co. v.—92 M. 603.
McGowan, Vicksburg &c. R. Co. v.—62 M. 682.
McGrath v. Barlow, 21 So. 237—land. & t. 252a.
McGrath v. Hoopes, 26 M. 496—abate. & r. 27; bills & n. 460; dism. 23.
McGrath v. Sinclair, 55 M. 89—home. 84, 154; partners. 246.
McGrath, Bloom v.—53 M. 249.
McGrath, Keystone Lumber & Imp. Co. v.—21 So. 301.
McGrath, Valentine v.—52 M. 112.
McGraw v. Pulling, Freem. Ch. 357—cncts. 261; partners. 1, 71; sales, 316, 466.
McGraw v. Robinson Mercantile Co. 95 M. 828—ex. & ad. 86, 425.
McGraw v. State, W. 208—crim. l. 170; larc. 30.
McGraw, Brown v.—12 S. & M. 267.
McGraw, Mezeix v.—44 M. 100.
McGraw, Parkhurst v.—24 M. 134.
McGregor, Long v.—65 M. 70.
McGruder, Eskridge v.—45 M. 294.
McGuffie v. Planters' Bank, Freem. Ch. 383—banks, 56; eq. 341; inj. 124, 172.
McGuffie, Heard v.—2 Miss. Dec. 338.
McGuiggan, O'Reily v.—91 M. 498.
McGuire v. State, 13 S. & M. 257—slaves, 19.
McGuire v. State, 35 M. 366—crim. l. 285; ind. 158.
McGuire v. State, 37 M. 369—crim. l. 1172, 1173; int. liq. 224; jury, 96, 97, 109.
McGuire v. State, 76 M. 504—const. law, 203; crim. l. 261, 304, 957, 1085; ind. 14; jury, 103.
McGuire v. Stevens, 42 M. 724—ev. 449, 460; frds. st. of, 103, 105, 129.
McGuire v. Union Inv. Co. 76 M. 868—tax. 434.
McGuire, Gibbs v.—70 M. 646.
McGuire, Liverpool &c. Ins. Co. v.—52 M. 227.
McGuire, McRaven v.—9 S. & M. 34.
McGuire, McRaven v.—23 M. 100.
McGuire, Montgomery v.—59 M. 193.
McGuirk v. State, 64 M. 209—weap. 11, 13, 17b.
Machen, Banks v.—40 M. 256.
McHenry v. State, 91 M. 562—cmpt. 19, 21; courts, 45; mand. 3, 141, 172.
McHenry Baptist Church v. McNeal, 86 M. 22—tax. 244.
McIlvoy v. Alsop, 45 M. 365—eq. 93; ex. & ad. 519; inf. 89, 91; ven. & pur. 280.
McInnes v. Graves, 80 M. 632—j. p. 133, 210.
McInnis v. Mills, 78 M. 52—fraud. conv. 215.
McInnis v. Mitchum, 2 Miss. Dec. 126—tax. 787.
McInnis v. Pace, 78 M. 550—app. & e. 781; ferries, 9.
McInnis v. Pickett, 65 M. 354—estop. 35; pub. lands, 110.
McInnis v. State, 52 So. 634—crim. l. 13; embez. 1, 2; statut. 239, 241.
McInnis v. Thames, 80 M. 617—elec. 1, 20, 120; statut. 176.
McInnis v. Wiscassett Mills, 17 So. 605—nav. wat. 15.
McInnis v. Wiscassett Mills, 78 M. 52—fraud. conv. 258, 295; plead. 8.
McInnis, Anderson v.—56 So. 170.
McInnis, Bercier v.—57 M. 279.
McInnis, Ex parte, 54 So. 260—const. law, 83, 250; crim. l. 1206, 1213; statut. 159.
McInnis, Garrison v.—1 Miss. Dec. 129.
McInnis, Leatherbury v.—85 M. 160.
McInnis, Lyle v.—17 So. 510.
McInnis, Mitchum v.—60 M. 945.
McInnis, O'Flinn v.—80 M. 125.
McIntosh v. Rutland, 88 M. 718—ex. & ad. 314a; logs, 3; sales, 3.
McIntosh v. State, 2 Miss. Dec. 673—larc. 17.
McIntosh, Beville v.—41 M. 516.
McIntosh, Boone v.—62 M. 744.
McIntosh, Gibbs v.—78 M. 648.
McIntosh, Hooker v.—76 M. 693.
McIntosh, Mary Washington Female College v.—37 M. 671.
McIntosh, New York Life Ins. Co. v.—41 So. 381.
McIntosh, New York Life Ins. Co. v.—46 M. 401.
McIntosh, New York Life Ins. Co. v.—86 M. 236.
McIntyre v. Agricultural Bank, Freem. Ch. 105—eq. 20; execution, 36, 41; judgm. 780; liens, 11; mtg. 136.
McIntyre v. Harris, 41 M. 81—witn. 268.

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McIntyre v. Ingraham, 35 M. 25—banks, 87, 98; corp. 371, 372, 374, 382; courts, 97; propty. 3; statut. 187, 191, 199; wills, 591.
McIntyre v. Kline, 30 M. 361—cncts. 279; plead. 112; sales, 155, 343; trial, 189.
McIntyre v. Ledyard, Sm. & M. Ch. 91—eq. 390; witn. 101, 139.
McIntyre v. Weathersby, 1 H. 331—sheriffs, 169.
McIntyre v. White, 5 H. 298—attch. 132.
McIntyre v. Whitfield, 13 S. & M. 88—mtg. 384, 591.
McIntyre, Ross v.—53 M. 123.
McIntyre, Sims v.—8 S. & M. 324.
McIntyre, Zukoski v.—93 M. 806.
McIntyre, Zukoski v.—47 So. 666.
McIver v. Abernathy, 66 M. 79—corp. 384, 441, 455.
McIver v. Clarke, 69 M. 408—atty. & c. 28; can. of i. 23; eq. 66.
McIver v. Clarke, 71 M. 444—licens. 39.
McJunkin, Boone v.—63 M. 559.
Mack v. Jacobs, 70 M. 429—attch. 253, 377, 380.
McKay v. Hamblin, 40 M. 472—depty. 3; sales, 1.
McKay, Baldwin v.—41 M. 358.
McKay, Illinois Cent. R. Co. v.—69 M. 139.
McKay, Mortimer v.—1 Miss. Dec. 585.
McKay, Nabors v.—27 M. 799.
McKay, Spears v.—W. 265.
McKay, Yazoo &c. R. Co. v.—91 M. 138.
McKean v. J. Matthews Apparatus Co. 74 M. 119—replev. 12, 82; sales, 464, 478.
McKee v. Coffee, 58 M. 653—app. & e. 102, 351, 359; eq. 45.
McKee v. Jayle, 46 M. 676—judgm. 784.
McKee v. Jones, 67 M. 405—cncts. 144; sales, 2, 281; Sunday, 10, 18.
McKee v. Kent, 24 M. 131—hus. & w. 23, 156; plead. 53.
McKee v. Munn, 5 So. 616—trial, 190.
McKee v. Whitten, 25 M. 31—guard. & w. 163; judgm. 749.
McKee, Gross v.—53 M. 536.
McKeen, Spellman v.—96 M. 693.
McKee, Owings v.—34 M. 144.
McKee, Powell v.—81 M. 229.
McKee, Shipp v.—80 M. 741.
McKernon, Patrick v.—5 H. 578.
McKey v. Cobb, 33 M. 533—garn. 98.
Mackey v. Smith, 7 So. 222—app. & e. 932; sheriffs, 163, 171.
McKey v. Torry, 28 M. 78—abat. & r. 75; dism. 60.
Mackey v. Vicksburg, 64 M. 777—mun. corp. 747, 767, 782, 802; neg. 85, 115.
Mackey, Sandifer v.—3 So. 570.
McKenna v. Alabama &c. R. Co. 87 M. 652—r. r. 251, 348.
McKenna v. State, 61 M. 589—hom. 244, 300c.
McKens, Cotten v.—57 M. 418.
McKenzie v. Donald, 61 M. 452—dower, 3, 11, 49, 55, 57, 65.
McKenzie v. Fellows, 52 So. 628—lis pens. 12.
McKenzie v. McCrory, 88 M. 86—inj. 174.
McKenzie v. Moran, 54 So. 1—app. & e. 807.
McKenzie v. Shows, 70 M. 388—home. 118, 118a; woods, 1.
McKenzie, Jordan v.—30 M. 32.
Mackguire v. State, 91 M. 151—forg. 25, 29; ind. 158.
McKie, Moore v.—5 S. & M. 238.
McKiernan v. Massingill, 6 S. & M. 375—eq. 119.
Mackin Kane v.—9 S. & M. 387.
Mackin, Newman v.—13 S. & M. 383.
McKinney v. Adams, 50 So. 474—judgm. 452, 518; plead. 312.
McKinney v. Green, 52 M. 70—app. & e. 437; judgm. 706; land. & t. 229k.
McKinney v. Kuhn, 59 M. 186—inj. 171; interpl. 13.
McKinney v. Monroe County, 68 M. 284—counties, 101; lim. of act. 57.
McKinney v. Sweet, 28 So. 939—attch. 350.
McKinney v. Willis, 64 M. 82—eq. 43; judgm. 407, 507, 739; replev. 127.
McKinney, Bell v.—63 M. 187.
McKinney, Bodley v.—9 S. & M. 339.
McKinney, Field v.—60 M. 762.
McKinney, Gilleylen v.—74 M. 764.
McKinney, Parchman v.—12 S. & M. 631.
McKinney, Robb v.—27 M. 98.
McKinnon v. Horn, 78 M. 307—j. p. 146.
McKinstry, Dean v.—2 S. & M. 213.
McKissack v. Bullington, 37 M. 535—forc. e. & d. 4; ven. & pur. 298.
McKissack, Harris v.—34 M. 464.
MackMasters v. State, 81 M. 374—hom. 158; witn. 296, 370.
Mackmasters v. State, 82 M. 459—crim. l. 520, 522, 531.
Mackmasters v. State, 83 M. 1—crim. l. 516, 539, 547, 1036; hom. 250; witn. 393.
McKnight v. Dozier, 44 M. 606—app. & e 516; excep. 1; judgm. 951.
McKnight, Melsheimer v.—92 M. 386.
McKnight, Speed v.—76 M. 723.
McKowen, McCoy v.—26 M. 487.

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McLachlan, Humphries v.—87 M. 532.
McLain v. Thompson, 52 M. 418—ven. & pur. 275.
McLain, Natchez Cotton Mill Co. v.—33 So. 723.
McLain, Perry v.—66 M. 145.
McLain, Vicksburg v.—67 M. 4.
McLaran v. Moore, 60 M. 376—tax. 709.
McLaran, Caruthers v.—56 M. 371.
McLarty v. Tibbs, 69 M. 357—exemp. 16.
McLarty, Yazoo &c. R. Co. v.—71 M. 755.
McLaughlin v. Green, 48 M. 175—eq. 351; inj. 152; judgm. 678; mech. liens, 197; parties, 75; paymt. 36, 40; tax. 674c, 732.
McLaughlin v. Green, 50 M. 453—war, 9, 31.
McLaughlin v. Shaughnessey, 42 M. 520—mech. liens, 269.
McLaughlin v. Spengler, 57 M. 818—lim. of act. 73.
McLaughlin, Bowman v.—45 M. 461, 499.
McLaughlin, Bowman v.—48 M. 175.
McLaughlin, Phillips v.—26 M. 592, 597.
McLauren v. Graham, 26 M. 400—cncts. 138.
McLauren, Crawford v.—83 M. 265.
McLauren, Hill v.—28 M. 288.
McLaurin v. Baum, 12 So. 594—attch. 72; garn. 76.
McLaurin v. Parker, 24 M. 509—bonds, 14; eq. 43; ex. & ad. 388d, 389d; judgm. 106; plead. 342; usury, 99; ven. & pur. 144.
McLaurin v. State, 64 M. 529—hom. 301.
McLaurin, Bird v.—4 S. & M. 50.
McLaurin, Conner v.—77 M. 373.
McLaurin, Dennis v.—31 M. 606.
McLaurin, Malone v.—40 M. 161.
McLaurin, Rich v.—83 M. 95.
McLaurin, Richardson v.—69 M. 70.
McLaurin, Western Union Tel. Co. v.—70 M. 26.
McLaurin, Yale v.—66 M. 461.
McLean v. Letchford, 60 M. 169—disc. 50; fraud. conv. 183.
McLean v. Ragsdale, 31 M. 701—lim. of act. 44, 56, 83; mtg. 424; princ. & s. 175.
McLean v. State, 12 So. 905—hom. 202.
McLean v. Warring, 13 So. 236—libel, 54, 68, 88, 99.
McLean, Gwin v.—62 M. 121.
McLean, Mister v.—43 M. 268.
McLean, Saunders v.—65 M. 397.
McLellan, Southern R. Co. v.—80 M. 700.
McLellan, Tatum v.—50 M. 1.
McLellan, Tatum v.—56 M. 352.
McLemore v. Anderson, 92 M. 42—app. & e. 173; tax. 656, 727, 756, 761, 802.
McLemore v. Carter, 7 So. 357—trusts, 371.
McLemore v. Chicago &c. R. Co. 58 M. 514—inf. 87, 110, 111, 112; lis pens. 25.
McLemore v. Hawkins, 46 M. 715—bills & n. 455; ev. 148; plgs. 28; princ. & a. 147; trial, 44.
McLemore v. Rankin Mfg. Co. 68 M. 196—partners. 288.
McLemore v. Scales, 68 M. 47—fixt. 14; forc. e. & d. 38; tax. 792, 802.
McLemore, Barnes v.—12 S. & M. 316.
McLemore, Read v.—34 M. 110.
McLemore, Richardson v.—60 M. 315.
McLendon v. Pass, 66 M. 110—action, 54; j. p. 44.
McLendon v. State, 96 M. 250—crim. l. 636.
McLendon, Deans v.—30 M. 343.
McLendon, Pass v.—62 M. 580.
McLendon, Winston v.—43 M. 254.
McLeod v. Burkhalter, 57 M. 65—tax. 674b.
McLeod v. First Nat. Bank, 42 M. 99—sales, 41, 236; trusts, 350, 355.
McLeod v. Gray, 4 So. 544—j. p. 188; lim. of act. 63.
McLeod v. Harper, 43 M. 42—judgm. 870, 870g; proc. 55.
McLeod v. Johnson, 28 M. 374—ex. & ad. 431, 537.
McLeod v. McLeod, 88 M. 722—hab. corp. 40.
McLeod v. Shelton, 42 M. 517—ex. & ad. 436; venue, 47.
McLeod v. State, 69 M. 221—bonds, 1; offic. 37, 123.
McLeod v. Tutt, 1 H. 288—fraud, 49; sales, 437.
McLeod v. Womack, 50 So. 66—judgm. 18.
McLeod, Andrews v.—66 M. 348.
McLeod, Bonney v.—38 M. 393.
McLeod, Champlin v.—53 M. 484.
McLeod, Helton v.—93 M. 516.
McLeod, Illinois Cent. R. Co. v.—78 M. 334.
McLeod, O'Neal v.—28 So. 23.
McLeod, Poole v.—1 S. & M. 391.
McLeod, Tutt v.—3 H. 223.
McLeod, Worsham v.—11 So. 107.
Maclin v. Bloom, 54 M. 365—app. & e. 154, 1028; trial, 171, 303, 324, 338, 421.
McLin v. Warden, 55 So. 358—attch. 339; courts, 88; ev. 348.
McLure, Mayer v.—36 M. 389.
McLoskey v. Gordon, 26 M. 260—acct. 1, 11; fraud. conv. 163.
McMackin, Eldridge v.—37 M. 72.
McMahan v. American Building &c. Assn. 75 M. 965—licens. 36; mtg. 356.
McMahon v. Webb, 52 M. 424—bonds, 128; judgm. 576, 585; parties, 4, 81.

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McMahon v. Yazoo Delta Lumber Co. 92 M. 459—adv. pos. 27; costs, 59; quiet. t. 48; tax. 814.
McMann v. State, 13 S. & M. 471—crim. l. 935.
McManus, Gardner v.—57 M. 647.
McMaster v. Illinois Cent. R. Co. 65 M. 264—mast. & s. 160, 198.
McMaster v. State, 29 So. 522—crim. l. 1142, 1184; hom. 32.
McMaster v. State, 29 So. 522—crim. l. 814.
McMath v. Johnson, 41 M. 439—cncts. 108; cov. 26; slaves, 24; ven. & pur. 303.
McMath v. Levy, 74 M. 450—fixt. 1, 13.
McMillan v. Causey, 43 M. 227—ex. & ad. 389; judgm. 195; plead. 219; slaves, 7.
McMillan, Lowry v.—35 M. 147.
McMillan, Pearson v.—37 M. 588.
McMillan, Robbins v.—26 M. 434.
McMillan, Waterbury v.—46 M. 635.
McMillan v. Southern R. Co. 75 M. 490—r. r. 446.
McMillan v. Sprague, 4 H. 647—bills & n. 460; const. l. 169.
McMullen v. Hincle, 39 M. 142—princ. & s. 40, 111, 124.
McMullen v. Mayo, 8 S. & M. 298—app. & e. 1028, 1050; ev. 271; forc. e. & d. 12, 14; frds. st. of, 44; new tr. 160.
McMurran v. Soria, 4 H. 154—bills. & n. 313, 402, 427, 486; estop. 86; hus. & w. 111.
McMurran, Vertner v.—Freem. Ch. 136.
McMurry, Block v.—56 M. 217.
McMurtray v. Louisville &c. R. Co. 67 M. 601—carr. 328; neg. 122, 136.
McMurty, Black v.—W. 389.
McNair v. Kaiser, 62 M. 783—attch. 210.
McNair v. Stanton, 57 M. 298—eq. 230; hus. & w. 148; lim. of act. 23, 180.
McNairy v. Gathings, 52 M. 592—sales, 150, 171.
McNairy v. Gathings, 57 M. 215—app. & e. 264, 1003; new tr. 74.
McNairy, Taylor v.—42 M. 276.
McNamara v. Baird, 72 M. 89—tax. 699.
McNamara, Baird v.—78 M. 455.
McNamara, Klein v.—54 M. 90.
McNamee v. Relf, 52 M. 426—corp. 183; land. & t. 68.
McNamer, Lusk v.—24 M. 58.
McNeal, Anderson v.—82 M. 542.
McNeal, McHenry Baptist Church v.—86 M. 22.
McNeice, Carraway v.—W. 538.
McNeill v. Burton, 1 H. 510—app. & e. 1097; eq. 150.
McNeill v. Lee, 79 M. 455—mtg. 342b, 369a, 374.
McNeill v. McElroy, 15 So. 786—mand. 154.
McNeill v. Roache, 49 M. 436—attch. 25; garn. 143.
McNeill, Clark v.—46 So. 536.
McNeill, Duncan v.—31 M. 704.
McNeill, Mahoney v.—77 M. 406.
McNeill, Natchez &c. R. Co. v.—61 M. 434.
McNeill, Parker v.—12 S. & M. 355.
McNeill, Thornton v.—23 M. 369.
McNeill, Wells v.—93 M. 407.
McNeil, Magee v.—41 M. 17.
McNeil, Fisk v.—1 H. 535.
McNorton, Nagle v.—65 M. 197.
McNulty v. Lewis, 8 S. & M. 520—app. & e. 1025; ex. & ad. 181.
McNulty v. Walker, 64 M. 198—mal. pros. 17, 71.
McNutt v. Lancaster, 9 S. & M. 570—app. & e. 1123; tax. 546, 568, 570c.
McNutt v. Livingston, 7 S. & M. 641—clks. of c. 6, 64, 67, 73.
McNutt v. Wilcox, 3 H. 417—bills & n. 540; execution, 153e, 154b.
McNutt v. Wilcox, Freem. Ch. 116—bills & n. 236; execution, 145, 348.
McNutt, Parmilee v.—1 S. & M. 179.
McNutt, Pickens v.—12 S. & M. 651.
McNutt, Wilcox v.—2 H. 776.
Macon v. Patty, 57 M. 378—mun. corp. 278, 284, 378, 407, 411, 495, 595, 600.
Macon, Buck v.—85 M. 580.
Macon Compress &c. Co. Selleck v.—72 M. 1019.
Macon, Holberg v.—55 M. 112.
Macon, Noxubee County Hardware Co. v.—90 M. 636.
McPhail v. Blann, 47 So. 666—app. & e. 20, 25; j. p. 164.
McPhail v. Blaun, 95 M. 53—j. p. 159.
McPhay v. State, 87 M. 456—hom. 240.
McPherson, Hiwannee Lumber Co. v.—95 M. 580.
McPherson v. Acme Lumber Co. 70 M. 649—replev. 12, 118; sales, 316, 478; trusts, 63¾.
McPherson v. Davis, 95 M. 215—eq. 223; mtg. 364, 365, 369, 370.
McPherson v. Reese, 58 M. 749—deeds, 96; seals, 5.
McPherson, Blackston Mercantile Co. v.—77 M. 403.
McPherson, Butler v.—95 M. 635.
McPherson, Montgomery v.—86 M. 4.
McPherson, Pickels v.—59 M. 216.
McPike v. Wells, 54 M. 136—app. & e. 676;

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courts, 333; des. & d. 88, 92, 144; eq. 106; ex. & ad. 39, 319; judgm. 17, 676; parties, 37, 75.
McPike v. Western Assurance Co. 61 M. 37—ins. 539, 554, 556, 558, 559, 646, 668.
McPike, Carroll v.—53 M. 569.
McPike, Western Assur. Co. v.—62 M. 740.
McQueen v. Bostwick, 12 S. & M. 604—app. & e. 1003.
McQueen v. Bush, 76 M. 283—ev. 415; tax. 419.
McQueen, Trezevant v.—12 S. & M. 575.
McQueen, Trezevant v.—13 S. & M. 311.
McQuien, Jones v.—71 M. 98.
McQuillan v. State, 8 S. & M. 587—crim. l. 261, 277, 279, 299, 854, 1085, 1088, 1144; gr. jury, 19, 23.
McQuillan, Ware v.—54 M. 703.
Macrae v. Goodbar, 80 M. 315—attch. 175, 180; ven. & pur. 231.
McRae v. Lowery, 80 M. 47—wills, 578.
McRae, Faler v.—56 M. 227.
McRae, Pass v.—36 M. 143.
McRaney v. Coulter, 39 M. 390—judgm. 293; new tr. 95.
McRaven v. Crisler, 53 M. 542—alt. inst. 11; cov. 26.
McRaven v. Forbes, 6 H. 569—eq. 37, 66; judgm. 428; usury, 95.
McRaven v. McGuire, 9 S. & M. 34—ack. 14; app. & e. 287, 523, 691, 692; courts, 103; deeds, 46, 114, 115; eject. 8; excep. 15; fraud. conv. 154a; new tr. 10, 40; seals, 3.
McRaven v. McGuire, 23 M. 100—dep. 87; eject. 90, 110.
McRaven, Myrick v.—54 M. 11.
McRaven, Stubblefield v.—5 S. & M. 130.
McRea v. Walker, 4 H. 455—des. & d. 88; eq. 17, 47; ex. & ad. 3.
McRea, Edgerton v.—5 H. 183.
McRea, Mayer v.—16 So. 875.
McReary v. Robinson, 12 S. & M. 318—app. & e. 1016; ex. & ad. 173, 199.
McRee v. Swalm, 81 M. 679—tax. 746, 765.
McRee, Decell v.—83 M. 423.
McRovie v. White, 52 M. 406—land. & t. 229b.
McShan v. McShan, 56 M. 413—hab. corp. 99.
McShan, Kansas City &c. R. Co. v.—81 M. 460.
McWhorter v. Donald, 39 M. 779—ex. & ad. 227.
McWhorter, Donald v.—40 M. 231.
McWhorter, Donald v.—44 M. 124.
McWhorter, Sevier v.—27 M. 442.
McWhorter, Smith v.—74 M. 400.
McWilliams v. Norfleet, 60 M. 987—ev. 82; ex. & ad. 224; guard. & w. 15, 175, 177, 182a.
McWilliams v. Norfleet, 63 M. 183—guard. & w. 33, 175.
McWilliams v. Phillips, 51 M. 196—cncts. 103; int. liq. 94.
McWilliams, Clayton v.—49 M. 311.
McWilliams, Files v.—49 M. 578.
McWillie v. Kirkpatrick, 28 M. 802—bankr. 434.
McWillie v. Van Vacter, 35 M. 428—courts, 198, 202; deeds, 17; ex. & ad. 65, 73; gifts, 3, 17.
McWillie, Van Vacter v.—31 M. 563.
McVay v. State, 26 So. 947—crim. l. 786, 789.
McVey v. Railroad Co. 73 M. 487—action, 43; death, 7, 31.
Madden v. Louisville &c. R. Co. 66 M. 258—elect. rem. 1, 10, 13; em. dom. 167, 227, 268; estop. 52.
Madden v. State, 65 M. 176—crim. l. 416; witn. 320, 401.
Maddox, Posey v.—65 M. 193.
Maddux v. Jones, 51 M. 531—lim. of act. 105, 117, 169, 175.
Madison County v. Brown, 67 M. 684—courts, 88.
Madison County v. Collier, 79 M. 220—high. 94, 122; lim. of act. 39.
Madison County v. Collier, 87 M. 204—counties, 46.
Madison County v. Frazier, 78 M. 880—tax. 495.
Madison County v. Paxton, 56 M. 679—lis pens. 23; inj. 163.
Madison County v. Paxton, 57 M. 701—counties, 47, 186; eq. 186; offic. 102; princ. & a. 147; r. r. 149.
Madison County v. Powell, 71 M. 618—pub. lands, 55.
Madison County v. Powell, 75 M. 762—int. liq. 32.
Madison County v. Stewart, 74 M. 160—high. 111; statut. 160.
Madison County Court v. Alexander, W. 523—counties, 47; mand. 101, 141.
Madison County, Cutler v.—56 M. 115.
Madison County, Jones v.—72 M. 777.
Madison County, Yandell v.—79 M. 212.
Madison County, Yandell v.—81 M. 288.
Maduel, Betancourt v.—69 M. 839.
Maegher, Jenkins v.—46 M. 84.
Magee v. Catching, 33 M. 672—chat. m. 4, 6; cncts. 49, 54; mtg. 6; sales, 3, 455, 470, 478.
Magee v. Gregg, 11 S. & M. 70—ex. & ad. 114, 291, 299, 314, 314a.

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Magee v. Harrington, 13 S. & M. 403—app. & e. 1028; ex. & ad. 299; new tr. 160.
Magee v. Keegan, 35 M. 244—guard. & w. 34, 165; lim. of act. 20.
Magee v. Leggett, 48 M. 139—lim. of act. 56; princ. & s. 190; subrog. 5.
Magee v. Mellon, 23 M. 585—dower, 49, 50.
Magee v. McNeil, 41 M. 17—ev. 449; wills, 54, 80, 94, 315.
Magee v. Magee, 37 M. 138—adv. pos. 11, 13, 20, 43, 44, 69, 114, 115.
Magee v. Mississippi Cent. R. Co. 95 M. 678—mast. & s. 89, 279.
Magee v. Osyka, 45 So. 836—crim. l. 597; mun. corp. 220.
Magee v. State, 92 M. 865—witn. 299.
Magee v. State, 21 So. 130—crim. l. 696; witn. 393.
Magee v. State, 54 So. 802—cmpt. 60.
Magee v. Turner, 92 M. 438—tax. 710, 816.
Magee v. Young, 40 M. 164—dower, 1, 30.
Magee, Foxworth v.—44 M. 430.
Magee, Foxworth v.—48 M. 532.
Magee, Greve v.—92 M. 190.
Magee, Harmon v.—57 M. 410.
Magee, Miss. Cent. R. Co. v.—93 M. 196, 201.
Magee, Moore v —48 M. 567.
Magee, Stevens v.—81 M. 644.
Magee, Waddell v.—53 M. 687.
Magoffin v. Mandeville, 28 M. 354—eq. 119.
Magouirk v. Western Union Tel. Co. 79 M. 632—tel. & t. 48, 66.
Magruder v. Buck, 56 M. 314—hus. & w. 228, 237, 242.
Magruder v. Cumberland Tel. &c. Co. 92 M. 716—tel. & t. 33.
Magruder v. Eggleston, 41 M. 284—mtg. 394.
Magruder v. Stewart, 4 H. 204—hus. & w. 10; life est. 8.
Magruder, Barton v.—69 M. 462.
Magruder, Gillespie v.—92 M. 511.
Mahaffey Co. v. Russell, 54 So. 807—attch. 306; corp. 590.
Mahaffey Co. v. Russell, 54 So. 945—trial, 296.
Mahaff Rideout v. Mars, 54 So. 801—cncts. 138.
Mahon v. Columbus, 58 M. 310—cncts. 324; mun. corp. 244, 252, 255.
Mahone, American Life Ins. &c. Co. v.—56 M. 180.
Mahoney v. McNeill, 77 M. 406—land. & t. 19.
Mahormer v. Hooe, 9 S. & M. 247—cncts. 101; conver. 14, wills, 851.
Mahorner v. Forcheimer, 73 M. 302—assign. f. b. c. 94, 356.
Mahorner v. Harrison, 13 S. & M. 53—frds. st. of, 56; trusts, 77, 81, 85.
Mahorner, Davis v.—41 M. 552.
Maiden v. State, 11 So. 488—hom. 300b.
Mairs v. Bank, 58 M. 919—mtg. 309; ven. & pur. 260, 266a.
Mairs, Bank v.—58 M. 919.
Maitland &c. Co. v. Keith, 30 M. 499—lim. of act. 86; judgm. 934.
Majors v. Majors, 58 M. 806—home. 124, 162; judgm. 554, 948.
Majors v. State, 83 M. 439—crim. l. 449.
Majors, Ex parte, 34 So. 151—bail, 41.
Malcom, Freeman v.—11 S. & M. 53.
Mallery, Natchez v.—54 M. 499.
Mallett v. Lewis, 61 M. 105—frds. st. of, 44, 46, 82.
Mallett v. Parham, 52 M. 921—hus. & w. 239.
Mallory, Work v.—25 M. 172.
Malone v. McLaurin, 40 M. 161—curt. 3, 4, 9; hus. & w. 11.
Malone v. Mooring, 40 M. 247—wills, 752, 756. 102, 147, 242, 252.
Malone v. Robinson, 12 So. 709—princ. & a.
Malone v. State, 77 M. 812—assa. 47; crim. l. 622.
Maloney, Biloxi City R. Co. v.—74 M. 738.
Maloney, Biloxi City R. Co. v.—19 So. 832.
Mandell v. McClure, 14 S. & M. 11—attch. 201, 301, 308; garn. 177.
Mandeville v. Bracy, 31 M. 460—banks. 207; ev. 463.
Mandeville v. Lane, 28 M. 312—eq. 87.
Mandeville v. Stockett, 28 M. 398—ev. 345, 419; judgm. 286, 917.
Mandeville, Allen v.—26 M. 397.
Mandeville, Clapp v.—5 H. 197.
Mandeville, Gwinn v.—9 S. & M. 320.
Mandeville, Magoffin v.—28 M. 354.
Mandeville, Marsh v.—28 M. 122.
Mangiem, Lawrence v.—30 M. 171.
Mangold v. Barlow, 61 M. 593—ven. & pur. 231.
Mangold, Violett v.—27 So. 875.
Mangum v. Ball, 43 M. 288—atty. & c. 116; paymt. 12a, 72; princ. & a. 64, 81; set-off, 30.
Mangum v. Finucane, 38 M. 354—fraud. conv. 115, 118; hus. & w. 143; trial, 252.
Mangum, Hawkins v.—78 M. 97.
Mangum, Silver Creek Nav. &c. Co. v.—64 M. 682.
Mangum, Stevens v.—27 M. 481.
Mangum, Thames v.—87 M. 575.
Manier, Barber v.—71 M. 725.
Manion, Boyle v.—74 M. 572.

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Manion, Boyle v.—22 So. 947.
Manley v. Pattison, 73 M. 417—death, 2.
Manley, Kidd v.—28 M. 156.
Manley, Taylor v.—6 S. & M. 305.
Manlove v. Vick, 55 M. 567—inj. 176, 261.
Manlove, Catchings v.—39 M. 655.
Manly v. Kidd, 33 M. 141—des. & d. 88, 91; ex. & ad. 3, 29, 437; judgm. 691, 714.
Mann v. Lowry, 58 M. 73—j. p. 159.
Mann v. Manning, 12 S. & M. 615—app. & e. 999, 1002; bills & n. 499; paymt. 66.
Mann v. Nichols, 1 S. & M. 257—execution, 340, 356.
Mann v. State, 80 M. 398—assa. 78.
Mann v. Yazoo City, 31 M. 574—offic. 130; witn. 94.
Mann, Andrews v.—31 M. 322.
Mann, Freeland v.—1 S. & M. 531.
Manning v. Read, 30 M. 308—wills, 851.
Manning, Alexander v.—58 M. 634.
Manning, Gordon v.—44 M. 756.
Manning, Holly Springs v.—55 M. 380.
Manning, Mann v.—12 S. & M. 615.
Manning, Read v.—30 M. 308.
Mansfield v. Olsen, 4 So. 545—partit. 94, 114.
Mansfield, Continental Ins. Co. v.—45 M. 311.
Maples v. Maples, 49 M. 393—hab. corp. 24, 99; parent & c. 2.
Marble v. Fife, 69 M. 596—tax. 615, 679.
Marble v. Whaley, 33 M. 157—chat. m. 173; eq. 294.
Marble v. Whaley, 35 M. 527—courts, 482.
Marble, Beresford v.—50 So. 68.
Marble, Hamberlin v.—24 M. 586.
Marco v. Clarksdale, 94 M. 4—licens. 42.
Mardis v. Terrell, W. 327—actions, 39.
Mardis, McAuley v.—W. 307.
Marigny, Taltavall v.—91 M. 873.
Marion County v. Foxworth, 83 M. 677—bridges, 3; counties, 115, 122.
Marion County v. Taylor, 55 M. 184—counties, 136.
Marion County v. Woulard, 77 M. 343—counties, 133, 204.
Marion County, Taylor v.—51 M. 731.
Market v. Plant, 1 So. 250—lim. of act. 48.
Markham v. Merritt, 7 H. 437—dower, 7, 17, 28, 50, 73, 86; hus. & w. 55; inf. 55.
Markham, Calvit v.—3 H. 343.
Markham, Planters' Bank v.—5 H. 397.
Marks v. Bradley, 69 M. 1—assign. f. b. c. 94, 95, 104, 128, 142, 147, 157, 161; fraud. conv. 9; ins. 580; partners. 92.
Marks v. Bush, 14 So. 89—partners. 218.
Marks v. Hamblet, 23 So. 393—guard. & w. 182f.
Marks v. Howard, 70 M. 445—forc. e. & d. 14.
Marks v. McElroy, 67 M. 545—courts, 34; guard. & w. 8; inf. 11; judgm. 951.
Marks v. Price, 27 So. 600—app. & e. 1169.
Marks v. Price, 28 So. 721—eject. 121.
Marks v. State, 71 M. 206—counties, 59.
Marks v. Stoner, 11 So. 186—attach. 32.
Marks, Meridian Water-works Co. v.—16 So. 357.
Marks, Meridian Water-works Co. v.—17 So. 777.
Marks, Southern Express Co. v.—87 M. 656.
Marks, Whitney v.—16 So. 348.
Marlar v. State, 62 M. 677—counties, 101; jury, 30; refer. 19; tax. 570.
Marlett, Illinois Cent. R. Co. v.—75 M. 956.
Marlett, Vicksburg R. &c. Co. v.—78 M. 872.
Marlin, Bickerstaff v.—60 M. 509.
Marlow v. Hamer, 6 H. 189—app. & e. 1040; plead. 218, 409.
Marlow v. Johnson, 31 M. 128—execution, 36; judgm. 780.
Marlow, Pickens v.—2 S. & M. 428.
Maroney, Avent v.—12 So. 209.
Marqueze v. Caldwell, 48 M. 23—frds. st. of, 114; mtg. 407; spec. perf. 32, 65; statut. 226.
Marqueze v. Southeimer, 59 M. 430—attch. 32, 47, 351, 375, 378.
Marqueze, Richardson v.—59 M. 80.
Marseilles, Walker v.—70 M. 283.
Marsh v. Bennett, 6 H. 215—judgm. 405; princ. & s. 176.
Marsh v. Lisle, 34 M. 173—bills & n. 91; ev. 419, 429, 432; nova. 1.
Marsh v. Mandeville, 28 M. 122—bankr. 434; banks, 78, 216; eq. 23 ev. 419.
Marsh v. State, 30 M. 627—jury, 109.
Marsh v. Whittington, 88 M. 400—marr. 56.
Marsh v. Williams, 1 H. 132—cmpt. 36; eq. 404.
Marshal v. Stewart, 67 M. 494—execution, 155c.
Marshall v. Deere Plow Co. 54 So. 948—ex. & ad. 226.
Marshall v. Fulgham, 4 H. 216—contin. 6.
Marshall v. Grimes, 41 M. 27—ferries, 1; statut. 194.
Marshall v. Hamilton, 41 M. 229—app. & e. 510, 518; estop. 107; offic. 119, 120; parties, 75; plead. 32, 191, 351; schools, 16, 53.
Marshall v. Harris, 2 Miss. Dec. 255—est. 5.
Marshall v. King, 24 M. 85—des. & d. 10; est. 1; ex. & ad. 3; hus. & w. 111.
Marshall v. Minter, 43 M. 666—lim. of act. 111; judgm. 854; inj. 199, 239.

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Marshall v. Stewart, 67 M. 494—sheriffs, 126.
Marshall v. Stewart, 68 M. 180—execution, 37; sheriffs, 126, 145.
Marshall v. Stratton, 96 M. 465—gifts, 11; wills, 94.
Marshall v. Stratton, 51 So. 132—gifts, 47.
Marshall v. Western Union Tel. Co. 79 M. 154—com. 28; tel. & t. 78.
Marshall County v. Rivers, 88 M. 45—app. & e. 48, 77; paup. 49.
Marshall County v. Tidmore, 74 M. 317—witn. 23.
Marshall County, Holly Springs &c. Ins. Co. v.—52 M. 281.
Marshall County, Myers v.—55 M. 344.
Marshall, Dochterman v.—92 M. 747.
Marshall, Finlay v.—20 So. 864.
Marshall, Gayden v.—8 S. & M. 489.
Marshall, Geohegan v.—66 M. 676.
Marshall, Gibson v.—64 M. 72.
Marshall, Grimball v.—3 S. & M. 359.
Marshall, Johnson v.—48 So. 182.
Marshall, Lindsey v.—12 S. & M. 587.
Marshall, Owen v.—69 M. 486.
Marshall, Ridgeway v.—5 H. 286.
Marshall, Steamer Magnolia v.—39 M. 109.
Marshall, Vicksburg v.—59 M. 563.
Marsh, Bonner v.—10 S. & M. 376.
Marsh, Donald Bros. Mercantile Co. v.—48 So. 230.
Marsh, Tharpe v.—40 M. 158.
Mars, Rideout v.—54 So. 801.
Martin v. Broadus, Freem. Ch. 35—cncts. 266; eq. 23; inj. 124; slaves, 7b.
Martin v. Copiah County, 71 M. 407—rewards, 1.
Martin v. Dix, 52 M. 53—const. l. 70, 278; em. dom. 2, 5; mun. corp. 3, 26; tax. 1.
Martin v. Gilleylen, 70 M. 324—lim. of act. 72; partit. 113.
Martin v. Harden, 52 M. 694—paymt. 12a.
Martin v. Harrington, 57 M. 208—atty. & c. 173, 182.
Martin v. Harvey, 54 M. 685—app. & e. 530, 677; garn. 2, 64, 96; judgm. 17d.
Martin v. Kansas City &c. R. Co. 77 M. 720—mast. & s. 89.
Martin v. Kelly, 59 M. 652—costs, 139; interest, 32; subrog. 16, 33, 41; ven. & pur. 19.
Martin v. King, 3 H. 125—trial, 261.
Martin v. Lofland, 8 S. & M. 352—executions, 341; judgm. 784, 789.
Martin v. Lofland, 10 S. & M. 317—app. & e. 1097; execution, 98, 201, 341; judgm. 784, 789.
Martin v. Martin, 1 S. & M. 176—cncts. 144; ev. 35, 80; statut. 288; usury, 2.
Martin v. Martin, 69 M. 315—ex. & ad. 298; life est. 21.
Martin v. Martin, 84 M. 553—home. 141; partit. 12.
Martin v. Minor, 50 M. 42—assa. 30.
Martin v. Nash, 31 M. 324—execution, 23, 272; pub. lands, 114; records, 9; ven. & pur. 229.
Martin v. O'Brien, 34 M. 21—const. l. 93; fran. 11; inj. 164, 168; nav. wat. 36, 43; states, 11; statut. 206; wharves, 3, 7.
Martin v. Perkins, 56 M. 204—wills, 51, 217, 303.
Martin v. Phelps, 53 M. 134—app. & e. 619.
Martin v. Smith, 65 M. 1—ev. 449.
Martin v. State, 63 M. 505—crim. l. 699, 712, 724, 919, 1171.
Martin v. State, 71 M. 87—gaming, 84.
Martin v. State, 89 M. 633—ind. 175.
Martin v. State, 93 M. 764—crim. l. 1167; weap. 17a.
Martin v. State, 52 So. 258—bail, 41.
Martin v. State, 54 So. 148—crim. l. 923, 956, 957, 1162, 1166½; jury, 98.
Martin v. Stevens, 30 M. 159—guard. & w. 3, 33.
Martin v. Swofford, 59 M. 328—mtg. 144, 369; tax. 674c, 812.
Martin v. Tarver, 43 M. 517—ex. & ad. 87, 389; plead. 164; sales, 130.
Martin v. Terrill, 12 S. & M. 571—gaming, 19; judgm. 415.
Martin v. Tillman, 70 M. 614—assum. 3; cncts. 192; curt. 12; estop. 98; fraud. conv. 173.
Martin v. Williams, 42 M. 210—courts, 202a; eq. 431; ev. 157, 178, 337, 340, 346, 358.
Martinez, Cazeneuve v.—28 So. 788.
Martinez, Myers v.—95 M. 104.
Martinez, Polkinghorne v.—65 M. 272.
Martin, Allen v.—61 M. 78.
Martin, Beatty v.—42 So. 130.
Martin, Bernheimer v.—66 M. 486.
Martin, Bibb v.—14 S. & M. 87.
Martin, Brooks v.—62 M. 217.
Martin, Cable v.—1 H. 558.
Martin, Commercial Bank v.—9 S. & M. 613.
Martin, Commonwealth Bank v.—9 S. & M. 613.
Martin, Cook v.—5 S. & M. 379.
Martin, Cox v.—75 M. 229.
Martin, Cumberland Tel. &c. Co. v.—93 M. 505.
Martin, Davidson v.—33 M. 530.

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Martin, Dove v.—23 M. 588.
Martin, Ellis v.—2 S. & M. 187.
Martin, Gilleylen v.—73 M. 695.
Martin, Gulfport v.—96 M. 131.
Martin, Haley v.—85 M. 698.
Martin, Johnson v.—68 M. 330.
Martin, Lombard v.—39 M. 147.
Martin, McGehee v.—53 M. 519.
Martin, Mason v.—64 M. 572.
Martin, Mayor v.—83 M. 322.
Martin, Moore v.—18 So. 119.
Martin, Murdock v.—12 S. & M. 660.
Martin, Pleasants & Co. Hargrove v.—6 S. & M. 61.
Martin, Pintard v.—Sm. & M. Ch. 126.
Martin, Phenix Ins. Co. v.—16 So. 417.
Martin, Price v.—46 M. 489.
Martin, Prichard v.—27 M. 305.
Martin, State v.—56 M. 108.
Martin, Vertner v.—10 S. & M. 103.
Martin, White v.—75 M. 646.
Martin, Wolfe v.—1 H. 30.
Martin, Yazoo &c. R. Co. v.—29 M. 829.
Martin, Yazoo &c. R. Co. v.—94 M. 700.
Marx v. Davis, 56 M. 745—chat. m. 126, 271.
Marx v. Haley, 92 M. 113—ex. & ad. 327; home. 152.
Marx v. Jordan, 84 M. 334—ven. & pur. 231.
Marx v. Logue, 71 M. 905—app. & e. 208; lim. of act. 183; judgm. 916.
Marx v. State, 61 M. 478—recogn. 11.
Marx v. Trussel, 50 M. 498—j. p. 174.
Marx, Bonner v.—51 M. 141.
Marx, Davis v.—55 M. 376.
Marx, Dodds v.—63 M. 443.
Marx, Gustarus v.—44 M. 446.
Marx, Levy v.—18 So. 575.
Mary v. Baskin, 12 S. & M. 428—bound. 54.
Marye v. Dyche &c. Co. 42 M. 347—chat. m. 138; land. & t. 229c, 243, 248, 265, 271.
Mary Washington Female College v. McIntosh, 37 M. 671—app. & e. 1051; colleg. 6, 10; ev. 461; new tr. 41; subscrip. 6.
Mashburn v. Mathis, 23 So. 179—land. & t. 271.
Mask v. Allen, 17 So. 82—estop. 68; replev. 70; sales, 471.
Mask v. Philler, 32 M. 237—lim. of act. 148.
Mask v. Rawls, 57 M. 270—mal. pros. 5.
Mask v. State, 32 M. 405—crim. l. 135, 971; witn. 266, 266½, 269.
Mask v. State, 36 M. 77—crim. l. 419, 822, 1172; hom. 146, 286b; witn. 331½, 353.
Mask, Louisville &c. R. So. v.—64 M. 738.
Mason v. Fischer & Burnett Lumber Co. 21 So. 5—fraud. conv. 76, 115.
Mason v. Lane, 5 H. 11—app. & e. 1102.
Mason v. Lee, 96 M. 186—relig. soc. 12.
Mason v. Martin, 64 M. 572—jud. s. 41.
Mason v. Moody, 26 M. 184—chat. m. 1, 6, 34, 35, 42, 57, 102; mtg. 26; sales, 453.
Mason v. O'Brien, 42 M. 420—ex. & ad. 181, 453, 454; land. & t. 229c; trover, 21.
Mason, Goode v.—6 H. 543.
Mason, Holcomb v.—35 M. 698.
Masonic Benefit Ass'n v. Hoskins, 56 So. 169—ins. 717, 817.
Masonic Benefit Assn. v. Simmons, 86 M. 470—eq. 319; ex. & ad. 443; plead. 129.
Mason, Lobdell v.—71 M. 937.
Mason, Miss. Cent. R. Co. v.—51 M. 234.
Mason, Wynne v.—72 M. 424.
Masset, Adams v.—1 S. & M. 660.
Massey v. Rimmer, 69 M. 667—adv. pos. 42.
Massey v. Womble, 69 M. 347—can. of i. 19; eject. 152; home. 12, 111, 208; imp. 4.
Massey, Gallaspy & Co. v.—54 So. 805.
Massey, Greenbury v.—90 M. 121.
Massey, Illinois Cent. R. Co. v.—53 So. 385.
Massey, Kingsland v.—69 M. 296.
Massey, McAdams v.—1 S. & M. 660.
Massey, McCue v.—90 M. 124.
Massingill v. Carraway, 13 S. & M. 324—discov. 19, 22.
Massingill, McKiernan v.—6 S. & M. 375.
Masters v. Dunn, 30 M. 264—lim. of act. 70a.
Maston v. State, 83 M. 647—crim. l. 763c; hom. 163.
Mastronada v. State, 60 M. 86—courts, 62, 64; crim. l. 272.
Mastronardi, Warren County v.—76 M. 273.
Matheny, Clopton v.—48 M. 285.
Matheny v. Galloway, 12 S. & M. 475—garn. 124, 174, 179, 191.
Matheny, Mabry v.—10 S. & M. 323.
Matheny, Stewart v.—66 M. 21.
Mather, Starke v.—W. 181.
Mathews, Browning v.—73 M. 343.
Mathews, Jones v.—4 So. 547.
Mathis v. State, 80 M. 491—crim. l. 520, 789, 1036.
Mathis, Mashburn v.—23 So. 179.
Mathison v. State, 87 M. 739—crim. l. 338, 768; hom. 169, 300e, 311; witn. 406.
Matlock v. Cobb, 62 M. 43—usury, 30.
Matlock v. Livingston, 9 S. & M. 489—app. & e. 671; bills & n. 476, 486; cncts. 86, 341; ev. 419, 432; ex. & ad. 337; frds. st. of, 158.
Mattan, Mobile &c. R. Co. v.—41 M. 692.
Mattheny v Totten, 2 S. & M. 52—app. & e. 545; excep. 9.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Matthews v. Bailey, 25 M. 33—bonds, 123; parties, 4; plead. 305, 306; sheriffs, 166.
Matthews v. Chrisman, 12 S. & M. 595—guar. 4, 7.
Matthews v. Clifton, 13 S. & M. 330—execution, 237.
Matthews v. Copiah County, 53 M. 715—offic. 95.
Matthews v. Cotton, 83 M. 472—app. & e. 190; j. p. 32.
Matthews v. Delta Southern R. Co. 90 M. 429—ven. & pur. 254.
Matthews v. Hamblin, 28 M. 611—assign. 83; plead. 180.
Matthews v. Lee, 25 M. 417—offic. 126; plead. 360; tax. 546.
Matthews v. Matthews, 66 M. 239—ex. & ad. 379, 380, 437; lim. of act. 130.
Matthews v. Matthews, 1 So. 741—ex. & ad. 367, 379, 382, 385, 448, 454.
Matthews v. Millsaps, 58 M. 564—princ. & s. 194; sheriffs, 3.
Matthews v. Montgomery, 25 M. 150—clks. of c. 64; judgm. 874.
Matthews v. Mosby, 13 S. & M. 422—abate. & r. 47; judgm. 861, 863, 870; sci. fa. 4; states, 122, 124.
Matthews v. New Orleans &c. R. Co. 93 M. 325—mast. & s. 112, 286, 288, 289.
Matthews v. Parker, 27 M. 642—schools, 16.
Matthews v. Patterson, 2 H. 729—ven. & pur. 129.
Matthews v. Redwine, 23 M. 233—bills. & n. 28; bonds, 125; sheriffs, 133.
Matthews v. Redwine, 25 M. 99—exemp. 44.
Matthews v. Sontheimer, 39 M. 174—app. & e. 191, 680; lim. of act. 180; wills, 260, 280.
Matthews v. State, 61 M. 155—burg. 29; larc. 41, 77.
Matthews v. State, 96 M. 169—hom. 250.
Matthews v. Walker, 57 M. 337—convt. 10; costs, 322.
Matthews, Brown v.—40 So. 66.
Matthews, Chambliss v.—57 M. 306.
Matthews, Copes v.—10 S. & M. 398
Matthews, Fox v.—33 M. 433.
Matthews, Learned v.—40 M. 210.
Matthews, Nevill v.—W. 377.
Matthews, New Orleans Ins. Assn. v.—65 M. 301.
Matthews, Partee v.—53 M. 140.
Matthews, Roane v.—75 M. 94.
Matthews, Snodgrass v.—30 M. 472.
Matthews, State v.—57 M. 1.
Matthews, Thompson v.—56 M. 368.
Mattingly, Yazoo &c. R. Co. v.—37 So. 708.
Mattison v. Judd, 59 M. 99—assign. f. b. c. 110, 124, 154, 161, 171, 236, 257.
Maulding v. Rigby, 4 H. 222—app. & e. 548; excep. 9; trial, 331.
Maulding, Vick v.—1 H. 217.
Maurepas Milling Co. Perkins v.—88 M. 804.
Maury v. Commercial Bank, 5 S. & M. 41—contin. 6; plead. 86.
Maury v. Ingraham, 28 M. 171—usury, 19.
Maury v. Jeffers, 4 S. & M. 57—bills & n. 257, 303; set-off, 41.
Maury v. Jones, 27 M. 225—judgm. 538.
Maury v. Roberts, 27 M. 225—attach. 301; judgm. 564.
Maury v. Smith, 46 M. 81—inj. 129.
Maury v. State, 68 M. 605—arr. 61; crim. l. 865; hom. 231.
Maury, Dorsey v.—10 S. & M. 298.
Mauser &c. Co. Wessinger v.—75 M. 64.
Mawry, Dick v.—9 S. & M. 448.
Maxey v. Strong, 53 M. 280—contin. 6; ev. 238; partners. 286; proc. 157.
Maxey v. White, 53 M. 80—dism. 14; land. & t. 228k, 229½.
Maxwell v. Chamberlin, 23 So. 266—ev. 440; ven. & pur. 49, 80.
Maxwell v. Craft, 32 M. 307—des. & d. 88; ex. & ad. 3, 299.
Maxwell v. Harkleroad, 77 M. 456—guard. & w. 151.
Maxwell v. Mississippi Valley Co. 95 M. 466—eject. 90; r. r. 72.
Maxwell v. Pate, 16 So. 529—atty. & c. 101.
Maxwell v. State, 40 So. 615—crim. l. 522.
Maxwell v. State, 68 M. 339—ars. 19.
Maxwell, Anderson v.—94 M. 138.
Maxwell, Bass v.—25 So. 873.
Maxwell, Bennett v.—82 M. 70.
Maxwell, Bridgeforth v.—42 M. 743.
Maxwell, Bridges v.—34 M. 309.
Maxwell, Neal v.—40 M. 726.
Maxwell, Rice v.—13 S. & M. 289.
Maxwell, Sharpe v.—30 M. 589.
Maxwell, Witkowski v.—69 M. 56.
May v. Baskin, 12 S. & M. 428—bound. 34, 54; frds. st. of, 70.
May v. Blum, 21 So. 528—app. & e. 1091.
May v. Hubbard, 94 M. 456—dism. 80.
May v. Rockett, 25 M. 233—hus. & w. 206; replev. 8.
May v. Rocket, 25 M. 375—hus. & w. 111.
May v. State, 89 M. 291—crim. l. 824; hom. 309.
May v. State, 54 So. 70—crim. l. 865, 1163.
May v. Sullivan, 37 M. 541—spec. perf. 105, 106.

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May v. Taylor, 62 M. 500—assign. f. b. c. 142; paymt. 39.
May v. Williams, 61 M. 125—agric. 15; frds. st. of, 19; j. p. 44; mast. & s. 82.
May, Baskins v.—9 S. & M. 373.
Maybin v. Biloxi, 77 M. 673—mun. corp. 818, 960.
Maybin, Louisville &c. R. Co. v.—66 M. 83.
Mayer v. Bernstein, 69 M. 17—assign. f. b. c. 24, 30; partners. 151.
Mayer v. McRea, 16 So. 875—assign. f. b. c. 31.
Mayer v. Martin, 83 M. 322—party w. 9, 10.
Mayer v. McLure, 36 M. 389—abate. & r. 69; app. & e. 331; ex. & ad. 455; inf. 57; new tr. 40; princ. & a. 54, 105, 158, 159, 160, 171.
Mayer v. Peebles, 58 M. 628—tax. 211, 690, 734, 740, 802, 822.
Mayer v. Shields, 59 M. 107—assign. f. b. c. 39.
Mayer, Cassedy v.—64 M. 356.
Mayer, Dreyfus v.—69 M. 282.
Mayer, Lemonius v.—71 M. 514.
Mayer, McCown v.—65 M. 537.
Mayer, Rogers v.—59 M. 524.
Mayers, Covington v.—62 M. 730.
Mayers, Fearn v.—53 M. 458.
Mayers, Frederic v.—89 M. 127.
Mayer, Western Assur. Co. v.—64 M. 795.
Mayes v. Phillips, 60 M. 547—garn. 174.
Mayes v. State, 64 M. 329—crim. l. 362, 366; hom. 171.
Mayes, Hazlehurst v.—84 M. 7.
Mayes, Hazlehurst v.—96 M. 656.
Mayes, Long v.—94 M. 735.
Mayes, Somerville v.—54 M. 31.
Mayes, State v.—23 M. 516.
Mayes, State v.—43 M. 417.
May, Feemster v.—13 S. & M. 275.
Mayfield v. Barnard, 43 M. 270—plead. 218, 409; proc. 155; slaves, 7.
Mayfield, Dilworth v.—36 M. 40.
Mayfield, Herndon v.—79 M. 533.
Mayfield, Miller v.—37 M. 688.
Mayfield, Weems v.—75 M. 286.
Mayfield, Wilkerson v.—27 M. 542.
May, Kain v.—5 S. & M. 368.
Maynard v. Cocke, 71 M 493—land. & t. 5, 240, 243; trover, 25.
Maynard v. Cocke, 18 So. 374—app. & e. 517, 674; eq. 89; ex. & ad. 388e, 453.
Maynard, Cocke v.—16 So. 908.
Mayo v. Assurance Society, 71 M. 590—des. & d. 2; dom. 4.
Mayo v. Clancey, 57 M. 674—eq. 446; ex. & ad. 510a; inf. 111; judgm. 386, 456; lim. of act. 72b.
Mayo, McDonald Cotton Co. v.—38 So. 372.
Mayo, McMullen v.—8 S. & M. 298.
Mayo, Outlaw v.—1 Miss. Dec. 423.
Mayor, Elmslie v.—35 So. 201.
May Pants Co. Wilson v.—37 So. 813.
Mayrant, Welborn v.—48 M. 652.
Mays v. Rose, Freem. Ch. 703—quiet. t. 16; rec. 12, 35.
Mays, Dickerson v.—60 M. 388.
Mays, Kirkman v.—12 So. 443.
Mayson v. Banks, 59 M. 447—tax. 679.
Mayson v. Beazley, 27 M. 106—ev. 166, 354; partners. 217, 243, 245, 258, 258b.
May, Woodward v.—4 H. 389.
Meacham v. Edmonson, 54 M. 746—home. 145.
Meacham v. Moore, 59 M. 561—attch. 308; trial, 69.
Meacham v. Pinson, 60 M. 217—app. & e. 793; bills & n. 110, 126; ex. & ad. 418; judgm. 564; insolv. 117; usury, 62.
Meacham, Edmonson v.—50 M. 34.
Mead v. Day, 54 M. 58—eq. 192; tax. 809.
Mead, De Jean Mitchell Co. v.—92 M. 596.
Meade v. Thompson, W. 450—execution, 263.
Meaders v. Gray, 60 M. 400—app. & e. 160; int. 4.
Mead, Yates v.—68 M. 787.
Mead, Yates v.—69 M. 473.
Mead, Yeates v.—65 M. 89.
Means v. Haley, 84 M. 550—tax. 731, 777.
Means v. Haley, 86 M. 557—hus. & w. 55; lev. 2, 28f; tax. 175, 674b.
Means, Simmons v.—8 S. & M. 397.
Means, Thompson v.—11 S. & M. 604.
Mears v. Winslow, Sm. & M. Ch. 449—attch. 183.
Mears, Copeland v.—2 S. & M. 519.
Meaut, Chambers v.—66 M. 625.
Meaux, McGlothlin v.—38 So. 317.
Mebane v. Hickory Flat, 55 So. 359—schools, 23.
Mechanics' Bank v. Yager, 62 M. 529—bills & n. 68.
Mechanics' Sav. Bank v. Fargason, 79 M. 64—partners. 183, 184.
Mechanics' &c. Co. v. Smith, 79 M. 142—ins. 392.
Mechanics' Aid &c. Assn. Suttle v.—29 So. 758.
Medford v. Frazier, 58 M. 241—partit. 83, 86.
Medford, Bell v.—57 M. 31.
Meehan-Rounds Lumber Co. Fernwood Lumber Co. v.—85 M. 54.

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Meek v. Fox, 42 M. 513—attch. 26.
Meek v. Howard, 10 S. & M. 502—judgm. 433, 460; new tr. 96.
Meek v. Perry, 36 M. 190—app. & e. 970; ev. 118, 120, 122, 123; guard. & w. 69.
Meek, Gibson Mfg. Co. v.—71 M. 614.
Meek, Newman v.—Sm. & M. Ch. 331.
Meek, Newman v.—Freem. Ch. 441.
Meeks v. Whatley, 48 M. 337—bankr. 256; tax. 509, 796, 809.
Meek, Walker v.—12 S. & M. 495.
Meggett v. Baum, 57 M. 22—bills & n. 81, 140, 329, 371, 454, 455; princ. & s. 103.
Meggett v. Western Union Tel. Co. 69 M. 198—tel. & t. 53.
Melchior v. Kahn, 38 So. 347—app. & e. 1009.
Melchior, Jones v.—71 M. 115.
Melchior, Merritt v.—30 M. 516.
Melius v. Houston, 41 M. 59—abate. & r. 51; attch. 302; witn. 37.
Mellen v. Boarman, 13 S. & M. 100—ex. & ad. 368, 388b, 388d; set-off, 46.
Mellen, Prentiss v.—1 S. & M. 521.
Mellini v. Duly, 88 M. 219—j. p. 44, 178; witn. 275.
Melion, Breckenridge v.—1 H. 273.
Mellon, Magee v.—23 M. 585.
Mellton, Crawford v.—12 S. & M. 328.
Melmoth, Gwin v.—Freem. Ch. 505.
Melsheimer v. McKnight, 92 M. 386—eject. 113; mtg. 349.
Melson, Burrage v.—48 M. 237.
Melton v. Howard, 7 H. 103—princ. & s. 168.
Melton v. Williams Co. 83 M. 624—fraud. conv. 27.
Melton, Collins v.—40 M. 242.
Melton Hardware Co. v. Heidelberg, 91 M. 598—app. & e. 204, 1027; garn. 130.
Melton, Talbert v.—9 S. & M. 9.
Melvin v. Lyons, 10 S. & M. 78—wills, 434.
Memphis Grocery Co. v. Leach, 71 M. 959—assign. f. b. c. 31, 70, 124; mtg. 34.
Memphis Grocery Co. v. Anderson, 76 M. 322—sheriffs, 118; supersed. 7.
Memphis Grocery Co. v. Trotter, 7 So. 550—fraud. conv. 294.
Memphis Grocery Co. v. Valley Land Co. 17 So. 232—attch. 308.
Memphis Grocery Co. Willis v.—19 So. 101.
Memphis Mach. Works v. Aberdeen, 77 M. 420—acct. actl. on, 1; tender, 23.
Memphis &c. Packet Co. Jones v.—31 So. 201.
Memphis &c. R. Co. v. Anderson, 51 M. 829—plead. 106.
Memphis &c. R. Co. v. Blakeney, 43 M. 218—r. r. 441.
Memphis &c. R. Co. v. Chastine, 54 M. 503—app. & e. 270, 305; carr. 276, 354; dam. 142; tresp. 43.
Memphis &c. R. Co. v. Cocke, 64 M. 713—ev. 243; princ. & a. 122, 190; witn. 141.
Memphis &c. R. Co. v. Glover, 78 M. 467—abate. & r. 42; appr. 21; r. r. 194, 265.
Memphis &c. R. Co. v. Green, 52 M. 779—carr. 277b, 294, 303; dam. 91.
Memphis &c. R. Co. v. Jobe, 69 M. 452—r. r. 324, 351, 401.
Memphis &c. R. Co. v. Mitchell, 52 M. 808—r. r. 327.
Memphis &c. R. Co. v. Neighbors, 51 M. 412—assign. f. b. c. 351; can. of i. 36; deeds, 155, 166; quiet. t. 1, 3, 44; ven. & pur. 114.
Memphis &c. R. Co. v. Orr, 43 M. 279—r. r. 103, 441.
Memphis &c. R. Co. v. Orr, 52 M. 541—lim. of act. 130; plead. 223.
Memphis &c. R. Co. v. Owens, 60 M. 227—eq. 422; spec. perf. 123.
Memphis &c. R. Co. v. Payne, 37 M. 700—em. dom. 73.
Memphis &c. R. Co. v. Scruggs, 50 M. 284—arb. & a. 67, 82, 85; corp. 418; hus. & w. 60; princ. & a. 170.
Memphis &c. R. Co. v. Thomas, 51 M. 637—mast. & s. 167, 198, 240, 243.
Memphis &c. R. Co. v. Whitfield, 44 M. 466—app. & e. 1028; carr. 277a, 278, 303, 319, 323; crim. l. 1172; dam. 91, 92, 95; neg. 82.
Memphis &c. R. Co. Champion v.—35 M. 692.
Memphis &c. R. Co. Frank v.—52 M. 570.
Memphis &c. R. Co. Hester v.—32 M. 378.
Memphis &c. R. Co. Jobe v.—71 M. 734.
Memphis &c. Packet Co. Jones v.—21 So. 303.
Memphis &c. R. Co. White v.—64 M. 566.
Mendenhall, Birdsong v.—52 So. 795.
Mendenhall Lumber Co. v. State Bank, 54 So. 883—bills & n. 129, 137.
Mendenhall Lumber Co. Boone v.—52 So. 584.
Menge v. Gulf &c. R. Co. 53 So. 424—paymt 82.
Menken v. Combs, 2 Miss. Dec. 644—bills & n. 73, 444, 490.
Menken v. Frank, 57 M. 732—inj. 242.
Menken v. Frank, 58 M. 283—courts, 92.
Menken v. Gumbel, 57 M. 756—app. & e. 1175; assign. 50; garn. 212.
Menter v. Stewart, 2 H. 698—libel, 76.
Menxing, Cox v.—30 So. 41.
Mercer v. Stark, W. 451—spec. perf. 48.
Mercer v. Stark, Sm. & M. Ch. 479—eq. 451, 464; trusts, 44, 85.

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Mercer, Hays v.—1 Miss. Dec. 185.
Mercer, Parker v.—6 H. 320.
Mercer, Starke v.—3 H. 377.
Merchants' Nat. Bank v. Meridian Sash & Blind Factory, 18 So. 921—app. & e. 1025.
Merchants' Bank of Grenada, State Nat. Bank v.—83 M. 610.
Merchants' Bank, Kershaw v.—7 H. 386.
Merchants' Nat. Bank, Cook v.—72 M. 982.
Merchants' Wharfboat Association v. Heidingsfelder, 64 M. 678—carr. 139; wareh. 24; wharves, 7.
Merchants' Wharfboat Assn. v. Livingston, 3 So. 251—wareh. 24a.
Merchants' Wharfboat Assn. v. Wood, 64 M. 661—carr. 174; cust. & u. 19; ev. 471, 544; Sunday, 2, 7; wareh. 24a.
Merchants' &c. Assn. v. Smith, 3 So. 249—cust. & u. 19; ev. 471; wareh. 24a.
Merchants' &c. Assn. v. Wood, 3 So. 248—ev. 544.
Merchants' &c. Bank v. Calmes, 82 M. 603—guar. 38; plead. 194.
Merchants' &c. Bank v. Caston, 52 So. 633—usury, 49.
Merchants' &c. Bank v. Millsaps, 15 So. 659—bills & n. 98, 329.
Merchants' &c. Bank, Bamberger v.—73 M. 572.
Merchants' &c. Bank, Brill v.—12 So. 29.
Merchants' &c. Bank, Greene v.—73 M. 542.
Merchants' &c. Bank, Metcalfe v.—89 M. 649.
Merchants' &c. Bank, Millsaps v.—69 M. 918.
Merchants' &c. Bank, Millsaps v.—71 M. 361.
Merchants' &c. Packet Co. v. Strenby, 91 M. 211—corp. 377.
Merchant, Westerfield v.—93 M. 791.
Mercien v. Cotton, 34 M. 64—bills & n. 352.
Meredith, Atwood v.—37 M. 635.
Meredith, Felder v.—W. 447.
Meridian v. George, 6 So. 619—tax. 610.
Meridian v. Higgins, 81 M. 376—mun. corp. 396.
Meridian v. Hyde, 11 So. 108—mun. corp. 819.
Meridian v. McBeath, 80 M. 485—mun. corp. 821.
Meridian v. Phillips, 65 M. 362—tax. 616, 734a.
Meridian v. Poole, 88 M. 108—dedi. 11, 35.
Meridian v. Ragsdale, 67 M. 86—tax. 606, 608.
Meridian v. Trussell, 52 M. 711—judgm. 17d, 138, 153; mun. corp. 1029.
Meridian v. Telegraph Co. 72 M. 910—em. dom. 117; licens. 5½; mun. corp. 3, 680; tel. & t. 10.
Meridian, Armour v.—24 So. 533.
Meridian, Ball v.—67 M. 91.
Meridian Cotton Co. Star Compress &c. Co. v.—87 M. 228.
Meridian Fair &c. Assn. v. North Birmingham R. Co. 70 M. 808—bailm. 14, 31.
Meridian Fertilizer Factory v. Edwards, 77 M. 697—attch. 70; ev. 354.
Meridian, Fewell v.—90 M. 380.
Meridian, Forbes v.—86 M. 234.
Meridian Home Telephone Co. Braham v.—52 So. 485.
Meridian Land Co. Bourdeaux v.—67 M. 304.
Meridian Land &c. Co. v. Ormond, 82 M. 758—garn. 34; princ. & a. 145.
Meridian Land &c. Co. Ragsdale v.—71 M. 284.
Meridian Light & R. Co. Rosenbaum v.—38 So. 321.
Meridian Light &c. Co. v. Slaughter, 53 So. 952—r. r. 21.
Meridian, Meridian Waterworks Co. v.—85 M. 515.
Meridian, Mitchell v.—67 M. 644.
Meridian Nat. Bank v. Hoyt &c. Co. 74 M. 221—action, 63.
Meridian Nat. Bank, Rosenbaum v.—73 M. 267.
Meridian News Co. v. Diem, 70 M. 695—execution, 149.
Meridian, Sanford v.—52 M. 383.
Meridian Sash & Blind Foctory, Merchants' Nat. Bank v.—18 So. 921.
Meridian Sav. Inst. Hall v.—56 M. 674.
Meridian, Stainback v.—79 M. 447.
Meridian, Sturges v.—95 M. 35.
Meridian Waterworks Co. v. Meridian, 85 M. 515—estop. 62, 93; waters, 184, 196.
Meridian Waterworks Co. v. Marks, 16 So. 357—can. of i. 9.
Meridian Waterworks Co. v. Marks, 17 So. 777—corp. 370, 406.
Meridian Waterworks Co. v. Schulherr, 17 So. 167—can. of i. 9; corp. 406.
Meridian, Whitfield v.—66 M. 570.
Meridian, Witherspoon v.—69 M. 288.
Meridian &c. Land Co. v. Ball, 68 M. 135—adv. pos. 59, 113; ev. 273; land. & t. 66.
Meridian &c. R. Co. Slaughter v.—95 M. 251.
Merkel, First Nat. Bank v.—53 So. 350.
Merrell v. Learand, 1 H. 150—bills & n. 106.
Merrett v. Vance, 6 H. 498—app. & e. 545; excep. 9; execution, 154b.
Merrett, Clayton v.—52 M. 353.

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Merrick, Abbey v.—27 M. 320.
Merrill v. Bell, 6 S. & M. 730—cncts. 80, 309; courts, 20; dep. 97.
Merrill v. Hunt, 52 M. 774—app. & e. 395.
Merrill v. Melchior, 30 M. 516—attch. 312, 339; can. of i. 44; cncts. 153, 347; det. 20; ev. 92; slaves, 7b, 10; statut. 241.
Merrill v. Moore, 7 H. 271—ex. & ad. 495.
Merrill v. State, 45 M. 651—crim. l. 967; larc. 30.
Merrill v. State, 58 M. 65—hom. 206, 214, 221, 267.
Merrill, Humphreys v.—52 M. 92.
Merrill, Jones v.—69 M. 747.
Merritt v. Doss, 31 M. 275—adv. pos. 45; hus. & w. 134, 221; lim. of act. 73, 76.
Merritt v. State, 5 So. 386—obst. just. 10.
Merritt v. White, 37 M. 438—garn. 102; judgm. 119; proc. 132.
Merritt, Biggam v.—W. 430.
Merritt, Dorsey v.—6 H. 390.
Merritt, Markham v.—7 H. 437.
Mesmith, Rives v.—64 M. 807.
Mesmith, Ross v.—2 Miss. Dec. 389.
Metcalf v. Brandon, 58 M. 841—frds. st. of, 145, 151; spec. perf. 97.
Metcalf v. Grover, 55 M. 145—lim. of act. 43; plead. 196, 223, 269.
Metcalf v. Stelle, 42 M. 511—garn. 177.
Metcalf v. Yazoo &c. R. Co. 52 So. 355—carr. 247.
Metcalfe v. Brandon, 60 M. 685—deeds, 59, 191.
Metcalfe v. Merchants' &c. Bank, 89 M. 649—assign. f. b. c. 343, 350; banks, 80; judges, 51; plead. 8.
Metcalfe v. McCutcheon, 60 M. 145—adv. pos. 108; app. & e. 103; eject. 76; plead. 237.
Metcalfe v. Perry, 66 M. 68—tax. 697, 802, 806, 817.
Metcalf, Funston v.—40 M. 504.
Metcalf, McGee v.—12 S. & M. 535.
Metcalf, Scott v.—13 S. & M. 563.
Metcalf, Yazoo &c. R. Co. v.—84 M. 242.
Methodist &c. Church v. Vicksburg, 50 M. 601—corp. 456; ev. 120; mun. corp. 244, 249, 254.
Metsger v. Southern Bank, 54 So. 241—banks, 116, 118; corp. 285, 399, 425, 426.
Metts v. State, 68 M. 126—tax. 568b.
Metts, Foster v.—55 M. 77.
Meyer v. Baldwin, 52 M. 263—princ. & a. 107, 166.
Meyer v. Blakemore, 54 M. 570—app. & e. 1140; guar. 61, 69, 76, 88; indem. 5, 12, 15; trial, 194, 205, 253.
Meyer v. Casey, 57 M. 615—ev. 432.
Meyer v. Dorrance, 32 M. 263—judgm. 876.
Meyer v. King, 72 M. 1—death, 31; drug. 7; neg. 88, 113, 115, 122; plead. 67.
Meyer v. Morgan, 51 M. 21—fact. 39; princ. & a. 75, 161, 171, 173.
Meyer v. Mosler, 64 M. 610—action, 70; replev. 21.
Meyer v. Whitehead, 62 M. 387—lim. of act. 115; judgm. 140, 144, 163, 348.
Meyer, Adler v.—73 M. 863.
Meyer, Bynum v.—48 So. 289.
Meyer, Carbolineum Wood-Preserving &c. Co. v.—76 M. 586.
Meyer, Dittman &c. Co. v.—54 So. 441.
Meyer, Dunbar v.—43 M. 679.
Meyer Drug Co. Wilkerson v.—24 So. 971.
Meyer, Ex parte, 57 M. 85—const. law, 83; costs, 322; crim. l. 1206.
Meyer, Griffin Lumber Co. v.—80 M. 435.
Meyer, Paxton v.—58 M. 445.
Meyer, Smiley v.—55 M. 555.
Meyers, Planters' Ins. Co. v.—55 M. 479.
Meyer, Wood v.—7 So. 359.
Mezeix v. McGraw, 44 M. 100—eq. 120, 369; paymt. 12a.
Mhoon v. Colment, 51 M. 60—action, 48; app. & e. 1173; bills & n. 540; excep. 11; judgm. 26.
Mhoon v. Greenfield, 52 M. 434—assum. 3; tresp. 17, 22.
Mhoon v. Wilkerson, 47 M. 633—spec. perf. 24, 96, 97; ven. & pur. 261, 275, 279, 303.
Mhoon, Belcher v.—47 M. 613.
Mhoon, Poston v.—49 M. 620.
Mhoon, Robinson v.—68 M. 712.
Miazza v. State, 36 M. 613—crim. l. 285, 289; judges, 2; ind. 176; int. liq. 208.
Miazza v. Yerger, 53 M. 135—eq. 273, 288; frds. st. of, 56; trusts, 71, 81, 92½.
Miazza, Fidelity Mut. Life Ins. Co. v.—93 M. 18, 422.
Michel, Lott v.—16 So. 794.
Michie v. Planters' Bank, 4 H. 130—judgm. 752, 789.
Michie, Minor v.—W. 24.
Michon v. State, 1 Miss. Dec. 529—crim. l. 15.
Mickell, Moore v.—W. 231.
Middlesex Banking Co. v. Field, 84 M. 646—comp. 8; deeds, 126, 128, 129, 134; perp. 1, 4.
Middlesex Banking Co. Field v.—77 M. 180.
Middleton v. Claughton, 77 M. 131—partit. 12.

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Middleton v. State, 80 M. 393—crim. l. 719, 814; hom. 300d; witn. 387.
Middleton v. State, 52 So. 258—crim. l. 1038, 1122.
Middleton, Guise v.—Sm. & M. Ch. 89.
Middleton, Kyzer v.—61 M. 360.
Middleton, Turnbull v.—W. 413.
Middleton, Whitehead v.—2 H. 692.
Mikell, Davis v.—Freem. Ch. 548.
Milam v. Strickland, 45 M. 721—judgm. 17d; proc. 134.
Milan, Burleson v.—56 M. 399.
Miles v. Hall, 12 S. & M. 332—bills & n. 420.
Miles v. Miles, 78 M. 904—deeds, 111; ev. 452; ven. & pur. 280.
Miles v. Miles, 84 M. 624—ref. of inst. 5, 10, 26, 45.
Miles v. Myers, W. 379—plead. 217; tresp. 22, 252.
Miles v. Richards, W. 477—fraud. conv. 258.
Miles v. State, 54 So. 946—crim. l. 19; hom. 190; inf. 66.
Miles, Allen v.—36 M. 640.
Miles, Enloe v.—12 S. & M. 147.
Miles, Harvey v.—1 Miss. Dec. 135.
Miles, Jones v.—1 H. 50.
Miles, Keith v.—39 M. 442.
Miles, Standly v.—36 M. 434.
Miles, Vicksburg R. &c. Co. v.—88 M. 204.
Millburn Gin &c. Co. v. Ringold, 19 So. 675—ev. 400.
Miller v. American Nat. Bank, 76 M. 84—bills & n. 320.
Miller v. Board of Levee Commissioners, 78 M. 201—em. dom. 154.
Miller v. Brooks, 4 S. & M. 175—paymt. 63; plead. 142, 313, 382, 384.
Miller v. Buckley, 85 M. 706—judgm. 744, 949.
Miller v. Delta &c. Co. 74 M. 110—tax. 549, 657, 691.
Miller v. Doxy, W. 329—eq. 444.
Miller v. Edwards, 75 M. 739—j. p. 86; sheriffs, 26.
Miller v. Ewing, 8 S. & M. 421—appr. 11; attch. 217; atty. & c. 111; execution, 18; judgm. 16, 492, 813.
Miller v. Gaskins, Sm. & M. Ch. 524—eq. 70; judgm. 431.
Miller v. Hazlehurst Lodge, 53 M. 665—eject. 15.
Miller v. Helm, 2 S. & M. 687—bills & n. 336; eq. 150; ex. & ad. 120, 170, 222, 364, 368; lim. of act. 167; mtg. 94.
Miller v. Hinds County, 68 M. 88—counties, 216; lim. of act. 5, 57, 66.
Miller v. Ingram, 56 M. 510—eject. 15, 143.
Miller v. Ivey, 35 So. 417—app. & e. 1002.
Miller v. Jefferson College, 5 S. & M. 651—ex. & ad. 222, 225.
Miller v. Keith, 26 M. 166—am. cur. 3; app. & e. 150; ex. & ad. 20.
Miller v. Lamar, 43 M. 383—eq. 338, 340; ven. & pur. 308, 308a.
Miller v. Leflore, 32 M. 634—paymt. 44, 45.
Miller v. Lynch, 38 M. 344—Sunday, 13.
Miller v. McDougall, 44 M. 682—eq. 182; inj. 148, 161, 172.
Miller v. McGehee, 60 M. 903—counties, 191; tax. 612.
Miller v. Mayfield, 37 M. 688—app. & e. 1025, 1040; bills & n. 224, 280, 327, 328.
Miller v. Miller, 96 M. 526—wills, 118, 297.
Miller v. Northern Bank, 28 M. 81—ev. 220, 240.
Miller v. Northern Bank, 34 M. 412—partners. 200, 216; plead. 53, 229, 245, 248; trial, 328.
Miller v. Owens, W. 244—ven. & pur. 308a.
Miller v. Palmer, 55 M. 323—ex. & ad. 377, 384, 388b, 389d; judgm. 138, 428; inf. 80, 84.
Miller v. Patton, 3 S. & M. 463—execution, 154b, 155a; judgm. 130.
Miller v. Peeples, 60 M. 45—app. & e. 612.
Miller v. Peeples, 60 M. 819—inn. 11.
Miller v. Pickens, 26 M. 182—liens, 7; plead. 213; trusts, 187.
Miller v. Port Gibson Brick &c. Co. 78 M. 170—garn. 187.
Miller v. Reynolds, 4 So. 341—records, 17.
Miller v. State, 5 H. 250—ind. 203; int. liq. 200.
Miller v. State, 33 M. 356—crim. l. 970; gaming, 64, 94; gr. jury, 3; ind. 176.
Miller v. State, 53 M. 403—hom. 141; ind. 156, 160.
Miller v. State, 68 M. 221—crim. l. 390, 517; hom. 166, 171, 174; ind. 160.
Miller v. State, 68 M. 533—int. liq. 236.
Miller v. State, 69 M. 112—atty. gen. 5; dist. attys. 4; states, 202.
Miller v. State, 81 M. 162—crim. l. 211.
Miller v. State, 35 So. 690—crim. l. 741, 742, 789; witn. 317.
Miller v. State, 49 So. 513—crim. l. 552.
Miller v. Tunica County, 67 M. 651—counties, 37, 110; deeds, 99, 126, 152; dedi. 18.
Miller v. Wesson, 58 M. 831—lim. of act. 35, 72; plead. 54; plead. 17, 27, 29, 32.
Miller v. Winston County Union Warehouse Co. 94 M. 348—weights, 8.

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Miller v. Womack, Freem. Ch. 486—ex. & ad. 117, 120, 314, 464, 516.
Miller, Adams v.—31 M. 613.
Miller, Allen v.—54 So. 731.
Miller, Anderson v.—7 S. & M. 586.
Miller, Arnold v.—26 M. 152.
Miller, Bishop v.—48 M. 364.
Miller, Cole v.—32 M. 89.
Miller, Davis v.—12 So. 27.
Miller, Dickson v.—11 S. & M. 594.
Miller, Enochs v.—60 M. 19.
Miller, Evans v.—58 M. 120.
Miller, Fox v.—71 M. 598.
Miller, Gathings v.—76 M. 651.
Miller, Gillenwaters v.—49 M. 150.
Miller, Harrell v.—35 M. 700.
Miller, Hinds v.—52 M. 845.
Miller, Holloway v.—84 M. 776.
Miller, Howell v.—88 M. 655.
Miller, Illinois Cent. R. Co. v.—68 M. 760.
Miller, Irwin v.—72 M. 174.
Miller, Johnson v.—33 M. 553.
Miller, Joyner v.—55 M. 208.
Miller, Keaton v.—38 M. 630.
Miller, Kelly v.—39 M. 17.
Miller, Kirkpatrick v.—50 M. 521.
Miller, LeFlore v.—64 M. 204.
Miller, Lester v.—76 M. 309.
Miller, Lewis v.—13 S. & M. 110.
Miller, Lockman v.—22 So. 822.
Miller, McCutchen v.—31 M. 65.
Miller, Mississippi Cent. R. Co. v.—40 M. 45.
Miller, Money v.—13 S. & M. 531.
Miller, Nelson v.—52 M. 410.
Miller, Oakland v.—90 M. 275.
Miller, Pearson v.—71 M. 379.
Miller, Richardson v.—48 M. 311.
Miller, Robinson v.—57 M. 237.
Miller, Russell v.—53 So. 495.
Miller, Shattuck v.—50 M. 386.
Miller, Simmons v.—40 M. 19.
Miller, Southern R. Co. v.—30 So. 68.
Miller, Stephenson v.—57 M. 48.
Miller, Thomas v.—W. 324.
Miller, Toof v.—73 M. 756.
Miller, Webb v.—24 M. 638.
Miller, Western Union Tel. Co. v.—52 So. 701.
Miller, Williams v.—10 S. & M. 139.
Miller, Winston v.—12 S. & M. 550.
Miller, Wooten v.—7 S. & M. 380.
Milliken, Montgomery v.—Sm. & M. Ch. 495.
Milliken, Montgomery v.—5 S. & M. 151.
Milliot, McGaughan v.—78 M. 976.
Mills v. Richards, 34 M. 77—hus. & w. 279.
Mills v. Scott, 62 M. 525—tax. 431, 435, 495.
Mills v. Union Cent. Life Ins. Co. 77 M. 327—ins. 79.
Mills, Adams v.—71 M. 150.
Millsaps v. Bond, 64 M. 453—app. & e. 223; eq. 422, 431; marshaling, 4.
Millsaps v. Chapman, 76 M. 942—app. & e. 1016; banks, 53; corp. 316; mtg. 581.
Millsaps v. Jackson, 78 M. 537—tax. 267.
Millsaps v. Jackson, 88 M. 504—tax. 254.
Millsaps v. Louisville &c. R. Co. 69 M. 423—mast. & s. 1, 198.
Millsaps v. Merchants' &c. Bank, 69 M. 918—corp. 115; ev. 449; set-off, 25; st. r. r. 15.
Millsaps v. Merchants' &c. Bank, 71 M. 361—bills & n. 329, 371, 500; corp. 115, 117, 121; ev. 202, 215, 416, 461; sales, 281.
Millsaps v. Pfeiffer, 44 M. 805—eq. 196, 197.
Millsaps v. Shotwell, 76 M. 923—estop. 26; lim. of act. 44; spec. perf. 16.
Millsaps v. Tate, 75 M. 150—chat. m. 138; land. & t. 328.
Millsaps, Burnett v.—59 M. 333.
Millsaps, Jones v.—71 M. 10.
Millsaps, Matthews v.—58 M. 546.
Millsaps, Merchants' &c. Bank v.—15 So. 659.
Millsaps, Shaw v.—50 M. 380.
Millsaps, Simpson v.—80 M. 239.
Millsaps, Yazoo &c. R. Co. v.—76 M. 855.
Mills, B. F. Johnson Pub. Co. v.—79 M. 543.
Mills, Gibson Paving Co. v.—95 M. 726.
Mills, Greenwade v.—31 M. 464.
Mills, Griffing v.—40 M. 611.
Mills Guy Co. v. Dickerson, 94 M. 874—chat. m. 117.
Mills, Holt v.—4 S. & M. 110.
Mills, Kelly v.—41 M. 267.
Mills, McInnis v.—78 M. 52.
Millspaugh, Austin v.—90 M. 354.
Mills, Powell v.—30 M. 231.
Mills, Powell v.—37 M. 691.
Mills, Richards v.—31 M. 450.
Millstead, Allen West Commission Co. v.—92 M. 837.
Mills, Whyte v.—64 M. 158.
Mills, Wilcox v.—Sm. & M. Ch. 85.
Milton v. Howard, 7 H. 103—aud. 4; princ. & s. 126.
Mims v. Armstrong, 42 M. 429—cncts. 133.
Mims, Ross v.—7 S. & M. 121.
Mingo v. Goodman, 1 H. 552—indians, 3.
Minis, Hutchison v.—7 S. & M. 388.
Minkus v. Armstrong, 90 M. 751—judgm. 926.
Minkus, Armstrong v.—93 M. 621.
Minnis, Sevier v.—71 M. 473.

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Minor v. Gaw, 11 S. & M. 322—disc. 14, 17; parties, 4; partners. 128, 144.
Minor v. Michie, W. 24—cncts. 277; plead. 433.
Minor v. Natchez, 4 S. & M. 602—execution, 137, 215, 275, 320; tax. 734a.
Minor, Shaefer v.—1 H. 218.
Minor v. State, 36 M. 630—slaves, 11, 18a.
Minor v. Stewart, 2 H. 912—eq. 417; wills, 752.
Minor, Davis v.—1 H. 183.
Minor, Illinois Cent. R. Co. v.—69 M. 710.
Minor, McComas v.—W. 513.
Minor, Martin v.—50 M. 42.
Minor, Natchez v.—4 S. & M. 602.
Minor, Natchez v.—9 S. & M. 544.
Minor, Natchez v.—10 S. & M. 246.
Minor, Peyton v.—11 S. & M. 148.
Minor, Torrey v.—Sm. & M. Ch. 489.
Minor, Wing v.—7 So. 347.
Minshew v. Davidson, 86 M. 354—judgm. 768, 771, 775.
Minter v. Shirley, 45 M. 376—indians, 3, 9, 11, 14, 15, 27; pub. lands, 54.
Minter v. Swain, 52 M. 174—execution, 284.
Minter, Marshall v.—43 M. 666.
Mississippi Bank &c. Co. Enochs v.—87 M. 325.
Mississippi B. & L. Assn. v. McElveen, 56 So. 187—b. & l. assn. 33; corp. 38; statut. 167, 277.
Mississippi Cent. R. Co. v. Beatty, 35 M. 668—costs, 232; dism. 35, 42.
Mississippi Cent. R. Co. v. Butler, 93 M. 654—r. r. 234.
Mississippi Cent. R. Co. v. Caruth, 51 M. 77—app. & e. 999, 1004; waters, 55.
Mississippi Cent. R. Co. v. Crawford, 96 M. 401—judgm. 128a.
Mississippi Cent. R. Co. v. Dacus, 53 So. 398—trial, 85; witn. 405.
Mississippi Cent. R. Co. v. Fort, 44 M. 423—action, 28; judgm. 128a; r. r. 433.
Mississippi Cent. R. Co. v. Hanna, 54 So. 74—r. r. 327.
Mississippi Cent. R. Co. v. Hardy, 88 M. 732—app. & e. 204, 234, 1063; dam. 24, 134, 171; mast. & s. 103, 298; neg. 115, 122; plead. 433; trial, 260, 267, 295; witn. 248.
Mississippi Cent. R. Co. v. Harkness, 32 M. 203—paymt. 38.
Mississippi Cent. R. Co. v. Holden, 54 So. 851—em. dom. 121, 150, 192.
Mississippi Cent. R. Co. v. Kennedy, 41 M. 551—app. & e. 24.
Mississippi Cent. R. Co. v. Kennedy, 41 M. 671—carr. 4, 391, 408.
Mississippi Cent. R. Co. v. Magee, 93 M. 196—trial, 296.
Mississippi Cent. R. Co. v. Magee, 93 M. 201—waters, 62.
Mississippi Cent. R. Co. v. Mason, 51 M. 234—app. & e. 1002; neg. 82, 136; r. r. 418; waters, 51.
Mississippi Cent. R. Co. v. Miller, 40 M. 45—ev. 141; r. r. 405, 441, 442, 481; trial, 243.
Mississippi Cent. R. Co. v. State, 46 M. 157—states, 18c; statut. 215.
Mississippi Cent. R. Co. v. Turnage, 95 M. 854—app. & e. 261; ev. 268.
Mississippi Cent. R. Co. v. Whitehead, 41 M. 225—debt, act. 10; plead. 193; tresp. 9.
Mississippi Cent. R. Co. Barrington v.—32 M. 370.
Mississippi Cent. R. Co. Corinth Engine &c. Works v.—95 M. 817.
Mississippi Cent. R. Co. Davis v.—69 M. 136.
Mississippi Cent. R. Co. Howd v.—50 M. 178.
Mississippi Cent. R. Co. Hudson v.—95 M. 41.
Mississippi Cent. R. Co. Isom v.—36 M. 300.
Mississippi Cent. R. Co. London Guarantee &c. Co. v.—52 So. 787.
Mississippi Cent. R. Co. Magee v.—95 M. 678.
Mississippi Cent. R. Co. Raiford v.—43 M. 233.
Mississippi Cent. R. Co. Shackleford v.—52 M. 159.
Mississippi Cent. R. Co. Thigpen v.—32 M. 347.
Mississippi Cent. R. Co. Whitehead v.—41 M. 225.
Mississippi College, Hamilton v.—52 M. 65.
Mississippi College, New Orleans &c. R. Co. v.—47 M. 560.
Mississippi Cotton Compress &c. Co. v. Levy, 83 M. 774—cncts. 330; discov. 6; eq. 48.
Mississippi Cotton Oil Co. v. Blake, 20 So. 156—app. & e. 691.
Mississippi Cotton Oil Co. v. Buster, 84 M. 91—arb. & a. 30, 32, 46, 53, 75.
Mississippi Cotton Oil Co. v. Ellis, 72 M. 191—mast. & s. 150, 157, 205.
Mississippi Cotton Oil Co. v. Smith, 95 M. 528—app. & e. 197; death, 58, 65, 80, 94; mast. & s. 286.
Mississippi Cotton Oil Co. v. Smith, 33 So. 443—app. & e. 1010; sales, 366.
Mississippi Cotton Oil Co. v. Starling-Smith Co. 23 So. 648—app. & e. 1009.
Mississippi Cotton Oil Co. Ballard v.—81 M. 507.

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Mississippi Cotton Oil Co. Brooks v.—76 M. 874.
Mississippi Cotton Oil Co. State v.—79 M. 203.
Mississippi Eastern R. Co. v. Samuel Wymond Cooperage Co. 93 M. 73—app. & e. 1171; new tr. 77.
Mississippi Fire Assn. v. Dobbins, 81 M. 630—ins. 392.
Mississippi Fire Assn. v. Stein, 88 M. 499—app. & e. 1167; ins. 144, 614.
Mississippi Home Ins. Co. v. Barron, 91 M. 722—ins. 4, 614.
Mississippi Home Ins. Co. v. Dobbins, 81 M. 623—ins. 392.
Mississippi Home Ins. Co. v. Louisville &c. R. Co. 70 M. 119—r. r. 222, 453, 457, 458, 462, 485.
Mississippi Home Ins. Co. v. Stevens, 93 M. 439—ins. 378, 614.
Mississippi Home Ins. Co. Boyd v.—75 M. 47.
Mississippi Home Ins. Co. Brennan v.—70 M. 531.
Mississippi Home Ins. Co. Lester v.—19 So. 99.
Mississippi Home Ins. Co. Mitchel v.—72 M. 53.
Mississippi Home Ins. Co. Rosenstock v.—82 M. 674.
Mississippi Ins. Co. Bacon v.—31 M. 116.
Mississippi Levee Commissioners v. Refuge Cotton Oil Co. 91 M. 480—lev. 23.
Mississippi Levee Commissioners, State v.—75 M. 132.
Mississippi Lumber Co. Adams v.—84 M. 23.
Mississippi Lumber Co. Clarke County v.—80 M. 535.
Mississippi Lumber Co. Hicks v.—95 M. 353.
Mississippi Mills v. Cook, 56 M. 40—tax. 192, 205.
Mississippi Mills Co. v. Smith, 69 M. 299—app. & e. 1053; trial, 82; waters, 64, 68, 73, 141.
Mississippi Mills, Lewenthall v.—55 M. 101.
Mississippi Mutual Ins. Co. v. Ingraham, 34 M. 215—ins. 146, 501.
Mississippi Railroad Commission v. Gulf &c. R. Co. 78 M. 750—carr. 12; eq. 24.
Mississippi Railroad Commission, Western Union Tel. Co. v.—74 M. 80.
Mississippi Soc. &c. v. Musgrove, 44 M. 820—const. law, 132.
Mississippi State Bank, Adams v.—75 M. 701.
Mississippi Union Bank v. Wilkinson, 3 S. & M. 78—cncts. 94; sales, 41; ven. & pur. 32, 34, 37.
Mississippi Union Bank, Campbell v.—6 H. 625.
Mississippi Union Bank, Henderson v.—6 S. & M. 314.
Mississippi Union Bank, Heyford v.—7 S. & M. 434.
Mississippi Union Bank, Simmons v.—3 S. & M. 781.
Mississippi Valley Co. v. Chicago &c. R. Co. 58 M. 846—deeds, 81; execution, 263; fraud. conv. 154; judgm. 785, 786, 788; r. r. 140; ven. & pur. 213.
Mississippi Valley Co. v. Chicago &c. R. Co. 58 M. 896—r. r. 162, 167, 193.
Mississippi Valley Co. Maxwell v.—95 M. 466.
Mississippi Valley &c. Co. Ryan v.—62 M. 162.
Mississippi &c. Packet Co. v. Edwards, 62 M. 534—trial, 158.
Mississippi &c. R. Co. v. Archibald, 67 M. 38—neg. 61; waters, 53.
Mississippi &c. R. Co. v. Ballard, 5 S. & M. 606—costs, 116, 117.
Mississippi &c. R. Co. v. Devaney, 42 M. 555—eject. 139; em. dom. 59, 187; imp. 4.
Mississippi &c. R. Co. v. Gill, 66 M. 39—carr. 105, 277, 319; witn. 261.
Mississippi &c. R. Co. v. Grayson, 1 Miss. Dec. 438—carr. 287, 321.
Mississippi &c. R. Co. v. Harris, 36 M. 17—corp. 88; princ. & a. 168, 170, 175.
Mississippi &c. R. Co. v. Harrison, 66 M. 419—carr. 303.
Mississippi &c. R. Co. v. Scott, 7 H. 79—banks, 152, 182.
Mississippi &c. R. Co. v. Wynne, 42 M. 315—app. & e. 1221.
Mississippi &c. R. Co. Archibald v.—66 M. 424.
Mississippi &c. R. Co. Buckhalter v.—32 M. 119.
Mississippi &c. R. Co. Chaffe v.—59 M. 182.
Mississippi &c. R. Co. Coleman v.—5 H. 419.
Mississippi &c. R. Co. Fiser v.—32 M. 359.
Mississippi &c. R. Co. Garrett v.—Freem. Ch. 70.
Mississippi &c. R. Co. Graves v.—6 H. 548.
Mississippi &c. R. Co. Grimball v.—3 S. & M. 38.
Mississippi &c. R. Co. Harris v.—51 M. 602.
Mississippi &c. R. Co. Hawkins v.—35 M. 688.
Mississippi &c. R. Co. Jones v.—5 H. 407.
Mississippi &c. R. Co. Smith v.—6 S. & M. 179.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Mississippi &c. R. Co. Wynne v.—45 M. 569.
Mister v. McLean, 43 M. 268—lim. of act. 114; states, 18b; statut. 85.
Mister, Edmound v.—58 M. 765.
Mister, Harlow v.—64 M. 25.
Mitchel, Balfour v.—12 S. & M. 629.
Mitchel, Durr Co. v.—52 So. 583.
Mitchel, Hodge v.—27 M. 560.
Mitchell v. Bank, 54 So. 87—app. & e. 1167; banks, 154.
Mitchell v. Bishop, 1 Miss. Dec. 58—subrog. 26.
Mitchell v. Bond, 84 M. 72—adv. pos. 16, 100; tax. 631.
Mitchell v. Drake, 57 M. 605—agric. 15.
Mitchell v. Evans, 5 H. 548—execution, 69, 75, 275; judgm. 857.
Mitchell v. Greenwald, 43 M. 167—garn. 140, 165; partners. 204.
Mitchell v. Hancock County, 91 M. 414—cncts. 303; counties, 123.
Mitchell v. Harris, 43 M. 314—jud. s. 31, 36, 39; mtg. 529.
Mitchell v. Hewett, 5 S. & M. 361—bills & n. 428; paymt. 12.
Mitchell v. Louisville &c. R. Co. 1 Miss. Dec. 154—r. r. 484.
Mitchell v. McDavitt, 70 M. 608—j. p. 174; new tr. 67; sales, 233.
Mitchell v. McGee, 48 So. 234—app. & e. 1002; mast. & s. 293.
Mitchell v. Meridian, 67 M. 644—licens. 8, 10.
Mitchell v. Mississippi Home Ins. Co. 72 M. 53—ins. 317, 335, 389.
Mitchell v. Mitchell, 35 M. 108—hus. & w. 33, 35, 111, 218; princ. & a. 79; trusts, 60.
Mitchell v. New Orleans &c. R. Co. 36 So. 1—r. r. 446.
Mitchell v. Otey, 23 M. 236—eq. 44.
Mitchell v. Shell, 49 M. 118—courts, 198; ev. 402, 463; ex. & ad. 435; paymt. 12a; ven. & pur. 279.
Mitchell v. Sherman, Freem. Ch. 120—cncts. 263; ven. & pur. 123.
Mitchell v. Southern R. Co. 77 M. 917—carr. 356, 380; plead. 8.
Mitchell v. State, 24 M. 312—crim. l. 520.
Mitchell v. State, 55 So. 354—weap. 8.
Mitchell v. Thompson, 2 Miss. Dec. 214—partit. 109, 111.
Mitchell v. Tishomingo Sav. Inst. 53 M. 613—app. & e. 194; eq. 312.
Mitchell v. Tishomingo Sav. Inst. 56 M. 444—app. & e. 1051; crim. l. 1169; witn. 142, 388.
Mitchell v. Wells, 37 M. 235—citiz. 1, 11; cncts. 101; courts, 8; slaves, 1, 11, 12, 13, 22.
Mitchell v. Wood, 47 M. 231—judgm. 753; statut. 183.
Mitchell v. Woodson, 37 M. 567—eq. 87, 156; lim. of act. 60, 103, 181; notice, 10; proc. 106; time, 5, 7; ven. & pur. 190.
Mitchell, Arthur v.—10 S. & M. 326.
Mitchell, Ayres v.—3 S. & M. 683.
Mitchell, Cockrell v.—15 So. 41.
Mitchell, Crump v.—34 M. 449.
Mitchell, Doty v.—9 S. & M. 435.
Mitchell, Goodwin v.—38 So. 657.
Mitchell, Kimball v.—57 M. 632.
Mitchell, Lochte v.—28 So. 877.
Mitchell, Memphis &c. R. Co. v.—52 M. 808.
Mitchell, New Orleans &c. R. Co. v.—52 M. 808.
Mitchell, Price v.—10 S. & M. 179.
Mitchell, Saunders v.—61 M. 321.
Mitchell, Slaydon v.—2 Miss. Dec. 436.
Mitchell, State v.—95 M. 130.
Mitchell, State v.—96 M. 259.
Mitchell, Tabler v.—62 M. 437.
Mitchell, Taylor v.—1 H. 596.
Mitchell, Watt v.—6 H. 131.
Mitchell, Wells v.—39 M. 800.
Mitchell, Wilcox v.—4 H. 272.
Mitchell, Wilcox v.—4 S. & M. 744.
Mitchell, Yazoo &c. R. Co. v.—83 M. 179.
Mitchel, State v.—12 So. 710.
Mitchener v. Robins, 73 M. 383—eq. 218; ex. & ad. 417, 422; exemp. 71.
Mitchner, McAllister v.—68 M. 672.
Mitchum v. McInnis, 60 M. 945—tax. 431.
Mitchum, McInnis v.—2 Miss. Dec. 126.
Mixon v. Clevenger, 74 M. 67—tax. 442, 674b, 693, 787, 809.
Mixon v. State, 55 M. 525—crim. l. 789; witn. 403.
Mixon, Griffin v.—38 M. 424.
Mixon, Smith v.—73 M. 581.
Mizell v. Herbert, 12 S. & M. 547—fraud. conv. 294; witn. 91, 101.
Mizell v. Sims, 39 M. 331—fraud, 45; sales, 37, 259; slaves, 7a.
Mizelle, Green v.—54 M. 220.
Moak v. Bryant, 51 M. 560—forc. e. & d. 6, 11, 12, 15; ven. & pur. 143, 148, 298, 299.
Mobile Life Ins. Co. Sadler v.—60 M. 391.
Mobile Savings Bank v. Murdock, 1 Miss. Dec. 593—assign. f. b. c. 150, 350.
Mobile Savings Bank, Pollard v.—60 M. 946.
Mobile &c. R. Co. v. Brandon, 53 So. 957—carr. 20; const. law, 247.

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Mobile &c. R. Co. v. Bynum, 15 So. 795—r. r. 106.

Mobile &c. R. Co. v. Dale, 61 M. 206—j. p. 141; r. r. 441.

Mobile &c. R. Co. v. Davis, 62 M. 271—carr. 309; courts, 496; eq. 55; judgm. 570; r. r. 212, 265.

Mobile &c. R. Co. v. Franks, 41 M. 494—carr. 155; corp. 371; r. r. 6.

Mobile &c. R. Co. v. Francis, 9 So. 508—carr. 177, 211; trial, 252.

Mobile &c. R. Co. v. Gray, 62 M. 383—mast. & s. 180, 300.

Mobile &c. R. Co. v. Gray, 62 M. 383—r. r. 453, 471.

Mobile &c. R. Co. v. Gunn, 68 M. 366—r. r. 446.

Mobile &c. R. Co. v. Hicks, 91 M. 273—app. & e. 1025; const. law, 28; death, 7, 31, 99; mast. & s. 97, 180, 265, 279.

Mobile &c. R. Co. v. Hitt, 55 So. 484—courts, 119.

Mobile &c. R. Co. v. Holiday, 79 M. 294—anim. 43; r. r. 415.

Mobile &c. R. Co. v. Holt, 62 M. 170—neg. 120; r. r. 251, 419, 446.

Mobile &c. R. Co. v. Hoye, 87 M. 571—em. dom. 172.

Mobile &c. R. Co. v. Hudson, 50 M. 572—r. r. 443.

Mobile &c. R. Co. v. Humphries, 7 So. 522—ex. & ad. 157; trover, 46.

Mobile &c. R. Co. v. Jackson, 92 M. 517—carr. 303, 321, 381; ev. 597; trial, 139, 140, 252.

Mobile &c. R. Co. v. Kamper, 88 M. 817—r. r. 82.

Mobile &c. R. Co. v. Kea, 96 M. 195—r. r. 441.

Mobile &c. R. Co. v. Kranfield, 92 M. 494—carr. 382.

Mobile &c. R. Co. v. McArthur, 43 M. 180—carr. 271; dam. 198; trial, 156.

Mobile &c. R. Co. v. Mattan, 41 M. 692—courts, 62.

Mobile &c. R. Co. v. Moseley, 52 M. 127—tax. 198, 205, 608, 610.

Mobile &c. R. Co. v. Mullins, 70 M. 730—carr. 230.

Mobile &c. R. Co. v. Postal Tel. Cable Co. 76 M. 731—em. dom. 93, 102, 128; tel. & t. 16.

Mobile &c. R. Co. v. Robbins Cotton Co. 94 M. 351—carr. 135.

Mobile &c. R. Co. v. Roberts, 23 So. 393—neg. 65; r. r. 365, 383.

Mobile &c. R. Co. v. State, 51 M. 137—j. p. 44; mun. corp. 595; penal. 16; r. r. 234, 243, 254.

Mobile &c. R. Co. v. State, 89 M. 724—r. r. 54, 140.

Mobile &c. R. Co. v. Stinson, 74 M. 453—dam. 65; ev. 20, 121; r. r. 453, 458, 483.

Mobile &c. R. Co. v. Stroud, 64 M. 784—r. r. 234, 359, 377, 382, 383.

Mobile &c. R. Co. v. Trotter, 36 M. 416—judgm. 784.

Mobile &c. R. Co. v. Tupelo Furniture Mfg. Co. 67 M. 35—carr. 177, 185.

Mobile &c. R. Co. v. Watly, 69 M. 145—death, 88; neg. 94; r. r. 273½, 375, 401.

Mobile &c. R. Co. v. Watly, 69 M. 475—app. & e. 1189.

Mobile &c. R. Co. v. Weems, 74 M. 513—r. r. 443.

Mobile &c. R. Co. v. Weiner, 49 M. 725—carr. 60, 119, 147, 149.

Mobile &c. R. Co. v. Whitfield, 44 M. 466—new tr. 41, 76.

Mobile &c. R. Co. Abernathy v.—53 So. 539.

Mobile &c. R. Co. Amos v.—63 M. 509.

Mobile &c. R. Co. Anderson v.—38 So. 661.

Mobile &c. R. Co. Arrington v.—30 M. 470.

Mobile &c. R. Co. Bardwell v.—63 M. 574.

Mobile &c. R. Co. Board of Education v.—71 M. 500.

Mobile &c. R. Co. Board of Education v.—72 M. 236.

Mobile &c. R. Co. Bowen v.—33 So. 441.

Mobile &c. R. Co. Clisby v.—78 M. 937.

Mobile &c. R. Co. Combs v.—92 M. 532

Mobile &c. R. Co. Connell v.—7 So. 344.

Mobile &c. R. Co. Cooper v.—94 M. 413.

Mobile &c. R. Co. Dooley v.—69 M. 648.

Mobile &c. R. Co. Ellison v. 36 M. 572.

Mobile &c. R. Co. Hallum v.—24 So. 909.

Mobile &c. R. Co. Hightower v.—83 M. 708.

Mobile &c. R. Co. Jackson v.—89 M. 32.

Mobile &c. R. Co. Kinney v.—56 So. 165.

Mobile &c. R. Co. Lagrone v.—67 M. 592.

Mobile &c. R. Co. Laurel Mercantile Co. v.—87 M. 675.

Mobile &c. R. Co. Moore v.—24 So. 96.

Mobile &c. R. Co. Poythress v.—92 M. 638.

Mobile &c. R. Co. Roberts v.—32 M. 373.

Mobile &c. R. Co. Roberts v.—74 M. 334.

Mobile &c. R. Co. Russell v.—87 M. 806.

Mobile &c. R. Co. Skipworth v.—95 M. 50.

Mobile &c. R. Co. Staggs v.—77 M. 507.

Mobile &c. R. Co. State v.—86 M. 172.

Mobile &c. R. Co. State Board of Education v.—71 M. 500.

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Mobile &c. R. Co. State Board of Education v.—72 M. 236.
Mobile &c. R. Co. Walker v. 34 M. 245.
Mobile &c. R. Co. Waters v.—74 M. 534.
Mobile &c. R. Co. Watley v.—9 So. 445.
Mobile &c. R. Co. Wayne County v.—56 So. 173.
Mobile &c. R. Co. Westbrook v.—66 M. 560.
Mobile &c. R. Co. Williams v.—19 So. 90.
Mobile &c. R. Co. Wooten v.—79 M. 26.
Mobile &c. R. Co. Wooten v.—89 M. 322.
Mobile &c. R. Co. Zackery v.—74 M. 520.
Mobile &c. Co. Zeigler v.—87 M. 367.
Mobley v. Buchanan, 30 M. 174—courts, 476; eq. 120.
Mobley v. Keyes, 13 S. & M. 677—plead. 205; ven. & pur. 308.
Mobley v. Lonbat, 7 H. 318—partners. 219.
Mobley v. State, 46 M. 501—clks. of c. 6; crim. l. 996; offic. 105; rape, 35; witn. 227.
Mobley, Harrington v.—33 M. 34.
Mock, Young v.—79 M. 714.
Moffatt v. Loughridge, 51 M. 211—ex. & ad. 118, 480, 495, 506; garn. 132.
Moffett v. Robinson, 2 Miss. Dec. 704—app. & e. 999; attch. 253.
Moffett West Drug Co. Wilkerson v.—21 So. 564.
Moffitt, Russell v.—6 H. 303.
Monaghan v. State, 66 M. 513—int. liq. 157; statut. 185.
Moncrief, Independent Order of Sons and Daughters of Jacob of America v.—96 M. 419.
Moneghan v. Cannon, 2 Miss. Dec. 509—int. liq. 45.
Moneghan, Howe v.—19 So. 202.
Monet v. Jones, 10 S. & M. 237—counties, 25, 27, 39.
Monet, Graves v.—7 S. & M. 45.
Monette v. State, 91 M. 662—mun. corp. 179; statut. 90.
Money v. Dorsey, 7 S. & M. 15—execution, 40, 169; judgm. 780, 786; ven. & pur. 188, 212, 213, 254, 254a, 337.
Money v. Miller, 13 S. & M. 531—schools, 18.
Money v. Peavy, 70 M. 260—deeds, 157; ev. 440; party w. 4.
Money v. Ricketts, 62 M. 209—bills & n. 347; estop. 44, 73; frds. st. of, 143; ven. & pur. 232.
Money, Collins v.—4 H. 11.
Money, Georgia Pac. R. Co. v.—8 So. 646.
Monk v. Horne, 38 M. 100—app. & e. 247, 914; ex. & ad. 337, 347; judgm. 525; trial, 82.
Monohan, Weir v.—67 M. 434.
Monroe v. State, 71 M. 196—crim. l. 785b, 1159, 1184; rape, 24, 54.
Monroe County v. Bell, 18 So. 121—rewards, 5, 9.
Monroe County v. McDaniel, 68 M. 203—convt. 1, 8.
Monroe County v. State, 63 M. 135—high. 110.
Monroe County v. Strong, 78 M. 565—counties, 105, 152, 205.
Monroe County Alliance v. Owens, 25 So. 876—assn. 6.
Monroe County, Greene v.—72 M. 306.
Monroe County, Hatch v.—56 M. 26.
Monroe County, Honea v.—63 M. 171.
Monroe County, Honea v.—15 So. 789.
Monroe County, McKinney v.—68 M. 284.
Monroe County, Weiler v.—74 M. 682.
Monroe County, Weiler v.—76 M. 492.
Monroe, Ferguson v.—71 M. 524.
Montague v. Gaddis, 37 M. 453—attch. 34, 178, 192, 258, 259.
Montague v. King, 37 M. 441—bills & n. 144, 467, 487.
Montgomery v. Agricultural Bank, 10 S. & M. 566—hus. & w. 31d, 31e.
Montgomery v. Commercial Bank, Sm. & M. Ch. 632—banks, 78; eq. 2; inj. 110.
Montgomery v. Commissioners of Sinking Fund, 7 H. 13—dism. 23; states, 124.
Montgomery v. Dillingham, 3 S. & M. 647—app. & e. 1025, 1040; assign. 73, 74; bills & n. 313, 364; bonds, 83; disc. 22; estop. 86; ev. 226; ex. & ad. 43, 322; princ. & s. 83, 108; propty. 3; ven. & pur. 214.
Montgomery v. Evans, 2 Miss. Dec. 348—interpl. 18.
Montgomery v. Galbraith, 11 S. & M. 555—assign. f. b. c. 36; banks, 78; courts, 97.
Montgomery v. Goodbar, 69 M. 333—attch. 217.
Montgomery v. Griffin, W. 453—app. & e. 1128; trial, 182; judgm. 428.
Montgomery v. Handy, 62 M. 16—anim. 91, 97.
Montgomery v. Handy, 63 M. 43—anim. 91, 97; assign. 118; ev. 582.
Montgomery v. Hanover Nat. Bank, 79 M. 443—judgm. 253.
Montgomery v. Ives, 13 S. & M. 161—eject. 10; pub. lands, 114, 188, 206.
Montgomery v. Kellogg, 43 M. 486—guar. 7, 46, 699.
Montgomery v. McGimpsey, 7 S. & M. 557—app. & e. 1204; judgm. 754, 786.

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Montgomery v. McGuire, 59 M. 193—ev. 119; fraud. conv. 24, 29f, 293.
Montgomery v. McPherson, 86 M. 4—wills, 613.
Montgomery v. Milliken, Sm. & M. Ch. 495—ex. & ad. 138, 436; wills, 2, 434, 820.
Montgomery v. Milliken, 5 S. & M. 151—ex. & ad. 138; wills, 436.
Montgomery v. Milliken, 5 S. & M. 251—wills, 826.
Montgomery v. Norris, 1 H. 499—app. & e. 69; cncts. 9; spec. perf. 27.
Montgomery v. Scott, 61 M. 409—hus. & w. 47, 231.
Montgomery v. State, 85 M. 330—crim. l. 600, 801, 826; hom. 310.
Montgomery v. State, 52 So. 357—depy. 6, 8; mun. corp. 60.
Montgomery v. The Governor, 7 H. 68—tax. 568b.
Montgomery v. Tillotson, 1 H. 215—jury, 148; trial, 338.
Montgomery, Allen v.—48 M. 101.
Montgomery, Beck v.—7 H. 39.
Montgomery County v. State, 71 M. 153—anim. 91; mand. 15.
Montgomery County, Butt v.—62 M. 213.
Montgomery County, Portwood v.—52 M. 523.
Montgomery, First Nat. Bank v.—70 M. 550.
Montgomery, Goodbar v.—73 M. 73.
Montgomery, Harper v.—11 S. & M. 611.
Montgomery, Hoggatt v.—6 H. 933.
Montgomery, Hulme v.—31 M. 105.
Montgomery, Indianola &c. Co. v.—85 M. 304.
Montgomery, Irving v.—3 H. 191.
Montgomery, Lee v.—W. 109.
Montgomery, Matthews v.—25 M. 150.
Montgomery, Newman v.—5 H. 742.
Montgomery, Pitts v.—79 M. 250.
Montgomery, Redfield v.—71 M. 113.
Montgomery, Ruff v.—83 M. 184, 185.
Montgomery, Scherck v.—81 M. 426.
Montgomery, Smith v.—11 S. & M. 284.
Montgomery, Stone v.—35 M. 83.
Montgomery, Williams v.—10 S. & M. 321.
Montgomery, Wilson v.—14 S. & M. 205.
Montjoy v. Delta Bank, 76 M. 402—bills & n. 352, 367.
Montjoy v. Pillow, 64 M. 705—ferries, 9.
Montross v. State, 61 M. 429—crim. l. 164; mun. corp. 590.
Montross, Picard v.—17 So. 375.
Moody v. Farr, 6 S. & M. 100—execution, 40; eq. 345.
Moody v. Farr, 27 M. 788—eq. 460.
Moody v. Farr, 33 M. 192—eject. 12.
Moody v. Galigher, 1 Miss. Dec. 435—attch. 48; trial, 252.
Moody v. Galigher, 1 Miss. Dec. 463—attch. 380; judgm. 256.
Moody v. Grant, 41 M. 565—judgm. 313, 321.
Moody v. Harper, 25 M. 484—app. & e. 1055; judgm. 784.
Moody v. Harper, 28 M. 615—app. & e. 166; execution, 14, 155e, 172, 784.
Moody v. Harper, 33 M. 465—new. tr. 84.
Moody v. Harper, 38 M. 599—champ. 6; dower, 75; eject. 142; eq. 66; execution, 102, 154b; ex. & ad. 272, 324; inj. 26, 27; judgm. 428, 440, 586, 667, 713, 714, 919.
Moody v. Hoskins, 64 M. 468—const. l. 98; tax. 696.
Moody v. Kyle, 34 M. 506—assign. 49.
Moody v. Lyles, 44 M. 121—judgm. 17a.
Moody v. McDuff, 58 M. 751—app. & e. 197; ex. & ad. 349; inf. 76, 89, 115; judgm. 577.
Moody v. Moody, 86 M. 323—home. 143, 152.
Moody v. Nichol, 26 M. 109—app. & e. 494, 502, 529; excep. 1.
Moody v. Roberts, 41 M. 74—ev. 166, 376.
Moody v. State, 13 S. & M. 642—app. & e. 110.
Moody v. Willis, 41 M. 347—set-off, 41, 43, 48.
Moody, Barnes v.—5 H. 636.
Moody, Dease v.—31 M. 617.
Moody, Dickson v.—2 S. & M. 17.
Moody, Gasque v.—12 S. & M. 153.
Moody, Jones v.—59 M. 327.
Moody, Mason v.—26 M. 184.
Moody, Owen v.—29 M. 79.
Moody, Swoope v.—73 M. 82.
Mooney, Richard v.—39 M. 357.
Moon, Jamison v.—43 M. 598.
Moon, Southern Express Co. v.—39 M. 822.
Moore v. Allen, 25 M. 363—sheriffs, 92, 110.
Moore v. Allen, 72 M. 273—appr. 7; inf. 89.
Moore v. Ayers, 5 S. & M. 310—app. &. e. 1175; bills & n. 271, 423, 443, 457, 540; judgm. 119.
Moore v. Bradford, 70 M. 70—home. 162.
Moore v. Brady, 11 So. 723—ex. & ad. 358.
Moore v. Brungard, 5 H. 557—bills & n. 411.
Moore v. Caldwell, Freem. Ch. 222—offic. 82, 102.
Moore v. Cason, 1 H. 53—guard. & w. 18, 58, 77, 159; judgm. 951.
Moore v. Chambers, 11 S. & M. 408—execution, 151b.
Moore v. Chicago &c. R. Co. 59 M. 243—ev. 243; r. r. 282b; witn. 320, 323.

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Moore v. Christian, 56 M. 408—hab. corp. 24, 99.
Moore v. Coats, 43 M. 225—garn. 96.
Moore v. Crump, 84 M. 612—adv. pos. 80; ref. of inst. 10, 37; trusts, 92½, 95, 100; witn. 133.
Moore v. Decell, 17 So. 681—app. & e. 1028.
Moore v. Dunn, 50 M. 32—j. p. 141.
Moore v. Ernst, 54 M. 642—interpl. 1; j. p. 46, 202; parties, 57.
Moore v. Evans, 54 So. 438—app. & e. 78.
Moore v. Foote, 32 M. 469—tax. 295, 553, 570a.
Moore v. Fountain, 8 So. 509—princ. & s. 88, 96, 117, 124, 128.
Moore v. Gholson, 34 M. 372—bailm. 12; plead. 18.
Moore v. Hoskins, 66 M. 496—dism. 59; judgm. 115, 119, 388.
Moore v. Jeffries, 18 So. 272—fraud. conv. 1.
Moore v. Jordan, 65 M. 229—fraud. conv. 185; trusts, 63¾, 96.
Moore v. Joyce, 23 M. 584—ev. 166, 376; phys. 24.
Moore v. Knox, 46 M. 602—bills & n. 460; plead. 106.
Moore v. Lackey, 53 M. 85—mtg. 378; ven. & pur. 251, 257, 261.
Moore v. Lee, 51 M. 375—land. & t. 274.
Moore v. Lobbin, 26 M. 304—judgm. 910.
Moore v. Lord, 50 M. 229—eject. 8.
Moore v. Love, 57 M. 765—frds. st. of, 159.
Moore v. Love, 2 Miss. Dec. 724—bills & n. 433; judgm. 16.
Moore v. Lowrey, 74 M. 413—attch. 351, 355.
Moore v. McAllister, 34 M. 500—frds. st. of, 139.
Moore v. McKie, 5 S. & M. 238—witn. 52, 92, 112.
Moore v. Magee, 48 M. 567—tax. 552.
Moore v. Martin, 18 So. 119—stip. 14.
Moore v. Mickell, W. 231—bills & n. 493; ev. 596; plead. 99, 358.
Moore v. Mobile &c. R. Co. 24 So. 964—trial, 143.
Moore v. Moore, 74 M. 59—hus. & w. 119; trusts, 77.
Moore v. Probate Judge, W. 310—cmpt. 32.
Moore v. Railroad Co. 59 M. 243—app. & e. 204, 205; ev. 123; new tr. 104.
Moore v. Red, 22 So. 948—judgm. 405, 846.
Moore v. Redding, 69 M. 841—bills & n. 139; princ. & s. 128.
Moore v. Rowe, 53 So. 626—const. law, 240, 296; fraud. conv. 2, 47; statut. 184.
Moore v. Somerville, 80 M. 323—partit. 95, 107, 113; proc. 94, 96.
Moore v. State, W. 134—crim. l. 185, 867.
Moore v. State, 13 S. & M. 259—ind. 158.
Moore v. State, 36 M. 137—bail, 41; crim. l. 1023.
Moore v. State, 48 M. 147—const. l. 81, 132; lot. 2, 9.
Moore v. State, 55 M. 432—crim. l. 564; ind. 165; larc. 40.
Moore v. State, 59 M. 25—crim. l. 170, 199, 970; ind. 191.
Moore v. State, 86 M. 160, crim. l. 366, 761, 789; hom. 193, 338, 338a, 340c.
Moore v. State, 91 M. 250—perj. 18.
Moore v. State, 2 Miss. Dec. 227—app. & e. 999; crim. l. 457, ev. 535.
Moore v. State, 45 So. 866—sheriffs, 6.
Moore v. Stevens, 60 M. 809—partners. 138, 147, 173.
Moore v. Vick, 2 H. 746—cov. 17; deeds, 159.
Moore v. Ware, 51 M. 206—ex. & ad. 218, 326, 508a; judgm. 500.
Moore v. Williams, 44 M. 61—attch. 209.
Moore, Alabama &c. R. Co. v.—81 M. 14.
Moore, Anderson v.—84 M. 400.
Moore, Bank of Port Gibson v.—13 S. & M. 157.
Moore, Bradford v.—2 Miss. Dec. 432.
Moore, Clay v.—65 M. 81.
Moore, Cooper v.—44 M. 386.
Moore, Crescent Ins. Co. v.—63 M. 419.
Moore, Cummings v.—61 M. 184.
Moore, Dollman v.—70 M. 267.
Moore, Duncan v.—67 M. 136.
Moore, Ex parte, 7 H. 665—wills, 790.
Moore, Gelstrop v.—26 M. 206.
Moore, Gilliam v.—10 S. & M. 130.
Moore, Gordin v.—62 M. 493.
Moore, Greenwood v.—79 M. 201.
Moore-Haggerty Lumber Co. Barney v.—95 M. 118.
Moore, Hall v.—68 M. 527.
Moore, Hall v.—70 M. 75.
Moore, Hamilton v.—32 M. 205, 625.
Moore, Hartman v.—79 M. 74.
Moore, Haydon v.—1 S. & M. 605.
Moorehead v. Holliday, 1 S. & M. 625—sheriffs, 123.
Moorehead, Sneed v.—70 M. 690.
Moore, Herring-Hall-Marvin Co. v.—17 So. 385.
Moore, Holloway v.—4 S. & M. 594.
Moore, Illinois Cent. R. Co. v.—79 M. 766.
Moore, Kerr v.—54 M. 286.
Moore, Klaus v.—77 M. 701.

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Moore, Lenoir v.—61 M. 400.
Moore, McAlister v.—30 M. 258.
Moore, McLaran v.—60 M. 376.
Moore, Meacham v.—59 M. 561.
Moore, Merrill v.—7 H. 271.
Moore, New Orleans &c. R. Co. v.—40 M. 39.
Moore, Paddleford v.—32 M. 622.
Moore, Port Gibson v.—13 S. & M. 157.
Moore, Robinson v.—76 M. 89.
Moore, Russell v.—8 S. & M. 700.
Moores v. Flurry, 87 M. 707—lim. of act. 19; tax. 827.
Moores v. Thomas, 95 M. 644—tax. 328, 337, 419, 689, 709.
Moore, Smith v.—3 H. 40.
Moore, State v.—24 So. 308.
Moore, Stevens v.—1 Miss. Dec. 537.
Moore, Tate County v.—87 M. 245.
Moore, West v.—37 M. 114.
Moore, Wilkinson v.—27 M. 365.
Mooring, Malone v.—40 M. 247.
Moor, State v.—W. 134.
Moran, McKenzie v.—54 So. 1.
Mordaunt, Wright v.—77 M. 537.
Morehead v. Chaffe, 52 M. 161—judgm. 17.
Moreland v. Newberger Cotton Co. 94 M. 572—frds. st. of, 90; sales, 182; trial, 69.
Morehead v. Yazoo &c. R. Co. 84 M. 112—mast. & s. 137, 213, 229, 236; r. r. 377.
Moreland, Noles v.—27 So. 598.
Moreland, Pearson v.—7 S. & M. 609.
Morgan v. Blewett, 71 M. 409—champ. 7; eject. 7.
Morgan v. Blewitt, 72 M. 903—eject. 26; tax. 431, 445, 693.
Morgan v. Burrow, 16 So. 432—bills & n. 62; ev. 17.
Morgan v. Davis, 2 Miss. Dec. 467—tax. 619.
Morgan v. Harrell, 26 M. 468—tax. 311.
Morgan v. Hazelhurst Lodge, 53 M. 665—deeds, 54; eject. 15, 90; est. 8; ex. & ad. 329, 380, 388a; lim. of act. 19; statut. 199, 267; ven. & pur. 178.
Morgan v. Independent Order of Sons and Daughters of Jacob of America, 90 M. 864—estop. 98; ins. 307, 388, 688, 744, 745, 749, 755.
Morgan v. Long, 73 M. 406—partit. 87; ten. in c. 37. 42.
Morgan v. Morgan, 31 M. 546—app. & e. 1025; ev. 183; replev. 51.
Morgan v. Morgan, 36 M. 348—ex. & ad. 173, 194.
Morgan v. Nunes, 54 M. 308—attch. 25, 96; partners. 109, 318.
Morgan v. Pierce, 59 M. 210—chat. m. 240; j. adv. 6.
Morgan v. Reading, 3 S. & M. 366—ev. 265; nav. wat. 1, 36, 41.
Morgan v. Schwartz, 66 M. 613—tax. 679, 679a.
Morgan v. State, 13 S. & M. 242—crim. l. 970; hom. 142.
Morgan v. State, 63 M. 162—perj. 12.
Morgan v. State, 64 M. 511—int. liq. 37; liv. st. keep. 4.
Morgan, Baldwin v.—73 M. 276.
Morgan, Chandler v.—60 M. 471.
Morgan, Coopwood v.—34 M. 368.
Morgan, Cumberland &c. Co. v.—92 M. 478.
Morgan, Dowd v.—23 M. 587.
Morgan, Evans v.—69 M. 328.
Morgan, Furr v.—55 M. 389.
Morgan, Graham v.—53 M. 601.
Morgan, Hinds v.—75 M. 509.
Morgan, Latham v.—Sm. & M. Ch. 611.
Morgan, Meyer v.—51 M. 21.
Morgan, State v.—59 M. 349.
Morgan, State v.—79 M. 659.
Morgan, State v.—80 M. 372.
Morgan, Stone v.—65 M. 247.
Morgan, Western Union Tel. Co. v.—92 M. 108.
Moriarty v. State, 62 M. 654—crim. l. 375; hom. 163, 189, 190, 244; jury, 110.
Morin v. Balley, 55 M. 570—garn. 213.
Moring v. Ables, 62 M. 263—adv. pos. 63; eject. 1, 5.
Morman v. State, 24 M. 54—crim. l. 193½; hom. 142, 313; ind. 88, 189.
Morris v. Brookhaven &c. R. Co. 88 M. 539—mast. & s. 259.
Morris v. Dillard, 4 S. & M. 636—eq. 150.
Morris v. Greenwood, 73 M. 430—app. & e. 204, 243; mun. corp. 978.
Morris v. Henderson, 37 M. 492—abate. & r. 76; ack. 49; champ. 1; deeds, 191; eject. 68; ev. 201, 373; lev. 2; trial, 80, 82; wills, 454, 586.
Morris v. Hillery, 7 H. 61—partners. 100, 198, 201.
Morris v. Lake, 9 S. & M. 521—execution, 338, 348; sheriffs, 123.
Morris v. Morris, 27 M. 370—app. & e. 708.
Morris v. Morris, 27 M. 847—app. & e. 69; ex. & ad. 22; wills, 249, 434.
Morris v. Morris, 44 M. 441—deeds, 48.
Morris v. Myer, 87 M. 701—tax. 671.
Morris v. Palmer, 32 M. 278—app. & e. 168; hus. & w. 99; liens, 11.

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Morris v. Rucks, 62 M. 76—ack. 12; chat. m. 172.
Morris v. Shryock, 50 M. 590—j. p. 116, 196; sales, 291, 296, 299.
Morris v. State, 8 S. & M. 762—crim. l. 369, 878, 1190.
Morris v. State, 8 So. 295—ars. 25.
Morris, Davidson v.—5 S. & M. 564.
Morris, Glidewell v.—89 M. 82.
Morris, Hunt v.—44 M. 314.
Morris Ice Co. v. Adams, 75 M. 410—mun. corp. 978, 1000; tax. 200, 203, 495.
Morris, Inman v.—63 M. 347.
Morris, Leggett v.—6 S. & M. 723.
Morris, Newman v.—52 M. 402.
Morrison v. American Snuff Co.—79 M. 330—corp. 590.
Morrison v. Casey, 82 M. 522—deeds, 114; tax. 631.
Morrison v. Gaillard, 25 M. 194—plead. 225; proc. 63.
Morrison v. Hardin, 81 M. 583—deeds, 114; eq. 343.
Morrison v. Ives, 4 S. & M. 652—assum. 23; cncts. 274, 332, 347.
Morrison v. Kinstra, 55 M. 71—guard. & w. 42, 53, 119; hus. & w. 86; trusts, 351, 355.
Morrison v. McDaniel, 30 M. 213—ex. & ad. 182.
Morrison, Bell v.—27 M. 68.
Morrison, Blake v.—33 M. 123.
Morrison, Crisler v.—57 M. 791.
Morrison, Delmas v.—61 M. 314.
Morrison, State v.—60 M. 74.
Morrison, State Fire Ins. Co. v.—48 So. 178.
Morrison, Stewart v.—38 M. 417.
Morris, Stevenson v.—69 M. 232.
Morris, Turner v.—27 M. 733.
Morrow v. State, 57 M. 836—hom. 266.
Morrow, Andre v.—65 M. 315.
Morse v. Clayton, 13 S. & M. 373—ack. 35, 49; eq. 423; ex. & ad. 307; mtg. 143, 147, 460, 485.
Morse, Field v.—1 S. & M. 347.
Morse, Ingersoll v.—33 M. 667.
Morse, Saunders v.—3 H. 101.
Morson, Cleary v.—94 M. 278.
Mortimer v. Hannah, 82 M. 645—land. & t. 34, 44, 46; ven. & pur. 106, 110.
Mortimer v. McKay, 1 Miss. Dec. 585—paymt. 44, 46.
Mortimer v. Ragsdale, 62 M. 86—wareh. 24, 25, 34.
Mortimer, State v.—82 M. 443.
Morton v. Carroll, 68 M. 699—guard. & w. 87, 92, 107; inf. 112; judgm. 475; jud. s. 11.
Morton v. Grenada Academy, 8 S. & M. 773—eq. 179, 241; execution, 14, 272; pub. lands, 51; schools, 53.
Morton v. Jackson, 1 S. & M. 494—deeds, 114.
Morton v. McCanless, 68 M. 810—guard. & w. 79; home. 142.
Morton v. Simmons, 2 S. & M. 601—app. & e. 1204; execution, 155f.
Morton v. State, 12 So. 829—app. & e. 544.
Morton v. Walker, 7 H. 554—execution, 348, 353.
Morton, Buchanan v.—63 M. 280.
Morton, Carroll v.—68 M. 699.
Morton, Harney v.—36 M. 411.
Morton, Harney v.—39 M. 508.
Morton, Holmes County v.—24 M. 240.
Morton, Loeb v.—63 M. 280.
Morton, Phipps v.—33 M. 211.
Morton, Taylor v.—61 M. 24.
Mosby v. Wall, 23 M. 81—eq. 43; judgm. 549, 585; mtg. 559; ref. of inst. 23, 31, 45; ven. & pur. 285.
Mosby, Matthews v.—13 S. & M. 422.
Mosby, Peques v.—7 S. & M. 340.
Moseby v. Williams, 5 H. 520—adv. pos. 2; bailm. 24; lim. of act. 2, 169; sales, 465.
Moseley v. Jamison, 66 M. 52—assa. 27; trial, 62.
Moseley v. Jamison, 68 M. 336—dam. 129; new tr. 75.
Moseley v. Jamison, 71 M. 456—atty. & c. 101, 188.
Moseley v. Larson, 86 M. 288—div. 256; eq. 13, 148; home. 118a, 118b, 130.
Moseley v. State, 89 M. 802—hom. 188, 300g.
Moseley, Buck v.—24 M. 170.
Moseley, Mobile &c. R. Co. v.—52 M. 127.
Moseley, Riley v.—44 M. 37.
Mosely v. Anderson, 40 M. 49—exemp. 4, 83, 136; sheriffs, 127, 139.
Mosely v. State, 92 M. 250—burg. 40; crim. l. 878; ind. 203.
Mosely v. State, 11 So. 105—crim. l. 814, 823; hom. 250, 336, 340b.
Mosely, Brown v.—11 S. & M. 354.
Mosely, Carothers v.—55 So. 881.
Mosely, Jamison v.—69 M. 478.
Mosely, Reed v.—76 M. 1.
Mosely, Taylor v.—57 M. 544.
Mosely, Williams v.—5 H. 520.
Moses v. Krauss, 90 M. 618—partners. 322.
Moses v. State, 65 M. 56—ins. 18.
Moses, Herring v.—71 M. 620.
Mosler, Meyer v.—64 M. 610.
Mosler, Quin v.—21 So. 303.
Mosley, Jones v.—40 M. 261.

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Moss v. Agricultural Bank, 4 S. & M. 726—princ. & s. 164, 168, 172.
Moss v. Davidson, 1 S. & M. 112—eq. 271; fraud. conv. 154; hus. & w. 29; inj. 184; sales, 433; ven. & pur. 112, 123b, 123c, 314.
Moss v. State, 1 Miss. Dec. 261—int. liq. 217.
Moss v. State, 6 H. 298—recogn. 2.
Moss, Chicago &c. R. Co. v.—60 M. 641, 1003.
Moss, Davidson v.—5 H. 673.
Moss, Glass v.—1 H. 519.
Moss, Goodman v.—64 M. 303.
Moss, Peters v.—1 S. & M. 331.
Moss Point Lumber Co. v. Harrison County, 89 M. 448—courts, 88; land. & t. 70, 134; pub. lands, 55, 55a; waste, 2, 5, 6, 9.
Moss Point Lumber Co. v. Thompson, 83 M. 499—cncts. 190; logs, 34.
Moss Point Baptist Church, Dees v.—17 So. 1.
Moss Point, McAlister v.—96 M. 686.
Moss, Quinn v.—12 S. & M. 365.
Moss, Usher v.—50 M. 208.
Moss, Vicksburg Bank v.—63 M. 74.
Motz, Harrison v.—5 S. & M. 578.
Mount v. Brown, 33 M. 566—auct. 8; ex. & ad. 369.
Mount v. Harris, 1 S. & M. 185—sales, 450, 469, 471.
Mount v. State, 7 S. & M. 277—gaming, 76.
Mount, Ætna Ins. Co. v.—90 M. 642.
Mount Helm Baptist Church v. Jones, 79 M. 488—relig. soc. 23, 24.
Mount, Hundley v.—8 S. & M. 387.
Mount, Wetlin v.—73 M. 526.
Mower, Beirne v.—13 S. & M. 427.
Moye v. Herndon, 30 M. 110—ev. 563, 569; trial, 32, 260.
Moye, Alexander v.—38 M. 640.
Moye, McAllister v.—30 M. 258.
Moye, New Orleans &c. R. Co. v.—39 M. 374.
Moye, Rasberry v.—23 M. 320.
Moyers v. Columbus Banking &c. Co.—64 M. 48—trial, 244, 260.
Moyse v. Cohn, 76 M. 590—mtg. 433.
Moyse v. Howie, 53 So. 402—app. & e. 1009; trusts, 95.
Moyse, Barwick v.—74 M. 415.
Moyse, Cain v.—71 M. 653.
Moyse, Clark v.—48 So. 721.
Moyse, Johnson v.—12 So. 483.
Moyse, Scherck v.—94 M. 259.
Muirhead v. Muirhead, 6 S. & M. 451—app. & e. 963; contin. 43; crim. l. 1151; ex. & ad. 17.
Muirhead v. Muirhead, 8 S. & M. 211—app. & e. 484; ex. & ad. 12; excep. 11, 26.
Muirhead v. Muirhead, 23 M. 97—dower, 69; judgm. 342.
Muirhead, Laud v.—31 M. 89.
Muldrow v. Davis, 12 S. & M. 655—app. & e. 1175; costs, 139.
Mulheim, Smith v.—57 M. 591.
Mulholland v. Thompson-Houston Electric &c. Co. 66 M. 339—mar. liens, 25, 74; sales, 343, 367.
Mulholland, Rivers v.—62 M. 766.
Mullen v. Jelks, W. 205—plead. 10.
Muller, Wellborn v.—84 M. 726.
Mullons, Burnley v.—86 M. 441.
Mulligan v. State, 47 M. 304—crim. l. 1066.
Mulligan, Connell v.—13 S. & M. 388.
Mullins v. Cottrell, 41 M. 291—ins. p. 2; new tr. 42; trial, 219; wills, 33, 40, 53, 54, 55, 82, 328, 373.
Mullins v. Illinois Cent. R. Co. 93 M. 184—carr. 358.
Mullins v. Shaw, 77 M. 900—ev. 414; lev. 21, 25; tax. 435, 619.
Mullins v. Sparks, 43 M. 129—inf. 89; proc. 135; ven. & pur. 279.
Mullins, Brewer v.—52 So. 257.
Mullins, Brown v.—24 M. 204.
Mullins, Mobile &c. R. Co. v.—70 M. 730.
Mullins, Natchez Cotton Mill Co. v.—67 M. 672.
Mulvahill v. Cohen, 1 Miss. Dec. 280—attch. 378.
Mulverhill v. Vicksburg R. &c. Co. 88 M. 689—corp. 448, 522, 578; st. r. r. 43, 48.
Mumford v. State, 39 M. 558—crim. l. 186.
Muncaster, Bland v.—24 M. 62.
Munce, Rutherford v.—W. 370.
Munday v. Terrell, 87 M. 282—inj. 114.
Mundy v. Calvert, 40 M. 181—courts, 202a; ex. & ad. 314f, 314g, 314i, 315, 374, 375.
Munford v. State, 39 M. 558—crim. l. 199; slaves, 18.
Munford, Lake v.—4 S. & M. 312.
Munger, Smith v.—93 M. 627.
Munger, Westbrook v.—61 M. 329 .
Munger, Westbrook v.—62 M. 316.
Munger, Westbrook v.—64 M. 575.
Munn v. Perkins, 1 S. & M. 412—new tr. 11, 177; sales, 256.
Munn, McKee v.—5 So. 616.
Munson, Adams v.—3 H. 77.
Munson, Thompson v.—43 M. 176.
Murch v. Warren County, 73 M. 356—convt. 10; counties, 136.
Murdin v. State, 82 M. 507—weap. 17.
Murdoch v. Murdoch, 53 So. 684—wills, 616.
Murdock v. Chaffee, 67 M. 740—lev. 28g;

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mand. 174; offic. 102; pub. lands, 142; tax. 679a.
Murdock v. Columbus Ins. &c. Co. 59 M. 152—chat. m. 8; cncts. 144; corp. 123.
Murdock v. Daniel, 58 M. 411—attch. 217; garn. 184, 234.
Murdock v. Hughes, 7 S. & M. 219—lim. of act. 36, 101, 103.
Murdock v. Martin, 12 S. & M. 660—partners. 102, 121.
Murdock v. Yazoo &c. R. Co. 77 M. 487—r. r. 304.
Murdock v. Yazoo &c. R. Co. 29 So. 25—r. r. 400.
Murdock v. Washburn, 1 S. & M. 546—ex. & ad. 296, 299.
Murdock, Holman v.—34 M. 275.
Murdock, Mobile Savings Bank v.—1 Miss. Dec. 593.
Murdock, Ray v.—36 M. 692.
Murff v. Frazier, 41 M. 408—des. & d. 86; ex. & ad. 302, 314f.
Murff v. Osburn, 24 So. 873—j. p. 153.
Murff v. Peterson, 57 M. 146—app. & e. 266; ex. & ad. 510.
Murphee, Brown v.—31 M. 91.
Murphee, McDonald v.—45 M. 705.
Murphey, Virden v.—78 M. 515.
Murphree v. Countiss, 58 M. 712—ven. & pur. 275.
Murphree v. Dogan, 17 So. 231—ven. & pur. 310.
Murphy v. American Soda Fountain Co. 86 M. 791—judgm. 461; parties, 49; sales, 480.
Murphy v. Clark, 1 S. & M. 221—eq. 17, 148.
Murphy v. Clark, 14 S. & M. 187—eq. 17.
Murphy v. Hutchinson, 93 M. 643—app. & e. 792; elect. rem. 3; ex. & ad. 236, 423, 485.
Murphy v. Independent Order of Sons and Daughters of Jacob, 77 M. 830—ins. 749, 751, 753, 756, 789.
Murphy v. Jackson, 69 M. 403—app. & e. 1178; estop. 94; mtg. 171.
Murphy v. Klein, 71 M. 908—lim. of act. 119.
Murphy v. Orgill, 23 So. 305—attch. 318.
Murphy v. Red, 64 M. 614—ins. 203, 218.
Murphy v. Reedy, 2 So. 167—lim. of act. 101.
Murphy v. Sloan, 24 M. 658—atty. & c. 114; princ. & a. 69; trusts, 95.
Murphy v. State, 24 M. 590—ind. 57, 71; slaves, 19.
Murphy v. State, 28 M. 637—int. liq. 223; slaves, 10, 19; witn. 102, 108.
Murphy v. State, 62 M. 97—anim. 96; mal. mis. 2.
Murphy v. State, 66 M. 46—crim. l. 733; inn. 2; statut. 199.
Murphy v. State, 89 M. 221—hom. 286a; crim. l. 789, 1172.
Murphy v. State, 92 M. 203—jury, 103.
Murphy v. Thomas, 41 M. 429—ex. & ad. 150.
Murphy, Brandt v.—68 M. 84.
Murphy, Brunswick-Balke-Collender Co. v.—89 M. 264.
Murphy, Burke v.—27 M. 167.
Murphy, Coffin v.—62 M. 542.
Murphy, Curry v.—35 M. 473.
Murphy, Dalton v.—30 M. 59.
Murphy, Faust v.—71 M. 120.
Murphy, Hicks v.—W. 66.
Murphy, Murray v.—39 M. 314.
Murphy, Pass Christian v.—68 M. 84.
Murphy, Peebles v.—17 So. 278.
Murphy, Schuler v.—91 M. 518.
Murphy, Wolfe v.—60 M. 1.
Murrah v. State, 51 M. 675—anim. 5; courts, 117; crim. l. 108, 990, 1002, 1206; hab. corp. 59; ind. 160.
Murrah, Sadler v.—3 H. 195.
Murray v. Lehman, 61 M. 283—tax. 39.
Murray v. Murphy, 39 M. 214—plead. 214; wells, 113, 222, 393, 417.
Murray v. Smith, 28 M. 31—schools, 18.
Murray v. State, 36 So. 541—larc. 54, 69, 77.
Murray v. State, 54 So. 72—crim. l. 108, 112.
Murray, Ellis v.—28 M. 129.
Murray, Southern R. Co. v.—91 M. 546.
Murrell v. Jones, 40 M. 565—bills & n. 16, 180, 366; cncts. 101, 133; courts, 95; eq. 144; mtg. 220; states, 18a; war, 10.
Murrell, Southern R. Co. v.—78 M. 446.
Murry, Southern R. Co. v.—39 M. 478.
Muse v. Gulf &c. R. Co. 48 So. 897—r. r. 484.
Muse v. Muse, 76 M. 372—ins. p. 34.
Muse v. Richards, 70 M. 581—deeds, 114; eject. 92, 94; ev. 10, 206.
Muse, Taggart v.—60 M. 870
Musgrove v. Jackson, 59 M. 390—lim. of act. 26, 28.
Musgrove v. Vicksburg &c. R. Co. 50 M. 677—app. & e. 1107; const. law, 106; counties, 192; statut. 85, 149, 276.
Musgrove, Leachman v.—45 M. 511.
Musgrove, Miss. Soc. &c. v.—44 M. 820.
Musson v. Fall Back Planting &c. Co. 12 So. 587—guard. & w. 81, 115.
Musson v. Trigg, 51 M. 172—hus. & w. 119.
Mutual Benefit Life Ins. Co. v. Willoughby, 54 So. 834—ins. 730.
Mutual Life Ins. Co. v. Herron, 79 M. 381—app. & e. 1007; ins. 129, 198.

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Mutual &c. Assn. v. Ogletree, 77 M. 7—ins. 252, 292, 379.
Mutual &c. Assn. v. Opp. 30 So. 69—ins. 668.
Mutual &c. Assn. Lewis v.—27 So. 649.
Myer v. Blakemore, 54 M. 570—ev. 332.
Myer v. Warner, 64 M. 610—action, 70; replev. 1, 21.
Myer-Bridges Co. v. Badeau, 90 M. 27—estop. 92; frds. st. of, 17.
Myer, Morris v.—87 M. 701.
Myer, Wood v.—54 So. 73.
Myer &c. Hardware Co. v. Spann, 35 So. 177—ev. 114.
Myers v. Buchanan, 46 M. 397—deeds, 79; fixt. 30, 35; mech. liens, 107; mtg. 171; ven. & pur. 227.
Myers v. Chalmers, 60 M. 772—mand. 74; u. s. 7.
Myers v. Coleman, 93 M. 226—brok. 59.
Myers v. Estell 47 M. 4—dam. 117; set-off, 4, 35; ven. & pur. 310.
Myers v. Estelle, 48 M. 372—mtg. 199, 466; ven. & pur. 266a, 281.
Myers v. Farrell, 47 M. 281—app. & e. 999, 1004; attch. 34, 39, 375; fraud, 1.
Myers v. Little, 60 M. 203—hus. & w. 149.
Myers v. Marshall County, 55 M. 344—clks. of c. 10; statut. 159.
Myers v. Martinez, 95 M. 104—corp. 134; eq. 239; ex. & ad. 537d.
Myers v. Oglesby, 6 H. 46—paymt. 49; trial, 248.
Myers v. State, 23 So. 428—crim. l. 1172; hom. 125.
Myers v. State, 61 M. 138—courts, 69; mand. 15, 144; pub. lands, 111.
Myers v. State, 54 So. 849—crim. l. 656.
Myers, Avery v.—60 M. 367.
Myers, Emmons v.—7 H. 375.
Myers, Estell v.—54 M. 174.
Myers, Estell v.—56 M. 800.
Myers, Foote v.—60 M. 790.
Myers, Hartsell v.—57 M. 135.
Myers, Kansas City &c. R. Co. v.—7 So. 321.
Myers, Miles v.—W. 379.
Myers, Pool v.—13 S. & M. 466.
Myers, Pritchard v.—3 S. & M. 42.
Myers, Pritchard v.—11 S. & M. 169.
Myles, McDonald v.—12 S. & M. 279.
Myles, Quin v.—59 M. 375.
Myrick v. McRaven, 54 M. 11—abate. & r. 76; eject. 80.
Myrick v. National Cash Register Co. 25 So. 155—replev. 10.
Myrick v. Wells, 52 M. 149—eject. 86; trial, 59, 190.
Myrick, Chambers v.—61 M. 459.
Myrick, Garner v.—30 M. 448.
Myse v. Dandridge, 35 M. 672—ven. & pur. 240.

N

Nabers v. Goldford, 77 M. 661—ev. 158.
Nabors v. McKay, 27 M. 799—ex. & ad. 314d, 329.
Nabours v. Cocke, 24 M. 44—cncts. 93; eq. 8; execution, 5, 151b, 153, 275.
Nagle v. Ball, 71 M. 330—ex. & ad. 222, 224, 328.
Nagle v. McNorton, 65 M. 197—cncts. 324.
Nail v. State, 70 M. 32—crim. l. 782; jury, 39, 52, 133.
Nail, Hughston v.—73 M. 284.
Nail, Warren County v.—78 M. 726.
Nalty, Hudson v.—55 M. 582.
Nance v. Webb, 42 M. 268—proc. 34.
Nance, Bush v.—61 M. 237.
Napier, Van Eaton v.—63 M. 220.
Nash v. Fletcher, 44 M. 609—adv. pos. 69, 100; statut. 199.
Nash v. Phillips, 2 Miss. Dec. 628—app. & e. 208; spec. perf. 66.
Nash v. Young, 31 M. 134—exemp. 30.
Nash, Armfield v.—31 M. 361.
Nash, Fairly v.—70 M. 193.
Nash, Hill v.—73 M. 849.
Nash, Martin v.—31 M. 324.
Nash, Prewett v.—50 M. 584.
Nash, Sims v.—1 H. 271.
Natchey, Briel v.—48 M. 423.
Natchez v. Lewis, 90 M. 310—mun. corp. 805.
Natchez v. Mallery, 54 M. 499—estop. 92; mun. corp. 255.
Natchez v. Minor, 4 S. & M. 602—execution, 275.
Natchez v. Minor, 9 S. & M. 544—alt. of inst. 15; bonds, 83, 95, 180; deeds, 30; eq. 153; mtg. 234, 460; princ. & a. 168; ven. & pur. 308a.
Natchez v. Minor, 10 S. & M. 246—ex. & ad. 367; execution, 215, 275; tax. 734a.
Natchez v. Shields, 74 M. 871—mun. corp. 765, 787.
Natchez v. Trimble, W. 376—bills & n. 108; cncts. 104.
Natchez v. Vandervelde, 31 M. 706—bound. 46; eject. 122; eq. 45; frds. st. of, 56, 68; partit. 5.
Natchez B. & L. Assn. v. Shields, 71 M. 630—
Natchez, Agnew v.—9 S. & M. 104.
b. & l. assn. 33.
Natchez Cotton Mill Co. v. McLain, 33 So. 723—mast. & s. 216.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Natchez Cotton Mill Co. v. Mullins, 67 M. 672—death, 31.
Natchez Ins. Co. v. Buckner, 4 H. 63—comp. 18; ins. 2, 172, 273, 314, 388, 410, 473, 475, 660.
Natchez Ins. Co. v. Buckner, 5 H. 744—ins. 660.
Natchez Ins. Co. v. Buckner, 2 S. & M. 340—comp. 18.
Natchez Ins. Co. v. Helm, 13 S. & M. 182—execution, 141, 223, 232, 270; lis pens. 23; mech. liens, 268.
Natchez Ins. Co. v. Stanton, 4 H. 7—app. & e. 398, 404.
Natchez Ins. Co. v. Stanton, 2 S. & M. 340—cust. & w. 5, 10; ins. 153, 156.
Natchez Ins. Co. Helm v.—8 S. & M. 197.
Natchez Ins. Co. Stanton v.—5 H. 744.
Natchez, Minor v.—4 S. & M. 602.
Natchez, O'Conley v.—1 S. & M. 31.
Natchez Steamboat Co. Nevitt v.—5 H. 196.
Natchez Steamboat Co. Smith v.—1 H. 479.
Natchez, Thornton v.—88 M. 1.
Natchez Water Co. Thompson v.—68 M. 423.
Natchez &c. R. Co. v. Bolls, 62 M. 50—ev. 113; jury, 131; trial, 67, 169, 194.
Natchez &c. R. Co. v. Cook, 63 M. 38—death, 7, 31.
Natchez &c. R. Co. v. Crawford, 55 So. 596—const. law, 41, 48, 55, 245, 301; jury, 10.
Natchez &c. R. Co. v. Currie, 62 M. 506—r. r. 114; tresp. 20, 55.
Natchez &c. R. Co. v. Lambert, 70 M. 779—judgm. 914; tax. 192, 198, 210, 248.
Natchez &c. R. Co. v. Lambert, 54 So. 836—carr. 272, 305.
Natchez &c. R. Co. v. McNeill, 61 M. 434—carr. 147, 208; r. r. 405.
Natchez &c. R. Co. Adams v.—76 M. 714.
Natchez &c. R. Co. Currie v.—61 M. 725.
Natchez &c. R. Co. Dabney v.—2 Miss. Dec. 133.
Natchez &c. R. Co. Hinds County v.—85 M. 599.
Natchez &c. R. Co. Hope v.—54 So. 369.
Natchez &c. R. Co. Louisville &c. R. Co. v.—67 M. 399.
Natchez &c. R. Co. Ross v.—61 M. 12.
Natchez &c. R. Co. Ross v. 62 M. 23.
Natchez &c. R. Co. Stone v.—62 M. 646.
Nathan v. Halsell, 91 M. 785—atty. & c. 80, 144.
National B. & L. Assn. v. Wilson, 78 M. 993—b. & l. assn. 33, 46.
National Cash Register Co. Myrick v.—25 So. 155.
National Mut. B. & L. Assn. v. Brahan, 80 M. 407—b. & l. assn. 25; eq. 342; lev. 281; tax. 679.
National Mut. B. & L. Assn. v. Brahan, 80 M. 407—plead. 356.
National Mut. B. & L. Assn. v. Farnham, 81 M. 364—b. & l. assn. 46.
National Mutual B. & L. Assn. v. Houston, 81 M. 386—mtg. 600, 602.
National Mut. B. & L. Assn. v. Pinkston, 79 M. 468—app. & e. 828; b. & l. assn. 46.
National Mut. B. & L. Assn. Buntyn v.—86 M. 454.
National Mut. B. & L. Assn. Houston v.—80 M. 31.
National Parlor Furniture Co. Strauss v.—76 M. 343.
Nations v. Alvis, 5 S. & M. 338—app. & e. 20; hab. corp. 2.
Nations v. Lovejoy, 80 M. 401—j. p. 141, 159; mast. & s. 340; statut. 164, 270.
Nations, Johnson v.—26 M. 147.
Native Lumber Co. v. Harrison County, 89 M. 171—const. law, 46; elec. 256.
Native Lumber Co. Wesley v.—53 So. 346.
Naul v. McComb City, 70 M. 699—crim. l. 678; ev. 32; int. liq. 223.
Naul v. State, 12 So. 903—crim. l. 369, 1085.
Nave, McCall v.—52 M. 494.
Navra, Forbes v.—63 M. 1.
Neal v. Allison, 50 M. 175—chat. m. 240; paymt. 40.
Neal v. Maxwell, 40 M. 726—ex. & ad. 318.
Neal v. Saunderson, 2 S. & M. 572—carr. 119; excep. 17.
Neal v. Wellons, 12 S. & M. 649—ex. & ad. 471, 510a.
Neal, Duvall v.—70 M. 288.
Neal, Greener v.—61 M. 204.
Neal, Hanks v.—44 M. 212.
Neal, Hawkins v.—60 M. 256.
Neal, Hawks v.—44 M. 212.
Neal, Hull v.—27 M. 424.
Neal, Jordan v.—33 So. 17.
Neal, Yazoo &c. R. Co. v.—93 M. 680.
Neary v. State, 38 So. 335—bailm. 93.
Nebbett v. Cunningham, 27 M. 292—app. & e. 869, 874; jud. s. 30, 31, 34; mtg. 515.
Neblett v. Neblett, 70 M. 572—can. of i. 47; deeds, 59, 208; ev. 272; inf. 85, 97; partit. 114; witn. 139.
Ned v. State, 33 M. 364—app. & e. 202; crim. l. 628, 855, 924; slaves, 18c.
Neel v. Neel, 61 M. 630—app. & e. 372, 396.
Neeley, Thomason v.—50 M. 310.
Neely v. Planters' Bank, 4 S. & M. 113—

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abate. & r. 75; app. & e. 202; dep. 89; ex. & ad. 436, 453.
Neely v. State, 54 So. 315—cmpt. 1, 6.
Neely, Dibrell v.—61 M. 218.
Neely, Planters' Bank v.—7 H. 80.
Neely, Scott v.—140 U. S. 106.
Neibert v. Withers, Sm. & M. Ch. 599—ex. & ad. 409, 417.
Neighbors, Memphis &c. R. Co. v.—51 M. 412.
Neil, Ex parte, 90 M. 518—courts, 64.
Neill v. Neill, 31 M. 36—ins. p. 42; trusts, 219.
Neill, Studevant v.—27 M. 157.
Neilson v. Holmes, W. 261—eq. 444.
Nelm v. State, 13 S. & M. 500—crim. l. 929, 957; hom. 214, 219, 221; jury, 100, 103; new tr. 143; witn. 379.
Nelms v. State, 58 M. 362—crim. l. 596, 683, 754, 775, 789.
Nelms, Applewhite v.—71 M. 482.
Nelms, Arbuckle v.—50 M. 556.
Nelms, Bass v.—56 M. 502.
Nelms, Board of Levee Com'rs v.—82 M. 416.
Nelms, Board of Levee Com'rs v.—84 M. 642.
Nelson v. Abernathy, 74 M. 164—tax. 671, 688, 764.
Nelson v. Henderson, 16 So. 911—app. & e. 494, 529.
Nelson v. Illinois Cent. R. Co. 53 So. 619—carr. 414; judgm. 630; torts, 22.
Nelson v. Lawson, 71 M. 819—frds. st. of, 72; rep. lev. 3.
Nelson v. Leake, 25 M. 199—eject. 143.
Nelson v. Miller, 52 M. 410—hus. & w. 85, 168, 171.
Nelson v. Nye, 43 M. 124—proc. 134; sheriffs, 18.
Nelson v. Ratliff, 72 M. 656—adv. pos. 4, 100; lim. of act. 174; lis pens. 26; mtg. 148, 327, 587; trusts, 171, 206.
Nelson v. Rogers, 41 M. 635—judgm. 119.
Nelson v. Sims, 23 M. 383—pub. lands, 32.
Nelson v. Smith, 12 S. & M. 662—ex. & ad. 181.
Nelson v. State, 47 M. 621—crim. l. 752, 1184; perj. 11.
Nelson v. State, 57 M. 286—jury, 39.
Nelson v. State, 61 M. 212—app. & e. 214; crim. l. 1135, 1172; trial, 295.
Nelson, Buckingham v.—42 M. 417.
Nelson, Crowder v.—32 M. 260.
Nelson, Gulf &c. R. Co. v.—82 M. 653.
Nelson, Little v.—61 M. 672.
Nelson, Reynolds v.—41 M. 83.
Nelson, Skaggs v.—25 M. 88.
Nelson, Smith v.—57 M. 138.
Nelson, Taylor v.—54 M. 524.
Nelson, Walker v.—87 M. 268.
Nelson, Weaver v.—12 So. 597.
Nesbit v. Greenville, 69 M. 22—ev. 5; mun. corp. 763, 778, 791, 821; neg. 136; trial, 143.
Nesbit v. Rodewald, 43 M. 304—app. & e. 69, 359.
Nesbit, Barringer v.—1 S. & M. 22.
NeSmith v. Patterson, 2 Miss. Dec. 713—eject. 86.
Nethery v. Belden, 66 M. 490—attch. 3, 6, 8; bailm. 14.
Netterville v. Barber, 52 M. 168—hus. & w. 79, 85, 92, 155.
Netterville v. Stevens, 2 H. 642—bills & n. 427, 452.
Netterville, Davis v.—68 M. 429.
Nettles, Gwin v.—18 So. 798.
Nettles, Hartman v.—64 M. 495.
Nettleton Hardware Co. Alliance Trust Co. v.—74 M. 584.
Nevill v. Matthews, W. 377—eq. 367.
Neville, Gully v.—55 So. 289.
Neville, Kemper County v.—95 M. 56.
Neville, Williams v.—53 So. 594.
Nevin v. Bailey, 62 M. 433—tax. 439, 688, 802.
Nevin, Sutton v.—2 Miss. Dec. 409.
Nevit v. Rabe, 5 H. 653—plead. 317.
Nevitt v. Bacon, 32 M. 212—eq. 367; lim. of act. 44, 130, 167, 180; mtg. 424.
Nevitt v. Bank of Port Gibson, Freem. Ch. 438—bills & n. 279.
Nevitt v. Bank of Port Gibson, 6 S. & M. 513—abat. & r. 39; banks, 68, 70, 77; const. law, 169.
Nevitt v. Beaumont, 6 H. 237—pub. lands, 206, 223.
Nevitt v. Gillespie, 1 H. 108—eq. 43; inf. 14, 45; judgm. 428.
Nevitt v. Hamer, 5 S. & M. 145—judgm. 428, 870g.
Nevitt v. Natchez Steamboat Co. 5 H. 196—dism. 23.
Nevitt, Brown v.—27 M. 801.
Nevitt, Pearson v.—32 M. 180.
Nevitt, Smith v.—W. 370.
New v. Wright, 44 M. 202—inj. 59, 148; partners. 118, 325.
New Albany v. Kansas City &c. R. Co. 76 M. 111—tax. 317.
Newberg v. Cowan, 62 M. 570—land. & t. 200, 206; use & o. 6, 11.
Newberger Cotton Co. v. Illinois Cent. R. Co. 75 M. 303—carr. 155, 167.
Newberger Cotton Co. v. Watts, 49 So. 146—app. & e. 494.

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Newberger Cotton Co. Moreland v.—94 M. 572.
Newberry, Williams v.—32 M. 256.
Newburger v. Perkins, 62 M. 584—paymt. 39.
Newburn, Field v.—91 M. 861.
Newcomb v. State, 37 M. 383—app. & e. 547; crim. l. 366, 935, 941, 961, 1032, 1089; hom. 135, 190, 191; ind. 193; witn. 297, 302, 306, 372, 388, 411.
Newcomb, Enoch-Havis Lumber Co. v.—79 M. 462.
Newcomer, Alston v.—42 M. 186.
Newell v. Briggs, 3 H. 45—app. & e. 398.
Newell v. Cowan, 30 M. 492—slaves, 16; tresp. 21.
Newell v. Crider, 50 M. 539—cncts. 54; ven. & pur. 230, 260.
Newell v. Fisher, 11 S. & M. 431—cncts. 70, 84, 92; frds. st. of, 23.
Newell v. Fisher, 24 M. 392—action, 13; parties, 1; plead. 252; rec. 167, 169.
Newell v. Hamer, 4 H. 684—princ. & s. 124.
Newell v. Newell, 9 S. & M. 56—app. & e. 223; wills, 303, 436.
Newell v. Newell, 34 M. 385—app. & e. 523; estop. 101; ev. 271; fraud. conv. 172; gifts, 62; parent. &c. 9; plead. 204; replev. 11, 56, 67, 69, 116.
Newell, Callahan v.—61 M. 437.
Newell, Cooper v.—36 M. 316.
Newell, Wellons v.—7 S. & M. 399.
New England Mortgage Security Co. v. Townes, 1 So. 242—usury, 16.
New England Mortgage Security Co. Barton v.—25 So. 362.
New England Mortgage Co. Pass v.—66 M. 365.
New England Mortgage Co. Swan v.—75 M. 907.
Newlin, Irvine v.—63 M. 192.
Newlon, Smith v.—62 M. 230.
Newman v. Bank of Greenville, 66 M. 323—agric. 11; estop. 102; fact. 47; land. & t. 217, 229b, 243, 250, 252a.
Newman v. Bank of Greenville, 67 M. 770—atty. & c. 86; ev. 67, 386; plgs. 22.
Newman v. Black, 73 M. 239—assign. f. b. c. 83.
Newman v. Elam, 26 M. 474—licens. 15.
Newman v. Elam, 30 M. 507—states, 78.
Newman v. Foster, 3 H. 383—bound. 10, 54; eject. 19, 104; ev. 387; plead. 236, 245; trial, 252.
Newman v. Foster, 1 So. 505—lim. of act. 29.
Newman v. Harris, 4 H. 522—ev. 334; indians, 14, 27.
Newman v. Harris, 3 S. & M. 565—witn. 38.
Newman v. Kling, 73 M. 312—can. of i. 6; nova. 3.
Newman v. Mackin, 13 S. & M. 383—app. & e. 1140; forc. e. & d. 8, 12, 42; lis pens. 25; witn. 338.
Newman v. Meek, Freem. Ch. 441—auct. 7; cncts. 260; ev. 385; trusts, 197.
Newman v. Meek, Sm. & M. Ch. 331—paymt. 40.
Newman v. Montgomery, 5 H. 742—chat. m. 172.
Newman v. Morris, 52 M. 402—eq. 64; hus. & w. 97, 237, 407, 428, 436; partners. 16.
Newman v. State, 69 M. 393—adult. 6; forn. 3; lewd. 4; incest, 9.
Newman v. State, 72 M. 124—crim. l. 295; int. liq. 215; witn. 72.
Newman v. Taylor, 69 M. 670—comp. 4; eq. 37, 66; judgm. 348, 419.
Newman v. Tillman, 71 M. 26—bills & n. 342; trusts, 355.
Newman v. Vicksburg &c. R. Co. 64 M. 115—r. r. 419.
Newman v. Williams, 29 M. 212—usury, 21.
Newman, Anderson v.—60 M. 532.
Newman, Dunbar v.—46 M. 231.
Newman, Dunn v.—7 H. 582.
Newman, Gibson v.—1 H. 341.
Newman, Harris v.—5 H. 654.
Newman, Harris v.—3 S. & M. 565.
Newman, Heath v.—11 S. & M. 201.
Newman, Hoopes v.—2 S. & M. 71.
Newman, Jackson v.—59 M. 385.
Newman, Lee v.—55 M. 365.
Newman, Pegram v.—54 M. 612.
New Orleans Acid &c. Co. v. Grissom, 79 M. 662—attch. 306; bankr. 174.
New Orleans Ins. Assn. v. Holberg, 64 M. 51—ins. 328, 336, 346.
New Orleans Brewing Assn. Andrews v.—74 M. 362.
New Orleans German Gazette, Gum Carbo Co. v.—90 M. 177.
New Orleans Ins. Assn. v. Matthews, 65 M. 301—ins. 376, 556, 561, 668.
New Orleans Ins. Assn. 76 M. 697.
New Orleans &c. Ins. Assn. Cassity v.—65 M. 49.
New Orleans Nat. Bank, Campbell v.—74 M. 526.
New Orleans Seed Co. Warren Mills v.—65 M. 391.
New Orleans &c. Mfg. Co. v. Lowenstein, 11 So. 187—inj. 26.
New Orleans &c. R. Co. v. Allbritton, 38 M.

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242—app. & e. 502, 528; carr. 4, 283, 316, 317, 319; ev. 536; excep. 1, 6; dam. 92, 94; new tr. 131; princ. & a. 159; r. r. 267; trial, 210.

New Orleans &c. R. Co. v. Bailey, 40 M. 395—dam. 92; mast. & s. 300; princ. & a. 159; r. r. 273½, 278.

New Orleans &c. R. Co. v. Bourgeois, 66 M. 3—neg. 120; r. r. 251, 354, 419.

New Orleans &c. R. Co. v. Brooks, 85 M. 269—r. r. 310, 346, 350.

New Orleans &c. R. Co. v. Brown, 64 M. 479—r. r. 73, 112.

New Orleans &c. R. Co. v. Burke, 53 M. 200—afft. 1; app. & e. 462; bonds, 14; carr. 284, 319; dam. 209, 215; mast. & s. 302c; parties, 21; r. r. 276; seals, 4; sheriffs, 154; tax. 547.

New Orleans &c. R. Co. v. Crayton, 69 M. 152—app. & e. 976, 979.

New Orleans &c. R. Co. v. Drake, 60 M. 621—em. dom. 225, 239.

New Orleans &c. R. Co. v. Echols, 54 M. 264—dam. 62; ev. 355, 588; r. r. 109.

New Orleans &c. R. Co. v. Enochs, 42 M. 603—r. r. 441; trial, 150.

New Orleans &c. R. Co. v. Evans, 49 M. 785—app. & e. 55.

New Orleans &c. R. Co. v. Faler, 58 M. 911—carr. 117, 147, 156, 163.

New Orleans &c. R. Co. v. Field, 46 M. 573—anim. 47; app. & e. 1063; r. r. 405, 411, 417; trial, 295.

New Orleans &c. R. Co. v. Frederic, 46 M. 1—em. dom. 167, 179, 273.

New Orleans &c. R. Co. v. George, 82 M. 710—carr. 100, 197.

New Orleans &c. R. Co. v. Harris, 27 M. 517—const. law, 125; corp. 38, 84, 375.

New Orleans &c. R. Co. v. Harrison, 48 M. 112—mast. & s. 302, 306.

New Orleans &c. R. Co. v. Hemphill, 35 M. 17—app. & e. 25, 902; deeds, 2, 26, 46, 54; est. 1, 4; judgm. 17a; jury, 49; statut. 180.

New Orleans &c. R. Co. v. Hughes, 49 M. 258—mast. & s. 85, 167, 173, 180, 195, 198, 203, 216.

New Orleans &c. R. Co. v. Hurst, 36 M. 660—action, 26, 27; app. & e. 999, 1004; carr. 4, 271, 273, 274, 277a, 277b; dam. 92, 181; new tr. 76; r. r. 267.

New Orleans &c. R. Co. v. Jones, 1 Miss. Dec. 206—r. r. 443.

New Orleans &c. R. Co. v. Jones, 3 So. 653—r. r. 443.

New Orleans &c. R. Co. v. Lamkin, 78 M. 502—carr. 177.

New Orleans &c. R. Co. v. McBride, 38 M. 32—app. & e. 999; new tr. 143.

New Orleans &c. R. Co. v. McDonald, 53 M. 240—mun. corp. 912.

New Orleans &c. R. Co. v. Mississippi College, 47 M. 560—bonds, 92; lost. inst. 12, 18.

New Orleans &c. R. Co. v. Mitchell, 52 M. 808—neg. 141; r. r. 324, 351.

New Orleans &c. R. Co. v. Moore, 40 M. 39—carr. 4, 391, 408.

New Orleans &c. R. Co. v. Moye, 39 M. 374—abate. & r. 55; adv. pos. 5; app. & e. 214; ded. 16, 45; em. dom. 73, 144; ex. & ad. 39; tresp. 25, 29, 82.

New Orleans &c. R. Co. v. Norwood, 62 M. 565—mast. & s. 301.

New Orleans &c. R. Co. v. Pressley, 45 M. 66—app. & e. 671; assump. 3; cncts. 324, 332, 337; int. rev. 19; paymt. 60.

New Orleans &c. R. Co. v. Reese, 61 M. 581—mast. & s. 301, 315, 330; tresp. 30.

New Orleans &c. R. Co. v. Rollins, 36 M. 384—abate. & r. 69; ex. & ad. 334.

New Orleans &c. R. Co. v. Shackleford, 87 M. 610—carr. 19, 400.

New Orleans &c. R. Co. v. State, 52 M. 877—states, 18c, 124.

New Orleans &c. R. Co. v. Statham, 42 M. 607—app. & e. 999; carr. 272, 277a, 281, 303; dam. 91; trial, 189, 252.

New Orleans &c. R. Co. v. Thornton, 65 M. 256—r. r. 407, 419.

New Orleans &c. R. Co. v. Toulme, 59 M. 284—r. r. 417, 442, 446.

New Orleans &c. R. Co. v. Tyson, 46 M. 729—carr. 84, 85, 87, 122; ev. 99.

New Orleans &c. R. Co. v. Wallace, 50 M. 244—app. & e. 881; appr. 16; carr. 109; corp. 666, 669; death, 8; plead. 187, 428.

New Orleans &c. R. Co. v. Williams, 96 M. 373—trial, 252.

New Orleans &c. R. Co. Beasley v.—91 M. 268.

New Orleans &c. R. Co. Biloxi Lumber &c. Co. v.—28 So. 21.

New Orleans &c. R. Co. Bonner Co. v.—40 So. 65.

New Orleans &c. R. Co. Crowell v.—61 M. 631.

New Orleans &c. R. Co. Dennis v.—32 So. 914.

New Orleans &c. R. Co. Echols v.—52 M. 610.

New Orleans &c. R. Co. Fairchild v.—60 M. 931.

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New Orleans &c. R. Co. Fairchild v.—62 M. 177.
New Orleans &c. R. Co. Gardner v.—78 M. 640.
New Orleans &c. R. Co. Gatti v.—77 M. 754.
New Orleans &c. R. Co. Howze v.—91 M. 695.
New Orleans &c. R. Co. Matthews v.—93 M. 325.
New Orleans &c. R. Co. Mitchell v.—36 So. 1.
New Orleans &c. R. Co. Shackelford v.—37 M. 202.
New Orleans &c. R. Co. Short v.—69 M. 848.
New Orleans &c. R. Co. T. B. Bonner v.—40 So. 65.
New Orleans &c. R. Co. Thompson v.—50 M. 315.
New Orleans &c. R. Co. Threefoot v.—89 M. 192.
New Orleans &c. R. Co. Williams v.—60 M. 689.
New Orleans &c. R. Co. Wilson v.—63 M. 352.
New Orleans &c. R. Co. Wilson v.—68 M. 9.
Newsom v. Cocke, 44 M. 352—clks. of c. 8; const. law, 14, 44; offic. 7; quo w. 1.
Newsom, Drane v.—73 M. 422.
New South B. & L. Assn. Crofton v.—77 M. 166.
New South B. & L. Assn. Hundermark v.—29 So. 528.
New South B. & L. Assn. Shipp v.—81 M. 17.
New South B. & L. Assn. Sokoloski v.—77 M. 155.
New South B. & L. Assn. Sokoloski v.—43 So. 764.
Newton v. State, 12 So. 560—crim. l. 761, 771.
Newton County v. Doolittle, 72 M. 929—rewards, 5.
Newton County v. Wells, 67 M. 151—rewards, 13.
Newton, Enochs v.—65 M. 86.
Newton, Foster v.—46 M. 661.
Newton Lumber Co. Hoye v.—54 So. 839.
Newton Oil &c. Co. v. Carr, 52 So. 353—fraud. conv. 142.
Newton, Stamps v.—3 H. 34.
New, Staton v.—49 M. 307.
New York Hospital v. Knox, 57 M. 600—app. & e. 411, 432.
New York Life Ins. Co. v. Jack, 76 M. 788—ins. 624, 647.
New York Life Ins. Co. v. McIntosh, 86 M. 236—cncts. 43; ins. 130.
New York Life Ins. Co. v. McIntosh, 41 So. 381—ins. 141.
New York Life Ins. Co. v. McIntosh, 46 So. 401—app. & e. 1097.
New York Life Ins. Co. Jacobs v.—71 M. 656, 658.
New York Life Ins. Co. Statham v.—45 M. 581.
Neylans v. Burge, 14 S. & M. 201—acct. 22; courts, 202c; eq. 22, 146, 232; ex. & ad. 471; judgm. 342.
Neylaus, Porterant v.—38 M. 104.
Niagara Ins. Co. v. Warren-Gee Lumber Co. 94 M. 159—disc. 6.
Niblett v. State, 75 M. 105—crim. l. 260.
Niblett, Billingsley v.—56 M. 537.
Niblett, Gibson v.—Sm. & M. Ch. 278.
Nichol, Moody v.—26 M. 109.
Nichols v. Daniels, W. 224—eq. 325, 345.
Nichols v. Denny, 37 M. 59—j. ten. 2; wills, 497, 530, 622, 635.
Nichols v. Gulf &c. R. Co. 83 M. 126—app. & e. 1027; costs, 139; r. r. 251, 381.
Nichols v. State, 46 M. 284—crim. l. 1167; gr. jury, 17; trial, 253.
Nichols v. Sun Mutual Ins. Co. 71 M. 326—ins. 421.
Nichols, Barnett v.—56 M. 622.
Nichols, Chewning v.—Sm. & M. Ch. 122.
Nichols, Ex parte, 62 M. 158—hab. corp. 118.
Nichols, Kansas City &c. R. Co. v.—38 So. 371.
Nichols, McCoy v.—4 H. 31.
Nichols, Mann v.—1 S. & M. 257.
Nicholson v. Heiderhoff, 50 M. 56—hus. & w. 86, 201.
Nicholson v. Karpe, 58 M. 34—app. & e. 282; chat. m. 46, 49.
Nicholson v. Stockett, W. 67—high. 69, 81.
Nicholson, Fleeson v.—W. 247.
Nicholson, Stockett v.—W. 75.
Nichols, Scott v.—27 M. 94.
Nichols, State v.—39 M. 318.
Nichols, Womack v.—39 M. 320.
Nickles v. Dillard, 73 M. 803—assign. 117.
Nickles v. Kendrick, 76 M. 334—app. & e. 387, 452.
Nickles v. Kendricks, 73 M. 711—j. p. 7, 36.
Niles v. Anderson, 5 H. 365—eq. 215; indians, 14, 15, 24; judgm. 372; propty. 10.
Niles v. Davis, 60 M. 750—adv. pos. 10, 63, 98, 100; execution, 172; judgm. 785, 786.
Niles, Attala County v.—58 M. 48.
Niles, Clark v.—42 M. 460.
Niles, Stebbins v.—13 S. & M. 307.
Niles, Stebbins v.—25 M. 267.
Nimocks v. McGehee, 52 So. 626—j. p. 57, 60; replev. 5.
Niolon v. McDonald, 71 M. 337—mtg. 377; trusts, 314.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Nix v. Dickerson, 81 M. 632—nav. wat. 45.
Nixon v. Biloxi, 76 M. 810—mun. corp. 974, 980, 1040.
Nixon v. Biloxi, 5 So. 621—dedi. 17; mun. corp. 691, 654.
Nixon v. Carco, 28 M. 414—deeds, 4; estop. 44, 89, 93, 94; ev. 271; frds. st. of, 114; propty. 9; pub. lands, 139; ven. & pur. 8, 95.
Nixon v. Dillard, 73 M. 803—nova. 11; parties, 4.
Nixon v. Hewes, 80 M. 88—home. 126.
Nixon v. Jullian, 72 M. 570—subrog. 23, 26.
Nixon v. Porter, 34 M. 697—bound. 34; deeds, 38; eject. 89; ev. 326, 343, 372, 374.
Nixon v. Porter, 38 M. 401—adv. pos. 44; eject. 25, 86, 139; ev. 460.
Nixon v. Seal, 78 M. 863—inj. 185.
Nixon v. Seal, 27 So. 875—ex. & ad. 129.
Nixon v. State, 2 S. & M. 497—crim. l. 573, 627; gr. jury, 8.
Noah, Hines v.—52 M. 192.
Noble v. Terrell, 64 M. 830—mech. liens, 276; plead. 433.
Noble, Gammage v.—24 M. 156.
Noble, Osborn v.—46 M. 449.
Noble, Scharff v.—67 M. 143.
Nobles v. Christmas, 2 H. 885—dam. 197.
Nobles v. McCarty, 61 M. 456—land. & t. 5; ven. & pur. 59.
Noe v. State, 4 H. 330—app. & e. 963; contin. 43; crim. l. 575, 598; int. liq. 200; jury, 102.
Noel v. Aron, 8 So. 647—app. & e. 1038; quo w. 51.
Noel v. Harvey, 29 M. 72—ex. & ad. 111, 115.
Noel v. Hooker, 1 Miss. Dec. 444—mtg. 115; trial, 252.
Noel v. Southworth, 17 So. 84—cncts. 303; fact. 44.
Noel v. Wheatly, 30 M. 181—sales, 418; witn. 105.
Noel, Robinson v.—49 M. 253.
Nogales Club v. State, 69 M. 218—int. liq. 172.
Nolan v. Calvit, 12 S. & M. 273—ex. & ad. 125.
Nolan v. Snodgrass, 70 M. 794—spec. perf. 97.
Nolan, Bank of Manchester v.—7 H. 508.
Nolan, Burford v.—30 M. 427.
Nolan, Commercial Bank v.—7 H. 508.
Nolan, Gaultney v.—33 M. 569.
Noland, Hazlip v.—6 S. & M. 294.
Nolan, Snodgrass v.—71 M. 857.
Nolen, Smith v.—2 H. 735.
Noles v. Moreland, 27 So. 598—land. & t. 212.
Noonan v. State, 1 S. & M. 562—com. l. 10; const. law, 256; crim. l. 295, 419; slaves, 19.
Noonan, Handy v.—51 M. 166.
Noonan, Wesling v.—31 M. 599.
Norage, Talbot v.—23 M. 572.
Norcum v. Lum, 33 M. 299—ex. & ad. 408, 432; interest, 4; usury, 95, 96.
Norcum, Emanuel v.—7 H. 150.
Norcum, Robins v.—4 S. & M. 332.
Norfleet v. Beall, 82 M. 538—deeds, 70; can. of l. 5.
Norfleet v. Callicott, 90 M. 221—wills, 497, 757, 763, 798.
Norfleet v. Sigman, 41 M. 631—trial, 242.
Norfleet, McWilliams v.—60 M. 987.
Norfleet, McWilliams v.—63 M. 183.
Norman v. Burnett, 25 M. 183—trusts, 24, 59.
Norman v. Jackson Fertilizer Co. 79 M. 747—partners. 239.
Norman, Brown v.—65 M. 369.
Norman, Garland v.—50 M. 238.
Norris v. Callahan, 59 M. 140—app. & e. 676; home. 134, 136; jud. s. 30; statut. 231; wills, 4, 438.
Norris v. State, 33 M. 373—ind. 71; larc. 39.
Norris, Montgomery v.—1 H. 499.
Norris, Warbington v.—3 H. 227.
North v. Culpepper, 53 So. 419—tax. 348, 455, 463, 619, 734a.
North v. James, 61 M. 761—lim. of act. 72, 72b, 73, 77.
North v. Lowe, 63 M. 31—ex. & ad. 227.
North American Ins. Co. v. Pitts, 88 M. 587—ins. 282.
North American Trust Co. v. Lanier, 78 M. 418—lim. of act. 100; mtg. 82; subrog. 31; tax. 726.
North Birmingham R. Co. Meridian Fair &c. Assn. v.—70 M. 808.
North British &c. Ins. Co. v. Edwards, 85 M. 322—const. law, 171; ins. 622.
North Carolina, Hines v.—10 S. & M. 529.
North, Comstock v.—88 M. 754.
Northern Bank v. Kyle, 7 H. 360—plead. 384.
Northern Bank, Miller v.—28 M. 81.
Northern Bank, Miller v.—34 M. 412.
Northern Bank, Stovall v.—5 S. & M. 17.
Northern Bank, Williams v.—7 S. & M. 28.
North Lumber Co. v. Gary, 83 M. 640—cncts. 171; tresp. 20.
North Lumber Co. Truly v.—83 M. 430.
Northrop v. Flaig, 57 M. 754—app. & e. 154; discov. 24; judgm. 105; plead. 206, 223, 295.
North, Simmons v.—3 S. & M. 67.
Norton v. Coley, 45 M. 125—app. & e. 218, 283, 1034; eq. 238; ref. of inst. 20, 42.

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Norton v. Phelps, 54 M. 467—lim. of act. 29; subrog. 24; trusts, 310.
Norton v. State, 65 M. 297—int. liq. 205, 221, 223.
Norton v. State, 72 M. 128—ind. 147; seduct. 29, 37.
Norton v. Wicker, 87 M. 365—bast. 94.
Norton, Dibble v.—44 M. 158.
Norton, Halsey v.—45 M. 703.
Norton, Pipes v.—47 M. 61.
Norwood v. Andrews, 71 M. 641—corp. 407; trial, 187, 194; rewards, 2; witn. 338.
Norwood, New Orleans &c. R. Co. v.—62 M. 565.
Norwood, Thompson v.—56 M. 487.
Norwood, Weaver v.—1 Miss. Dec. 72.
Norwood, Weaver v.—59 M. 665.
Noxubee County, Dismukes v.—58 M. 612.
Noxubee County, Foote v.—67 M. 156.
Noxubee County Hardware Co. v. Macon, 90 M. 636—eq. 25; mun. corp. 227, 246.
Nuckols, Bates v.—11 So. 109.
Nuckols, Threefoot v.—68 M. 116.
Nugent v. Jackson, 72 M. 1040—mun. corp. 278, 281, 297, 407, 408, 411, 495, 600; statut. 39, 61, 95, 200, 231; tax. 44.
Nugent v. Levee Commissioners, 58 M. 197—lev. 11, 19.
Nugent v. Powell, 63 M. 99—partit. 39, 45; quiet. t. 28.
Nugent v. Priebatsch, 61 M. 402—execution, 265; ref. of inst. 27; trusts, 19, 63¾; ven. & pur. 231.
Nugent, Epperson v.—57 M. 45.
Nugent, Horne v.—74 M. 102.
Nugent, Hunt v.—10 S. & M. 541.
Nunes, Morgan v.—54 M. 308.
Nunn, Fleming v.—61 M. 603.
Nunn, Palatine Ins. Co. v.—55 So. 44.
Nunnally, Dean v.—36 M. 358.
Nunnery v. Day, 64 M. 457—guard. & w. 182b; lim. of act. 65.
Nunnery v. Ford, 92 M. 263—deeds, 114.
Nunnery v. State, 87 M. 542—crim. l. 928, 956, 957, 959.
Nunnery, Hazlip v.—29 So. 821.
Nusom v. State, 1 Miss. Dec. 562—crim. l. 108.
Nutt v. Forsyth, see Nutt v. Brandon.
Nutt v. Henry, see Nutt v. Brandon.
Nutt v. Brandon, 85 M. 702—ex. & ad. 417.
Nutt v. Forsythe, 84 M. 211—u. s. 119.
Nutt v. Hunt, 4 S. & M. 702—partners. 198, 210.
Nutt v. Knut, 84 M. 465—app. & e. 1195.
Nutt v. Nutt, Freem. Ch. 128—ref. of inst. 2; wills, 115, 222, 784.
Nutt v. State, 95 M. 422—cmpt. 66.
Nutt v. State, 96 M. 473—ex. & ad. 31; trusts, 164.
Nutt, Knut v.—83 M. 365.
Nye v. Cleveland, 31 M. 440—judgm. 853.
Nye v. Grubb, 8 S. & M. 643—bills & n. 508.
Nye v. Slaughter, 27 M. 638—eq. 277, 309.
Nye, Grubbs v.—13 S. & M. 443.
Nye, Lamkin v.—43 M. 241.
Nye, Nelson v.—43 M. 124.
Nye, Phipps v.—34 M. 330.
Nye, Reynolds v. Freem. Ch. 462.

O

Oakdale Lumber Co. Pole Stock Lumber Co. v.—54 So. 596.
Oakes v. State, 54 So. 79—crim. l. 390; libel, 148, 158.
Oakey v. Rabb, Freem. Ch. 546—eq. 338; ex. & ad. 270.
Oakey v. Wilcox, 3 H. 330—alt. of inst. 1, 15, 25; bills & n. 223; plead. 291.
Oak Grove &c. R. Co. Vinegar Bend Lumber Co. v.—89 M. 84.
Oak Grove &c. R. Co. Vinegar Bend Lumber Co. v.—89 M. 117.
Oakland v. Miller, 90 M. 275—mun. corp. 594.
Oakley, Cock v.—50 M. 628.
Oates, Bell v.—53 M. 491.
Oatis, Day v.—85 M. 128.
Oatis, Gross v.—74 M. 357.
Obenchain, Sledge v.—58 M. 670.
Obenchain, Sledge v.—59 M. 616.
O'Brien v. Liddell, 10 S. & M. 371—garn. 44, 96, 159, 165.
O'Brien v. Wilson, 82 M. 93—ex. & ad. 62, 144, 173, 475.
Obrien v. Wilson, 86 M. 540—chat. m. 109; ex. & ad. 236, 416.
O'Brien, Hartley v.—70 M. 825.
O'Brien, Martin v.—34 M. 21.
O'Brien, Mason v.—42 M. 420.
Ocean Springs v. Green, 77 M. 472—const. law, 63; mun. corp. 112.
Ocean Springs, Catchot v.—34 So. 145.
Ocean Springs, Catchot v.—78 M. 509.
O'Conley v. Natchez, 1 S. & M. 31—mon. recd. 14, 719; plead. 85; tresp. 17.
O'Connell, Davis v.—92 M. 348.
O'Conner v. Starke, 59 M. 481—app. & e. 92, 100; inj. 175.
O'Connor v. Clopton, 60 M. 349—princ. & a. 159; usury, 102.

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O'Conner v. Ward, 60 M. 1025—ex. & ad. 115, 116; fraud. conv. 51, 108, 172.
Odam, Townsend v.—W. 356.
Oden v. State, 27 So. 992—crim. l. 699; hom. 167.
Oden, Gardner v.—24 M. 382.
Odeneal v. Henry, 70 M. 172—mast. & s. 30, 40, 44; trial, 244.
Odeneal, Alabama &c. R. Co. v.—73 M. 34.
Odeneal, Alabama &c. R. Co. v.—74 M. 827.
Odeneal, Carraway v.—56 M. 223.
Odeneal, Cumberland Tel. &c. Co. v.—26 So. 966.
Odenheimer, Rowan v.—5 S. & M. 44.
Odineal v. Barry, 24 M. 9—cncts. 108; counties, 103, 104.
Odineal, Rives v.—8 S. & M. 691.
Odom v. Harris, 34 M. 410—replev. 69.
O'Donnel v. Bailey, 24 M. 386—banks, 12; const. law, 137.
Officers of Court v. Bank of Port Gibson, 4 S. & M. 431—excep. 11; judgm. 439; plead. 384.
Officers of the Court v. Fisk, 7 H. 403—app. & e. 516; costs, 92.
Offit v. Vick, W. 99—bills & n. 13, 52, 423, 434, 510; ev. 169; trial, 65, 303, 307, 308.
O'Flinn v. McInnis, 80 M. 125—mun. corp. 980; tax. 814.
O'Flinn v. State, 66 M. 7—int. liq. 82, 88, 157.
O'Flinn, McCreary v.—63 M. 204.
O'Flynn v. State, 89 M. 850—cmpt. 58; jury, 19.
Offutt, Shelby v.—51 M. 128.
Ogden v. Glidewell, 5 H. 179—bills & n. 510; notaries, 9; plead. 212.
Ogden v. Guice, 56 M. 330—dep. 90; hus. & w. 155, 218.
Ogden v. Harrison, 56 M. 743—chat. m. 240, 289; mtg. 579; paymt. 40.
Ogden v. Waller, 24 M. 190—ex. & ad. 33; guard. & w. 173.
Ogden, Ladner v.—31 M. 332.
Ogden, Learned v.—80 M. 769.
Ogden, Lessly v.—83 M. 442.
Ogle v. State, 33 M. 383—app. & e. 963; crim. l. 1151, 1173; jury, 100, 103, 138.
Oglesby v. Bingham, 69 M. 795—hus. & w. 14; ven. & pur. 274.
Oglesby v. Sigman, 58 M. 502—elec. 191, 262, 263; u. s. 7.
Oglesby v. Stribling, 67 M. 666—trial, 5.
Oglesby, Cummings v.—50 M. 153.
Oglesby, Myers v.—6 H. 46.
Ogletree, Mutual &c. Assn. v.—77 M. 7.
O'Gwinn v. Winner, 25 So. 354—assign. f. b. c. 60, 223.
O'Hara v. Alexander, 56 M. 316—cncts. 54; estop. 30; hus. & w. 167, 198; sales, 236.
O'Hara v. Haas, 46 M. 374—bills & n. 440; mtg. 417; subrog. 4.
O'Harra v. Cox, 42 M. 496—tax. 67.
O'Herrin v. Brooks, 67 M. 266—bound. 3; deeds, 40.
Ohleyer v. Bernheim, 67 M. 75—bills & n. 476; ev. 432.
Ohlson v. Durfrey, 82 M. 213—mand. 8.
O'Kelly v. Yazoo &c. R. Co. 94 M. 635—ev. 595; r. r. 406.
Okolona, Rosaman v.—85 M. 583.
Okolona Savings Institution v. Trice, 60 M. 262—land. & t. 248.
Okolona Savings Institution, Pollock v.—61 M. 293.
Okolona, Woodruff v.—57 M. 806.
Oktibbeha County v. Cottrell, 70 M. 117—rewards, 5.
Old, Day v.—2 Miss. Dec. 593.
Oldham v. Ledbetter, 1 H. 43—attch. 128, 175; bills & n. 267, 363; garn. 124.
O'Leary v. Adler, 51 M. 28—offic. 56, 57.
O'Leary v. Bolton, 50 M. 172—app. & e. 154; j. p. 208.
O'Leary v. Burns, 53 M. 171—app. & e. 1051; crim. l. 1169; mech. liens, 165, 270; witn. 159.
O'Leary v. Harris, 50 M. 13—cert. 35; j. p. 195.
O'Leary, Ex parte, 65 M. 80—const. law, 51; nuis. 3.
Olive v. Lewis, 45 M. 203—app. & e. 691; excep. 11; frds. st. of, 14.
Olive v. Walton, 33 M. 103—app. & e. 906; des. & d. 10, 52; hus. & w. 111; statut. 183.
Olive, Hammond v.—44 M. 543.
Oliver v. Baird, 90 M. 718—judgm. 415, 577.
Oliver v. Loye, 59 M. 320—cov. 109; venue, 4.
Oliver v. Smith, 94 M. 1—ex. & ad. 315.
Oliver v. Smith, 94 M. 879—lim. of act. 132.
Oliver v. State, 5 H. 14—crim. l. 15; excep. 9; ind. 87, 176.
Oliver v. State, 39 M. 526—crim. l. 805, 813, 815; hom. 15; slaves, 5.
Oliver, Delta Bank v.—70 M. 868.
Oliver, Ferguson v.—8 S. & M. 332.
Oliver Finnie Grocery Co. v. Bodenheimer, 77 M. 415—cred. s. 51; eq. 429; fraud. conv. 311.
Oliver Finnie Grocery Co. v. Sumner, 73 M. 248—ven. & pur. 275.
Oliver, Paxton v.—70 M. 570.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Oliver, Polk v.—56 M. 566.
Oliver, State v.—78 M. 5.
Olive, Walton v.—29 M. 270.
Olsen, Mansfield v.—4 So. 545.
O'Neal v. McLeod, 28 So. 23—ev. 395.
O'Neal v. O'Neal, 95 M. 415—hab. corp. 99.
O'Neal v. Refuge Cotton Oil Co. 88 M. 617—mast. & s. 288.
O'Neal v. State, 48 So. 225—hom. 250.
O'Neal, Bank of Gulfport v.—86 M. 45.
O'Neal, Breland v.—88 M. 449.
O'Neal, Christian v.—46 M. 669.
O'Neal, Cobb v.—1 H. 581.
O'Neal, Richardson v.—W. 469.
Opinion of the Court, 41 M. 54—courts, 62.
Oppelt, Williams v.—1 S. & M. 559.
Opperman v. Littlejohn, 54 M. 77—land. & t. 135, 161.
Opp, Mutual &c. Assn. v.—30 So. 69.
Order of Elks, State v.—69 M. 895.
O'Reiley, Loughlin v.—92 M. 121.
O'Reilly v. Hendricks, 2 S. & M. 388—chat. m. 257; ex. & ad. 538; mtg. 376; trial, 52.
O'Reilly v. Loughlin, 92 M. 1—wills, 784.
O'Reilly v. McGuiggan, 91 M. 498—wills, 205.
O'Reilly, Bowman v.—31 M. 261.
O'Reilly, Harrington v.—9 S. & M. 216.
Organ v. State, 26 M. 78—app. 926; crim. l. 927, 957, 970; excep. 13.
Organ, Laidlaw v.—2 Wheat. (U. S.) 178.
Organ Power Co. Alabama &c. R. Co. v.—92 M. 781.
Orgill, Bank of Forest v.—82 M. 81.
Orgill, Murphy v.—23 So. 305.
Orlansky, Taylor v.—92 M. 761.
Ormond v. Henderson, 77 M. 34—sales, 180.
Ormond v. White, 85 M. 276—const. law, 63.
Ormond, Meridian Land &c. Co. v.—82 M. 758.
Ormond, Simmons v.—22 So. 875.
Orne v. Sullivan, 3 H. 161—arb. & a. 26.
Orne, Bayless v.—Freem. Ch. 161.
Orne, Dollahite v.—2 S. & M. 590.
Orne, Leftwich v.—Freem. Ch. 207.
Orr v. State, 81 M. 130—ind. 158.
Orr v. State, 18 So. 118—crim. l. 789.
Orr, Doyle v.—51 M. 229.
Orr, Edmonson v.—12 S. & M. 541.
Orrell v. Bay Mfg. Co. 83 M. 800—cncts. 108, 153; perp. 3; pub. lands 11, 114, 135, 139.
Orr, Gregory v.—61 M. 307.
Orr, Memphis &c. R. Co. v.—43 M. 279.
Orr, Memphis &c. R. Co. v.—52 M. 541.
Orrick v. Stewart, 12 So. 824—sales, 346; trial, 252.
Orton v. Brown, 35 M. 426—theaters, 3.
Osborn v. McCallum, 38 So. 609—fraud. conv. 164.
Osborn v. Noble, 46 M. 449—princ. & s. 147.
Osborne v. Crump, 57 M. 622—eq. 346; lis pens. 25; mtg. 427; ven. & pur. 279.
Osborne v. State, 64 M. 318—hom. 142, 256.
Osborne v. State, 55 So. 52—crim. l. 79, 422, 423, 427, 508, 742, 1159.
Osborne, Bailey v.—33 M. 128.
Osborne, Hardin v.—43 M. 532.
Osborne, Stephenson v.—41 M. 119.
Osburn v. Andre, 58 M. 609—marshaling, 11.
Osburn v. Hide, 68 M. 45—tax. 435, 539, 638.
Osburn v. Hinds County, 71 M. 19—pub. lands, 124.
Osburn v. Sims, 62 M. 429—home. 134, 136; wills, 4, 778, 782.
Osburn, Murff v.—24 So. 873.
Osgood v. Brown, Freem. Ch. 392—atty. & c. 47; eq. 42; execution, 17, 348.
Osgood, Carleton v.—6 H. 285.
O'Shea, Spengler v.—65 M. 75.
Ostrander v. Quin, 84 M. 230—inf. 29, 56.
Oswald v. McGehee, 28 M. 340—cncts. 94; ven. & pur. 32, 36, 37, 108.
Osyka, MaGee v.—45 So. 836.
Osyka, Spears v.—92 M. 790.
Otey v. McAfee, 38 M. 348—app. & e. 1001; new tr. 67; witn. 133.
Otey, Mitchell v.—23 M. 236.
Otken v. Lamkin, 56 M. 758—schools, 19, 22, 100.
Otley v. Haviland, 36 M. 19—mech. liens, 197, 292.
Otley, Smith v.—26 M. 291.
Otley, Winston v.—25 M. 451.
Ott v. Smith, 68 M. 773—attch. 311; fraud. conv. 270.
Ott v. State, 78 M. 487—mun. corp. 81, 98, 128.
Ott, Barataria Canning Co. v.—84 M. 737.
Ott, Barataria Canning Co. v.—88 M. 771.
Ott, Crisler v.—72 M. 166.
Otts v. Alderson, 10 S. & M. 476—fraud, 15; sales, 37, 259, 263, 268, 269, 271, 272, 273; slaves, 7a.
Ouidas v. State, 78 M. 622—crim. l. 649; hom. 166, 248.
Ouilette v. Davis, 69 M. 762—app. & e. 642, 1033, 1052, 1056; conf. g. 11; excep. 11; logs, 22; sales, 202.
Outlaw v. Mayo, 1 Miss. Dec. 423—lev. 28e.
Outlaw, Johnson v.—56 M. 541.
Overstreet v. Cantrell, 46 So. 69—quiet. t. 7.
Overstreet v. Davis, 24 M. 393—costs, 120, 139.

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Overstreet v. State, 3 H. 328—ev. 314; forn. 8; lewd. 7.
Overstreet v. Trainer, 24 M. 484—app. & e. 325; ex. & ad. 510.
Overstreet, Alabama &c. R. Co. v.—85 M. 78.
Overstreet, Hopper v.—79 M. 241.
Overaker v. State, 4 S. & M. 738—recogn. 2, 9.
Overton v. Vicksburg, 70 M. 558—com. 68; courts, 97; licens. 7.
Owen v. Alliance, 77 M. 500—forc. e. & d. 9; trusts, 103.
Owen v. Illinois Cent. R. Co. 77 M. 142—mast. & s. 265.
Owen v. Little, W. 326—judgm. 96.
Owen v. Marshall, 69 M. 486—attch. 161; sheriffs, 101, 130.
Owen v. Moody, 29 M. 79—bills & n. 182; ex. & ad. 170; wills, 2.
Owen v. Snyder, W. 326—judgm. 128a.
Owen, Brown v.—75 M. 319.
Owen, Buckingham v.—6 S. & M. 502.
Owen, Dougherty v.—24 M. 404.
Owen, Hathcock v.—44 M. 799.
Owens v. State, 59 M. 547—hom. 218; witn. 118.
Owens v. State, 63 M. 450—crim. l. 543, 742.
Owens v. State, 80 M. 499—crim. l. 305, 326, 785, 785a; 1184; hom. 158.
Owens v. State, 82 M. 18—crim. l. 888; hom. 293, 314; witn. 411, 414.
Owens v. State, 82 M. 31—crim. l. 123.
Owens v. State, 96 M. 346—crim. l. 279, 1132.
Owens v. Waddell, 87 M. 310—app. & e. 154, 185; eq. 22; wills, 699.
Owens v. Yazoo-Mississippi Delta Levee Board, 74 M. 269—em. dom. 267.
Owens v. Yazoo &c. R. Co. 74 M. 821—pub. lands 41; statut. 158, 162; tax. 699.
Owens v. Yazoo &c. R. Co. 94 M. 378—r. r. 275, 282a.
Owens, Abbey v.—57 M. 810.
Owens, Armstrong v.—83 M. 10.
Owens, Goodbar v.—70 M. 840.
Owens, Memphis &c. R. Co. v.—60 M. 227.
Owens, Miller v.—W. 244.
Owens, Monroe County Alliance v.—25 So. 876.
Owens, Watkins v.—47 M. 503.
Owens, Wilson v.—1 H. 126.
Owens, Woodsen v.—12 So. 207.
Owen, Whitman v.—76 M. 783.
Owen, Wiggle v.—43 M. 158.
Owen, Wiggle v.—45 M. 691.
Owings v. McKee, 34 M. 144—costs, 108.
Oxford, Bank of Oxford v.—70 M. 504.
Oxford, Butler v.—69 M. 618.
Oxford Mercantile Co. Fargason v.—78 M. 65.

P

Pace v. State, 25 M. 54—recogn. 1, 2.
Pace, McInnis v.—78 M. 550.
Pack v. Hammond, 13 S. & M. 11—bills & n. 385; ev. 463.
Packard, Rothenberg v.—52 So. 458.
Pack, Harney v.—4 S. & M. 229.
Packwood v. Atkinson &c. Co. 79 M. 646—chat. m. 229.
Packwood v. Chicago &c. R. Co. 59 M. 280—r. r. 411.
Packwood v. Elliott, 43 M. 504—ex. & ad. 295, 299, 314i, 315.
Packwood, Chicago &c. R. Co. v.—59 M. 280.
Paddleford v. Moore, 32 M. 622—sheriffs, 3, 159, 168.
Paddleford v. State, 57 M. 118—bankr. 420; ex. & ad. 527, 537g.
Paddock v. Shields, 57 M. 340—partit. 12, 13, 76, 78, 85, 99.
Paden v. Gibbs, 88 M. 274—forc. e. & d. 4, 28, 29.
Pafhausen v. State, 94 M. 103—app. & e. 781.
Pagdud v. State, 5 S. & M. 491—forg. 36; states, 145; statut. 216.
Page v. Ford, 2 S. & M. 266—attch. 110, 129.
Page v. State, 59 M. 474—crim. l. 402; ev. 183; perj. 33, 34.
Page v. State, 54 So. 725—weap. 13.
Page, Goldman v.—50 M. 404.
Page, Honea v.—60 M. 248.
Page, Wood v.—55 M. 105.
Paine v. Aberdeen Hotel Co. 60 M. 360—assign. f. b. c. 184, 217; land. & t. 252a.
Paine v. Hall Safe &c. Co. 64 M. 175—land. & t. 229½, 269; princ. & a. 145; sales, 222, 318, 471.
Paine v. Holliday, 68 M. 298—attch. 291; rec. 195.
Paine v. Pendleton, 32 M. 320—ex. & ad. 322, 423.
Paine v. Sykes, 72 M. 351—assign. f. b. c. 184, 217, 334; land. & t. 217, 252a.
Paine, Biddle v.—74 M. 494.
Paine, Buck v.—50 M. 648.
Paine, Buck v.—52 M. 271.
Paine, Canton &c. R. Co. v.—19 So. 199.
Paine, Cumberland Tel. &c. Co. v.—94 M. 883.
Paine, Kinney v.—68 M. 258.
Paine, Louisville Banking Co.—67 M. 678.
Paine, Quillin v.—94 M. 696.
Paine, Ryan v.—66 M. 678.

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Painter v. Trotter, 10 S. & M. 537—statut. 183.
Painter, Robinson v.—8 S. & M. 613.
Palatine Ins. Co. v. Nunn, 55 So. 44—ins. 493, 500.
Pallen v. Agricultural Bank, Freem. Ch. 419—execution, 31.
Pallen, Agricultural Bank v.—8 S. & M. 357.
Pallota, Western Union Tel. Co. v.—81 M. 216.
Palm v. Fancher, 93 M. 785—usury, 49.
Palmer v. Cross, 1 S. & M. 48—adv. pos. 39; chat. m. 82; deeds, 96; hus. & w. 32, 119, 231; sales, 148, 465.
Palmer v. Hutchison Grocery Co. 11 So. 789—corp. 550.
Palmer v. Jones, 50 M. 657—judgm. 870b; lim. of act. 80.
Palmer v. Lowery, 1 Miss. Dec. 579—trusts, 224.
Palmer v. State, 73 M. 780—courts, 65, 66, 70.
Palmer, Cox v.—60 M. 793.
Palmer, Gaddis v.—60 M. 758.
Palmer, Miller v.—55 M. 323.
Palmer, Morris v.—32 M. 278.
Palmer, Steele v.—41 M. 88.
Pankey v. Howard, 47 M. 83—partit. 99.
Pannell, State v.—34 So. 388.
Pennell, Wheeler v.—96 M. 382.
Panola County v. Carrier, 89 M. 277—tax. 377.
Panola County v. Carrier, 92 M. 148—ev. 387; tax. 47, 377.
Panola County v. Gillen, 59 M. 198—counties, 129; mech. liens, 9.
Panola County, Perkins v.—32 So. 316.
Parberry v. Johnson, 51 M. 291—mech. liens, 209, 212; partners. 128, 136, 143, 156.
Parchman v. Conway, 28 M. 85—sheriffs, 125; subrog. 5, 41.
Parchman v. McKinney, 12 S. & M. 631—bills & n. 444; eq. 66; usury, 21, 95, 96, 100.
Pardee, Boddie v.—74 M. 13.
Paret, Strong v.—1 Miss. Dec. 283.
Parham v. Harney, 6 S. & M. 55—new tr. 52; trial, 315.
Parham v. Randolph, 4 H. 435—bills & n. 313, 427; eq. 17, 23, 143; ven. & pur. 32, 35, 37.
Parham v. Stith, 56 M. 465—ex. & ad. 86.
Parham v. Stith, 61 M. 199—app. & e. 671, 867.
Parham, Fortner v.—2 S. & M. 151.
Parham, Hardaway v.—27 M. 103.
Parham, Mallett v.—52 M. 921.
Parham, Stith v.—57 M. 289.
Parish v. Lewis, Freem. Ch. 299—cred. s. 13, 16; partners. 183, 193.
Parish, Cummings v.—39 M. 412.
Parish, Pollard v.—23 M. 573.
Parisot v. Green, 46 M. 747—judgm. 500, 577; ship. 76.
Parisot v. Helm, 52 M. 617—adm. 1; app. & e. 154, 191, 900; judgm. 105; plead. 253; ship. 113, 119.
Parisot v. Tucker, 65 M. 439—home. 70, 152.
Park v. Bamberger, 52 M. 565—bankr. 183; eq. 340; fraud. conv. 114.
Parker v. Bacon, 26 M. 425—eq. 267; judgm. 839.
Parker v. Clark, 61 M. 492—land. & t. 248, 254.
Parker v. Dean, 45 M. 408—app. & e. 484; execution, 129, 145, 149, 158, 351; home. 127; sheriffs, 119.
Parker v. Eason, 68 M. 290—forc. e. & d. 8, 15.
Parker v. Foy, 43 M. 260—estop. 22; notice, 4; ven. & pur. 37, 228, 229, 257, 262, 281.
Parker v. Harrison, 63 M. 225—partit. 12.
Parker v. Horne, 38 M. 215—jud. s. 49.
Parker v. Johnson, 47 M. 632—app. & e. 173, 355.
Parker v. Kelly, 10 S. & M. 184—eq. 39; execution, 171; liens, 16; ven. & pur. 260, 261, 275.
Parker v. McBee, 61 M. 134—atty. & c. 97; ven. & pur. 261, 266a.
Parker v. McNeill, 12 S. & M. 355—ev. 265; witn. 66, 140.
Parker v. Mercer, 6 H. 320—mtg. 376; partners. 241.
Parker v. Parker, 71 M. 164—div. 227, 228, 229.
Parker v. Payne, 95 M. 375—sales, 450, 460.
Parker v. Reddick, 65 M. 242—bills & n. 400.
Parker v. Stacey, 25 M. 471—chat. m. 82.
Parker v. State, 51 M. 535—crim. l. 993.
Parker v. State, 55 M. 414—crim. l. 829, 917, 1151, 1166, 1173; hom. 115, 116, 341; jury, 110; trial, 252.
Parker v. State, 10 So. 571—schools, 110.
Parker v. Stovall, 31 M. 446—attch. 77, 145.
Parker v. Whiting, 6 H. 352—app. & e. 970; ex. & ad. 410, 411.
Parker v. Willis, 27 M. 766—app. & e. 386.
Parker v. Wood Lumber Co. 54 So. 252—mast. & s. 233, 235, 274, 289.
Parker, Clarke v.—63 M. 549.
Parker, Cotton v.—Sm. & M. Ch. 125.
Parker, Cotton v.—Sm. & M. Ch. 191.

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Parker, Dickson v.—3 H. 219.
Parker, Doe v.—3 S. & M. 114.
Parker, Ex parte, 94 M. 899—prisons, 14.
Parker, Ezelle v.—41 M. 520.
Parker, Gordon v.—2 S. & M. 485.
Parker, Huff v.—31 So. 833.
Parker, McLaurin v.—24 M. 509.
Parker, Matthews v.—27 M. 642.
Parker, Payne v.—95 M. 375.
Parker, Pitts v.—44 M. 247.
Parker, Simmons v.—1 Miss. Dec. 456.
Parker, Sweatman v.—49 M. 19.
Parker, Trotter v.—38 M. 473.
Parker, Webster v.—42 M. 465.
Parker, Wilson v.—14 So. 264.
Parker, Wiseman v.—73 M. 378.
Parker, Yazoo &c. R. Co. v.—88 M. 193.
Parkhurst v. Dunlap, 6 H. 577—land. & t. 274.
Parkhurst v. McGraw, 24 M. 134—eq. 3, 326, 345; fraud. 50, 58; fraud. conv. 138, 172; plead. 36; witn. 197.
Parkinson v. Waldron, 7 S. & M. 189—execution, 153, 154b; judgm. 334.
Parkison v. Parkison, 12 S. & M. 672—wills, 141, 142, 302.
Parks v. Granger, 96 M. 503—j. p. 44.
Parks v. Person, Sm. & M. Ch. 76—execution, 340, 342.
Parks, Berry v.—3 S. & M. 625.
Parks, Callicott v.—58 M. 528.
Parks, Evans v.—13 So. 240.
Parmele v. McGinty, 52 M. 475—eq. 340; guard. & w. 70; inf. 29; lim. of act. 72a.
Parmilee v. McNutt, 1 S. & M. 179—ex. & ad. 433; lim. of act. 11; states, 202.
Parr v. Gibbons, 23 M. 92—ev. 272; hus. & w. 231.
Parr v. Gibbons, 27 M. 375—app. & e. 171; det. 17; ev. 272, 582; hus. & w. 111, 231; replev. 69.
Parrott v. Poppenheimer, 16 So. 911—app. & e. 532, 785.
Parry Mfg. Co. v. Lowenberg, 88 M. 532—princ. & a. 103.
Parsons v. Rutherford, 84 M. 70—app. & e. 162.
Partee v. Bedford, 51 M. 84—app. & e. 934; bills & n. 428; paymt. 18.
Partee v. Kortrecht, 54 M. 66—cred. s. 1; des. & d. 88; eq. 239; ex. & ad. 2, 8, 17, 325, 518.
Partee v. Mathews, 53 M. 140—const. law, 9; deeds, 181; ex. & ad. 425; fraud. conv. 212, 237, 241, 248; lim. of act. 49; quiet t. 29; subrog. 5.
Partee v. Silliman, 44 M. 272—cncts. 144; ev. 148; hus. & w. 79, 228; witn. 91, 112.
Partee v. Stewart, 50 M. 717—home. 18, 70, 117.
Partee, Andrews v.—79 M. 80.
Partier, Harmon v.—12 S. & M. 425.
Parvis v. Forbes, 5 H. 518.—judgm. 105.
Pascagoula v. Kirkwood, 86 M. 630—mun. corp. 805, 807.
Pascagoula Boom Co. v. Dickson, 77 M. 587—nav. wat. 21, 26.
Pascagoula Ice Co. Ross-Meehan &c. Foundry Co. v.—72 M. 608.
Pascagoula St. R. &c. Co. v. Brondum, 96 M. 28—app. & e. 1068; neg. 85; st. r. r. 36, 112.
Pascagoula &c. R. Co. Herrick v.—54 So. 660.
Pass v. Dykes, 8 S. & M. 92—inj. 172.
Pass v. Grenada County, 71 M. 426—counties, 95; lim. of act. 49; princ. & s. 194.
Pass v. McLendon, 62 M. 580—life est. 17; remaind. 11.
Pass v. McRae, 36 M. 143—app. & e. 252, 906, 913; assign. 34, 72, 98; courts, 103; judgm. 839.
Pass v. New England Mortgage Co.—66 M. 365—princ. & a. 14; usury, 54.
Pass v. Payne, 63 M. 239—j. p. 191.
Pass Canning Co. v. Torsch, 87 M. 694—app. & e. 1052.
Pass Christian v. Murphy, 68 M. 84—tax. 913.
Pass Christian v. Washington, 81 M. 470—mun. corp. 120, 219, 220.
Pass Christian, Lizano v.—96 M. 640.
Pass, Love v.—14 S. & M. 158.
Pass, McLendon v.—66 M. 110.
Pass Packing Co. v. Torsch, 87 M. 694—cncts. 346.
Pate v. Pate, 40 M. 750—wills, 733.
Pate v. Shannon, 69 M. 372—land. & t. 270.
Pate v. Taylor, 66 M. 97—ex. & ad. 368; venue, 12.
Pate, Copeland v.—6 H. 275.
Pate, Maxwell v.—16 So. 529.
Patrick v. Beasly, 6 H. 609—bills & n. 403, 414, 420.
Patrick v. Carr, 50 M. 199—bills & n. 538; trial, 190, 194b, 338, 388.
Patrick v. Dillard, 44 M. 384—attch. 209.
Patrick v. McKernon, 5 H. 578—cert. 1, 44.
Patrick v. Rembert, 55 M. 87—estop. 68; home. 177.
Patrick, Anderson v.—7 H. 347.
Patrick, Benton County v.—54 M. 240.

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Patrick, Commissioners of Sinking Fund v.—Sm. & M. Ch. 110.
Patrick, Covington v.—1 Miss. Dec. 8.
Patrick, Frost v.—3 S. & M. 783.
Patrick, Ray v.—1 Miss. Dec. 162.
Patten-Worsham Drug Co. v. Planters' &c. Co. 86 M. 423—ev. 432; fraud. 1.
Patterson v. Denton, Sm. & M. Ch. 592—execution, 153c, 344.
Patterson v. Durfey, 68 M. 779—lev. 289; tax. 735.
Patterson v. Edwards, 29 M. 67—eq. 241; ven. & pur. 254.
Patterson v. Gathings, 48 M. 639—app. & e. 3, 137, 323; princ. & s. 165.
Patterson v. Illinois Cent. R. Co. 29 So. 93—r. r. 108; trial, 143.
Patterson v. Ingraham, 23 M. 87—eq. 239, 417; lim. of act. 181.
Patterson v. Kirkland, 34 M. 423—plead. 53; sales, 40, 259, 268, 410.
Patterson v. Langston, 69 M. 400—deeds, 81; tax. 768.
Patterson v. Phillips, 1 H. 572—app. & e. 272.
Patterson v. State, 71 M. 675—hab. corp. 59, 90.
Patterson v. State, 75 M. 670—hom. 112, 295.
Patterson v. Town of Batesville, 37 So. 560—int. liq. 236.
Patterson, Bass v.—68 M. 310.
Patterson, Chaffe v.—61 M. 28.
Patterson, Dillon v.—66 M. 204.
Patterson, Ex parte, 22 So. 186—bail. 41.
Patterson, Louisville &c. R. Co. v.—69 M. 421.
Patterson, McAfee v.—2 S. & M. 593.
Patterson, Matthews v.—2 H. 729.
Patterson, NeSmith v.—2 Miss. Dec. 713.
Patterson, Pettus v.—47 M. 228.
Patterson, Rice v.—92 M. 666.
Patterson, Richards v.—30 M. 583.
Patterson, Semmes v.—65 M. 6.
Patterson, Wells v.—7 H. 32.
Patterson, Wilkinson v.—6 H. 193.
Pattison v. Clinghan, 93 M. 310—guard. & w. 137, 182b; lim. of act. 65; statut. 158, 184.
Pattison v. Harvey, 81 M. 348—tax. 756.
Pattison v. Josselyn, 43 M. 373—app. & e. 984; eq. 181, 421, 430; jud. s. 37.
Pattison v. Pattison, 1 Miss. Dec. 494—paymt. 39.
Pattison, Black v.—61 M. 599.
Pattison, Craig v.—74 M. 881.
Pattison, Ex parte, 56 M. 161—bail. 41; hab. corp. 118.
Pattison, Manley v.—73 M. 417.
Pattison, Smith v.—45 M. 619.
Patton v. Patton, 32 M. 331—ex. & ad. 120.
Patton v. Pinkston, 86 M. 651—lim. of act. 36; trusts, 101, 365; wills, 745.
Patton v. State, 1 Miss. Dec. 270—forn. 9.
Patton, Bank of United States v.—5 H. 200.
Patton, Miller v.—3 S. & M. 463.
Patton, Vicksburg & Jackson &c. R. Co. v.—31 M. 156.
Patton, Watts v.—66 M. 54.
Patty v. Bogle, 59 M. 491—attch. 355; land. & t. 229c, 252, 265.
Patty v. Jones, 13 So. 931—bills & n. 313.
Patty v. Sparkman, 58 M. 76—clks. of c. 10; offic. 93.
Patty v. Williams, 71 M. 837—eq. 93, 108; guard. & w. 121, 175, 182, 182c.
Patty, Davis v.—42 M. 509.
Patty, Davis v.—76 M. 753.
Patty Dry Goods Co. Western Union Tel. Co. v.—96 M. 781.
Patty, Ex parte, 56 M. 499—clks. of c. 10; statut. 223.
Patty, Jones v.—73 M. 179.
Patty, Macon v.—57 M. 378.
Patty, Rives v.—43 M. 338.
Patty, Rives v.—74 M. 381.
Paxton v. Archer, 2 Miss. Dec. 611—counties, 101; offic. 134; plead. 41.
Paxton v. Arthur, 60 M. 832—counties, 47, 59, 101; high. 99.
Paxton v. Baum, 59 M. 531—counties, 24, 59, 101.
Paxton v. Kennedy, 70 M. 865—land. & t. 229b.
Paxton v. Meyer, 58 M. 445—chat. m. 117, 138; cncts. 194; land. & t. 248.
Paxton v. Oliver, 70 M. 570—land. & t. 287.
Paxton v. Valley Land Co. 67 M. 96—lev. 28f; quiet. t. 13.
Paxton v. Valley Land Co. 68 M. 739—adv. pos. 14; lev. 28g; tax. 615.
Paxton v. Yazoo &c. R. Co. 76 M. 536—adv. pos. 8; r. r. 73.
Paxton, Dingey v.—60 M. 1038.
Paxton, Enochs v.—87 M. 660.
Paxton, Krosmopolski v.—58 M. 581.
Paxton, Madison County v.—56 M. 679.
Paxton, Madison County v.—57 M. 701.
Payne v. Baldwin, 3 S. & M. 661—banks, 3, 87, 98; const. law, 125; corp. 38.
Payne v. Banks, 32 M. 292—wills, 51, 286.

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Payne v. Bullard, 23 M. 88—action, 33; corp. 226, 247, 264; lim. of act. 101.
Payne v. Commercial Bank, 6 S. & M. 24—banks, 105; princ. & s. 106, 115.
Payne v. Cowan, Sm. & M. Ch. 26—dep. 56, 83; eq. 197; inj. 163.
Payne v. Devinal, 11 S. & M. 400—witn. 65.
Payne v. Dundee Land &c. Co. 14 So. 269—ex. & ad. 264.
Payne v. Green, 10 S. & M. 507—tresp. 24, 40, 43, 68; trial, 228, 252.
Payne v. Harrell, 40 M. 498—action, 21; ven. & pur. 268, 301.
Payne v. Jones, 2 Miss. Dec. 183—app. & e. 838; ven. & pur. 27.
Payne v. Parker, 95 M. 375—chat. m. 1.
Payne v. State, 57 M. 348—larc. 41, 68, 77.
Payne v. State, 61 M. 161—hom. 200, 215.
Payne v. Stone, 7 S. & M. 367—guard. & w. 38, 53; mech. liens, 69.
Payne v. Stovall, 67 M. 514—land. & t. 229f.
Payne, Bridgeforth v.—62 M. 777.
Payne, Fowler v.—49 M. 32.
Payne, Fowler v.—52 M. 210.
Payne, Lott v.—82 M. 218.
Payne, Memphis &c. R. Co. v.—37 M. 700.
Payne, Parker v.—95 M. 375.
Payne, Pass v.—63 M. 239.
Payne, Robinson v.—58 M. 690.
Payne, Yazoo &c. R. Co. v.—92 M. 126.
Payne, Yazoo &c. R. Co. v.—93 M. 50.
Payson v. West, W. 515—frds. st. of, 129.
Peabody v. State, 72 M. 104—prost. 4; vag. 3.
Peacher v. Strauss, 47 M. 353—deeds, 109; ev. 452, 459.
Peale v. Bolton, 24 M. 630—execution, 229, 353; judgm. 877.
Peale, Chew v.—12 S. & M. 700.
Peale, Dahlgren v.—24 M. 142.
Pearce v. Furr, 2 S. & M. 54—ev. 178; witn. 393.
Pearce v. Perkins, 70 M. 276—tax. 434, 735, 764, 802.
Pearce v. Twitchell, 41 M. 344—parties, 4; replev. 21, 107.
Pearce v. Young, W. 259—plead. 93.
Pearce, Baum v.—67 M. 700.
Pearce, Delta Trust &c. Co. v.—92 M. 377.
Pearce, Floyd v.—57 M. 140.
Pearce, Western Union Tel. Co. v.—82 M. 487.
Pearce, Wren v.—4 S. & M. 91.
Pearl v. Conley, 7 S. & M. 356—ex. & ad. 226.
Pearl v. Cortright, 81 M. 300—bills & n. 242; princ. & s. 115.
Pearle v. Bolton, 24 M. 630—judgm. 870d.
Pearl River Lumber Co. Cohn v.—80 M. 649.
Pearl River Lumber Co. Fox v.—80 M. 1.
Pearl River Lumber Co. Weathersby v.—88 M. 535.
Pearson v. Caldwell, 93 M. 637—estop. 92; ex. & ad. 388d.
Pearson v. Johnson, 54 M. 259—em. dom. 71, 167, 269.
Pearson v. Kendrick, 74 M. 235—app. & e. 101, 904, 920; rec. 20.
Pearson v. Kendrick, 75 M. 416—licens. 39.
Pearson v. McMillan, 37 M. 588—lim. of act. 72; trusts, 387.
Pearson v. Miller, 71 M. 379—exemp. 17.
Pearson v. Moreland, 7 S. & M. 609—ex. & ad. 365, 379.
Pearson v. Nevitt, 32 M. 180—judgm. 372.
Pearson v. State, 66 M. 510—int. liq. 147; sales, 83.
Pearson v. State, 53 So. 689—crim. l. 416, 419, 479, 1159.
Pearson v. Wilson, 57 M. 848—elec. 276, 305, 306; offic. 37.
Pearson, Arthur v.—32 M. 131.
Pearson, Davis v.—44 M. 508.
Pearson, Gilchrist v.—70 M. 351.
Pearson, Illinois Cent. R. Co. v.—80 M. 26.
Pearson, Rush v.—92 M. 153.
Pease v. Turner, 3 H. 375—set-off, 51.
Pease, Furst v.—52 So. 257.
Peavy v. Wood, 71 M. 981—tax. 695, 710.
Peavy, Hendricks v.—78 M. 316.
Peavy, Money v.—70 M. 260.
Pecan Lake Mill Co. v. American Cooperage Co. 15 So. 580—sales, 469.
Peck v. Critchlow, 7 H. 243—const. law, 208; land. & t. 264, 270.
Peck v. Glass, 6 H. 195—ex. & ad. 270; remaind. 11.
Peck v. Ingraham, 28 M. 246—bills & n. 455; mtg. 342c; parties, 4.
Peck v. Thompson, 23 M. 367—app. & e. 999; assum. 20; bills & n. 485; ev. 383.
Peck v. Webber, 7 H. 658—attch. 201; sales, 197, 240.
Peck, Chewning v.—6 H. 524.
Peck-Hammond Co. v. Williams, 77 M. 824—assign. 98.
Peck, Vick v.—4 H. 407.
Peden v. State, 61 M. 267—app. & e. 698; consp. 28; crim. l. 519; excep. 18.
Pederre v. State, 54 So. 721—crim. l. 742; witn. 375.
Peebles v. Acker, 70 M. 356—lim. of act. 39; wills, 820, 826.

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Peebles v. Horton, 39 M. 406—wills, 848.
Peebles v. Murphy, 17 So. 278—parties, 6.
Peebles v. State, 55 M. 434—crim l. 912½; ind. 156.
Peebles, Mayer v.—58 M. 628.
Peebles, Scott v.—2 S. & M. 546.
Peek v. Glass, 6 H. 195—remaind. 13.
Peek, State v.—95 M. 240.
Peek, Stonewall Mfg. Co. v.—63 M. 342.
Peeler v. Peeler, 68 M. 141—app. & e. 1170, 1174; des. & d. 26; inf. 115; statut. 189.
Peeler v. Peeler, 11 So. 318—des. & d. 98.
Peel, Rand v.—74 M. 305.
Peeples v. Yates, 88 M. 289—acct. st. 3, 6, 11; app. & e. 837; chat. m. 115, 256; ex. & ad. 3.
Peeples, Miller v.—60 M. 45, 819.
Peete, Allen v.—25 M. 29.
Peets v. Baker, 95 M. 576—land. & t. 252.
Peevey v. Haughton, 72 M. 918—frds. st. of, 114; spec. perf. 97; ven. & pur. 16.
Peggott, Bradley v.—W. 348.
Pegram v. Newman, 54 M. 612—deeds, 114.
Pegram, Rundle v.—49 M. 751.
Pegues, Alford v.—92 M. 558.
Peine v. Lewis, 64 M. 96—set-off, 43.
Peine, Bowmar v.—64 M. 99.
Peirce v. Halsell, 90 M. 171—app. & e. 838; tender, 23.
Peirce v. Kingston Lumber Co. 90 M. 216—mtg. 312.
Pelan, Hardin v.—41 M. 112.
Pender v. Dicken, 27 M. 252—curt. 5; hus. & w. 208, 228; plead. 34.
Pender v. Felts, 2 S. & M. 535—app. & e. 1145; execution, 153d, 153e.
Pender, Conn v.—1 S. M. 386.
Pendergrass, Illinois Cent. R. Co. v.—69 M. 425.
Pendleton v. Galbreath, 45 M. 43—plead. 204.
Pendleton v. Lutz, 78 M. 322—rem. of c. 13.
Pendleton v. Pendleton, 6 S. & M. 448—ex. & ad. 17.
Pendleton v. Prestridge, 12 S. & M. 302—courts, 200¼; ex & ad. 510a; statut. 267.
Pendleton, Paine v.—32 M. 320.
Pendleton, Portevant v.—23 M. 25.
Pendleton, Prestidge v.—24 M. 80.
Pendleton, Prestidge v.—28 M. 379.
Pendleton, Vannerson v.—8 S. & M. 452.
Penn v. State, 62 M. 450—app. & e. 1051; crim. l. 419, 575, 600, 605, 641, 829, 957, 1166½, 1169; hom. 311, 314, 315, 338b; jury, 70, 98, 110; witn. 2.
Pennington v. Acker, 30 M. 161—hus. & w. 48, 210.
Pennington v. Seal, 49 M. 518—const. law, 180; fraud. conv. 107, 212; home. 18, 167; parent & c. 9.
Penn Mut. Life Ins. Co. v. Keeton, 95 M. 708—app. & e. 1170; ins. 628; judgm. 100.
Pennsylvania Fire Ins. Co. Ward v.—82 M. 124.
Penny v. Holberg, 53 M. 567—inj. 176, 244.
Penny, Endicott v.—14 S. & M. 144.
Penny, Powers v.—59 M. 5.
Penrice v. Cocks, 1 H. 227—execution, 198.
Penrice v. Wallis, 37 M. 172—app. & e. 190, 444; em. dom. 69, 144, 272.
Penrice, Swett v.—24 M. 416.
Pense, Cobb v.—16 So. 419.
Pensons, Scofield v.—26 M. 402.
Peoples v. State, 33 So. 289—crim. l. 126, 429, 809, 814, 1089, 1123, 1142; hom. 116, 300c; witn. 317, 345.
People's Bank v. Alabama &c. R. Co. 65 M. 365—licens. 39.
People's Bank v. Smith, 75 M. 753—garn. 120, 158, 205.
People's Bank v. West, 67 M. 729—attch. 162, 180; eject. 5; eq. 47; fraud. conv. 321; quiet. t. 3, 15, 43, 44.
People's Bank, Lenoir v.—87 M. 559.
People's B. & L. Assn v. Hawks, 81 M. 61—b. & l. assn. 6, 45.
People's Loan Assn. v. McElroy, 72 M. 434—b. & l. assn. 32.
People's Sav. Bank, McDougal v.—62 M. 663.
People's State Savings Bank, McDougal v.—2 Miss. Dec. 323.
People's Warehouse Co. v. Yazoo City, 52 So. 481—tax. 365.
Peques v. Mosby, 7 S. & M. 340—cov. 26; eq. 5; ev. 433, 460; ven. & pur. 308, 308a.
Pera, Brunini v.—54 M. 649.
Percy, Carson v.—57 M. 97.
Percy, Vick v.—7 S. & M. 256.
Perkins v. Carraway, 59 M. 222—elec. 48, 165, 171, 305.
Perkins v. Chicago &c. R. Co. 60 M. 726—carr. 280.
Perkins v. Coleman, 51 M. 298—lim. of act. 41, 170; set-off, 30; usury, 49.
Perkins v. Delta Pine Land Co. 66 M. 378—app. & e. 148; parties, 1; witn. 23.
Perkins v. First Nat. Bank, 81 M. 358—wills, 820.
Perkins v. Gibson, 51 M. 699—eq. 56; ven. & pur. 254, 266a.
Perkins v. Guy, 55 M. 153—app. & e. 153, 1052; lim. of act. 2; plead. 214, 339; trial, 25, 120.

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Perkins v. Hackleman, 26 M. 41—tresp. 9.
Perkins v. Henderson, 68 M. 631—int. liq. 66.
Perkins v. Ledbetter, 68 M. 327—int. liq. 69.
Perkins v. Maurepas Milling Co. 88 M. 804—cncts. 331, 332, 337.
Perkins v. Panola County, 32 So. 316—app. & e. 840; offic. 100; statut. 151.
Perkins v. Rouss, 78 M. 343—corp. 220.
Perkins v. Sanders, 56 M. 733—corp. 35, 258, 265, 279; eq. 143.
Perkins v. State, 23 So. 579—hom. 234.
Perkins v. Sturdivant, 4 So. 555—bills & n. 518, 542; des. & d. 91; ex. & ad. 131; lim. of act. 43, 83; plead. 373; rec. 81.
Perkins v. Swank, 43 M. 349—ack. 49; eq. 60, 61; fixt. 1, 21; fraud. conv. 154, 171, 242; mtg. 152, 155, 166; sales, 234; ven. & pur. 228, 232, 237.
Perkins v. Watson, 92 M. 452—acct. 22; app. & e. 1201, 1234; mtg. 369a.
Perkins, Draper v.—57 M. 277.
Perkins, Gray v.—12 S. & M. 622.
Perkins, Harris v.—25 So. 154.
Perkins, Herman v.—52 M. 813.
Perkins, Hough v.—2 H. 724.
Perkins, Jones v.—29 M. 139.
Perkins, Martin v.—56 M. 204.
Perkins, Munn v.—1 S. & M. 412.
Perkins, Newberger v.—62 M. 584.
Perkins, Pearce v.—70 M. 276.
Perkins, Seals v.—96 M. 704.
Perkins, Watson v.—88 M. 64.
Permenter v. State, 54 So. 949—crim. l. 552, 784.
Perret v. Borries, 78 M. 934—tax. 529, 734.
Perrie, Gallman v.—47 M. 131.
Perrin v. Connel, 2 Miss. Dec. 655—app. & e. 1175.
Perrow v. State, 67 M. 365—obst. just. 20.
Perry v. Clark, 5 H. 495—app. & e. 1028, 1068; trial, 139, 206.
Perry v. Ellis, 62 M. 711—lim. of act. 70, 83, 146, 148, 152, 167, 183.
Perry v. Lewis, 49 M. 443—exemp. 128; judgm. 714; sheriffs, 112.
Perry v. McLain, 66 M. 145—frds. st. of, 62; spec. perf. 61.
Perry v. Randolph, 6 S. & M. 335—partners. 28, 45, 71, 132, 141; witn. 95.
Perry v. Sumrall Lumber Co. 95 M. 691—corp. 414.
Perry v. West, 40 M. 233—ex. & ad. 222.
Perry, Clark v.—4 H. 285.
Perry County, Hinton v.—84 M. 536.
Perry, Gadberry v.—27 M. 119.
Perry, Gordon v.—54 So. 445.
Perry, Kingendall v.—25 M. 228.
Perry, Lake v.—95 M. 550.
Perry, Lake v.—54 So. 945.
Perry-Mason Shoe Co. v. Sykes, 72 M.390—assign. f. b. c. 216, 353, 389; rec. 195.
Perry, Meek v.—36 M. 190.
Perry, Metcalfe v.—66 M. 68.
Person v. Barlowe, 35 M. 174—assign. 127; eq. 45; judgm. 273; trial, 343.
Person v. Chambliss, 38 So. 286—deeds, 130.
Person v. Leathers, 67 M. 548—atty. & c. 76.
Person v. Leathers, 19 So. 582—app. & e. 41, 671; arb. & a. 17.
Person v. Nevitt, 32 M. 180—eq. 360, 430, 446.
Person v. Valentine, 13 S. & M. 551—judgm. 863, 870d; sci. fa. 4.
Person, Cahn v.—56 M. 360.
Person, Chambliss v.—77 M. 806.
Person, Illinois Cent. R. Co. v.—65 M. 319.
Person, Parks v.—Sm. & M. Ch. 76.
Pervanger v. Union Casualty &c. Co. 81 M. 32—ins. 625.
Pervanger v. Union &c. Co. 85 M. 31—ins. 455.
Peteet v. Crawford, 51 M. 43—partners. 311.
Peter v. State, 3 H. 433—crim. l. 516; gr. jury, 21; ind. 33, 142; slaves, 18c.
Peter v. State, 6 H. 326—judges, 14.
Peter v. State, 4 S. & M. 31—crim. l. 402, 519; slaves, 18c.
Peters v. Finney, 12 S. & M. 449—attch. 241; courts, 37; plead. 85, 91, 103, 127, 259.
Peters v. Louisville &c. R. Co. 48 So. 296—action, 38; mast. & s. 258.
Peters v. Moss, 1 S. & M. 331—witn. 97.
Peters-Calhoun Co. Smokey v.—66 M. 471.
Peters, Lee v.—1 S. & M. 503.
Peterson v. Kittredge, 65 M. 33—app. & e. 906; counties, 189; tax. 614, 734a, 793.
Peterson v. Polk, 67 M. 163—conf. g. 6; replev. 106; trial, 261; trover, 43.
Peterson, Fultz v.—78 M. 128.
Peterson, Illinois Cent. R. Co. v.—68 M. 454.
Peterson, Murff v.—57 M. 146.
Peters, Union Mortg. Co. v.—72 M. 1058.
Petit v. McCoombs, 41 M. 628—judgm. 119.
Petit, Donoho v.—W. 440.
Petrie v. Pincard, 27 M. 624—spec. perf. 65.
Petrie v. Wofford, 30 M. 698—counties, 86, 110.
Petrie v. Wright, 6 S. & M. 647—chat. m. 33, 112; corp. 406; eq. 348, 378; fraud. conv. 7, 28, 294; r. r. 110; turnpikes, 17.
Petrie, Dunlap v.—35 M. 590.
Petrie, Wright v.—Sm. & M. Ch. 282.
Petrie, Wright v.—Sm. & M. Ch. 326.

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Pettibone v. James, 25 M. 495—paymt. 17; trusts, 193½.
Pettis v. Sullivan, 21 So. 607—chat. m. 117.
Pettit, Stewart v.—94 M. 769.
Pettus v. Patterson, 47 M. 228—app. & e. 504, 512.
Petty v. Leggett, 38 So. 549—land. & t. 19.
Petty, Louisville &c. R. Co. v.—67 M. 255.
Petty v. State, 83 M. 260—crim. l. 753, 784, 785; hom. 158, 165.
Peyton v. Cabaniss, 44 M. 808—clks. of c. 7, 8; statut. 160.
Peyton v. Minor, 11 S. & M. 148—lim. of act. 143, 184; plead. 245.
Peyton v. Planters' Compress Co. 63 M. 410—set-off, 48.
Peyton v. Scott, 2 H. 870—app. & e. 879; dism. 23; judgm. 96.
Peyton, Bibb v.—11 S. & M. 275.
Peyton, Lemon v.—64 M. 161.
Pevey v. Jones, 71 M. 647—cov. 99, 102, 110; lim. of act. 47.
Pfeifer v. Chamberlain, 52 M. 89—app. & e. 194; partners. 213.
Pfeifer v. Smith, 2 Miss. Dec. 461—ex. & ad. 289.
Pfeiffer, Millsaps v.—44 M. 805.
Pfiefer v. Hartman, 60 M. 505—app. & e. 379; attch. 177, 315.
Phalen, Pollard v.—53 So. 453.
Pharis v. Conner, 3 S. & M. 87—plead. 74, 91; proc. 41, 152.
Phebe v. Prince, W. 131—witn. 35, 91.
Phelan, Ball v.—94 M. 293.
Phelps v. Commodore, 1 So. 833—eq. 427.
Phelps v. Harris, 51 M. 789—partit. 15; powers, 20; quiet. t. 3.
Phelps v. Harris, 61 M. 705—estop. 68.
Phelps, Harris v.—2 Miss. Dec. 173.
Phelps, Martin v.—53 M. 134.
Phelps, Norton v.—54 M. 467.
Phelps, Western Assur. Co. v.—77 M. 625.
Phenix Ins. Co. v. Hunter, 95 M. 754—ins. 230.
Phenix Ins. Co. v. Martin, 16 So. 417—ins. 163.
Phenix Ins. Co. v. Pollard, 63 M. 641—const. law, 105; statut. 164.
Philadelphia Investment Co. v. Bowling, 72 M. 565—attch. 26.
Philadelphia, Johnson v.—94 M. 34.
Philbrick v. Holloway, 6 H. 91—app. & e. 999; new tr. 13, 160.
Philbrick, Helm v.—28 M. 210.
Philips v. Burrus, 13 S. & M. 31—app. & e. 1055.
Philips v. Hines, 33 M. 163—attch. 205, 210, 217; eq. 32; trusts, 105.
Philips v. Lane, 4 H. 122—app. & e. 260, 287, 706, 836; new tr. 10.
Philler, Mask v.—32 M. 237.
Phillip, Hodges v.—50 M. 362.
Phillips v. Burrus, 13 S. & M. 31—pub. lands, 55.
Phillips v. Cage, 12 S. & M. 141.—lim. of act. 29.
Phillips v. Chamberlain, 64 M. 740—fraud. conv. 24, 180.
Phillips v. Chaney, 7 H. 250—land. & t. 270, 273; replev. 127.
Phillips v. Commercial Bank, 1 S. & M. 636—bills & n. 433; paymt. 30; sales, 358.
Phillips v. Cooper, 50 M. 722—app. & e. 179, 191; attch. 308; ev. 178, 386; execution, 194, 202; judgm. 508, 951; plead. 431, 437; trial, 252.
Phillips v. Cooper, 59 M. 17—replev. 124.
Phillips v. Cornelius, 28 So. 871—cncts. 144; elect. rem. 4; frds. st. of, 107, 116.
Phillips v. Douglass, 53 M. 175—land. & t. 242.
Phillips v. Eiland, 52 M. 721—spec. perf. 109.
Phillips v. Gastrell, 61 M. 413—replev. 12, 15.
Phillips v. Gastrell, 62 M. 362—pub. lands, 61.
Phillips v. Harvey, 50 M. 489—attch. 318, 341, 351.
Phillips v. Hines, 33 M. 163—app. & e. 372; eq. 44.
Phillips v. Lane, 4 H. 122—new tr. 10, 40; trover, 1, 15.
Phillips v. McLaughlin, 26 M. 592—des. & d. 108.
Phillips v. McLaughlin, 26 M. 597—courts, 200½; ex. & ad. 86.
Phillips v. Saunderson, Sm. & M. Ch. 462—ven. & pur. 254.
Phillips v. State, 58 M. 578—bail. 75; crim. l. 1197.
Phillips v. State, 91 M. 716—crim. l. 718.
Phillips v. Wormley, 58 M. 398—dism. 4; judgm. 570.
Phillips, Alabama &c. R. Co. v.—70 M. 14.
Phillips, Bingaman v.—1 H. 285.
Phillips, Ex parte, 57 M. 357—app. & e. 231; crim. l. 974, 1029, 1128, 1144; hab. corp. 30.
Phillips, First Nat. Bank v.—71 M. 51.
Phillips, Gastrell v.—64 M. 473.
Phillips, Louisville &c. R. Co. v.—12 So. 825.
Phillips, McWilliams v.—51 M. 196.
Phillips, Mayes v.—60 M. 547.
Phillips, Meridian v.—65 M. 362.

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Phillips, Nash v.—2 Miss. Dec. 628.
Phillipson, Eldridge v.—58 M. 270.
Phillips, Patterson v.—1 H. 572.
Phillips, Thomas v.—4 S. & M. 358.
Phillips, Vicksburg &c. R. Co. v.—64 M. 108.
Phillips, Vicksburg &c. R. Co. v.—64 M. 693.
Phillips, Washburn v.—5 S. & M. 600.
Phillips, Washburn v.—6 S. & M. 425.
Phillis, Richards v.—28 So. 807.
Phipps v. Ingraham, 41 M. 256—cncts. 346; frds. st. of, 57.
Phipps v. Morton, 33 M. 211—app. & e. 689, 691.
Phipps v. Nye, 34 M. 330—app. & e. 281; bills & n. 308, 445; ev. 346.
Phipps v. Probate Judge, 5 H. 59—ex: & ad. 37.
Phipps v. Skegogg, 30 M. 241—plead. 384.
Phipps v. Tarpley, 24 M. 597—chat. m. 260; cov. 91; ven. & pur. 4, 173, 176.
Phipps v. Tarpley, 31 M. 433—ven. & pur. 308, 351.
Phipps, Brown v.—6 S. & M. 51.
Phipps, Craig v.—23 M. 240.
Phipps, Lessley v.—49 M. 790.
Phipps, Probate Judge v.—5 H. 59.
Phœnix Assur. Co. Hope Oil Mill &c. Co. v.—74 M. 320.
Phœnix Fire Ins. Co. v. Hoffheimer, 46 M. 645—ins. 143; ref. of inst. 3, 44, 45.
Phœnix Ins. Co. v. Bowdre, 67 M. 620—ins. 282, 336, 376, 383, 554, 556.
Phœnix Ins. Co. v. Randle, 81 M. 720—ins. 378.
Phœnix Ins. Co. v. Smith, 95 M. 347—eq. 201; ins. 249, 623.
Phœnix Ins. Co. v. Summerfield, 70 M. 827—ins. 669; rem. of c. 94.
Phœnix Ins. Co. Bacot v.—96 M. 223.
Phœnix Ins. Co. Groce v.—94 M. 201.
Phœnix Ins. Co. Pollard v.—63 M. 244.
Phœnix Steam Laundry v. Rich Lumber Co. 53 So. 345—steam, 5.
Piazza, Demourelle v.—77 M. 433.
Piazza, State v.—66 M. 426.
Picard v. Montross, 17 So. 375—ex. & ad. 332, 336, 337; jud. s. 1.
Picard v. Samuels, 64 M. 822—attch. 47.
Picard v. Shantz, 70 M. 381—princ. & s. 96.
Picard, Elbert v.—4 So. 543.
Picard, French v.—49 M. 320.
Picard, Hart v.—75 M. 651.
Picard, McCaughan v.—21 So. 796.
Pickels v. McPherson, 59 M. 216—partners. 128, 153.
Pickens v. Eskridge, 42 M. 114—bills & n. 106.
Pickens v. Finney, 12 S. & M. 468—princ. & s. 124.
Pickens v. Harper, Sm. & M. Ch. 539—eject. 8; indians, 27.
Pickens v. Illinois Cent. R. Co. 92 M. 210—death, 37.
Pickens v. McNutt, 12 S. & M. 651—sheriffs, 18, 79.
Pickens v. Marlow, 2 S. & M. 428—execution, 141, 174, 223, 229, 353; judgm. 800a.
Pickens v. State, 61 M. 52—hom. 286b.
Pickens v. State, 61 M. 563—witn. 353.
Pickens v. Watson, 13 S. & M. 691—dower, 81.
Pickens, Miller v.—26 M. 182.
Pickens, Sample v.—Sm. & M. Ch. 501.
Pickens, Young v.—45 M. 553.
Pickering v. Yates, 36 So. 10—app. & e. 671.
Pickering, Hartman v.—84 M. 427.
Pickett v. Banks, 11 S. & M. 445—fraud. conv. 154; hus. & w. 29, 149.
Pickett v. Buckner, 45 M. 226—dower, 15, 27.
Pickett v. Doe, 5 S. & M. 470—ack. 49; eject. 22, 64, 121; excep. 9; execution, 277; judgm. 761, 784.
Pickett v. Ford, 4 H. 246—app. & e. 1140; atty. & c. 92; dep. 56; excep. 15; ex. & ad. 228; judgm. 748, 951; plead. 196, 436; slaves, 7.
Pickett v. Pickett, 1 H. 267—app. & e. 886, 792; courts, 85; judgm. 870d.
Pickett v. Planters' Bank, 5 S. & M. 470—tax. 766.
Pickett, Guion v.—42 M. 77.
Pickett, McInnis v.—65 M. 354.
Pickett, Simmons v.—24 M. 467.
Pickle v. Holland, 24 M. 566—app. & e. 5, 66.
Piedmont &c. Life Ins. Co. v. Wallin, 58 M. 1—ins. 17.
Pierce v. Hunter, 73 M. 754—quiet. t. 9, 44.
Pierce v. Jarnagin, 57 M. 107—assum. 23; atty. & c. 30, 97, 101; cncts. 257; sales, 112.
Pierce v. Lacy, 23 M. 193—assum. 1; bills & n. 489; deeds, 46; plead. 106, 392; seals, 3.
Pierce v. Pierce, 38 So. 46—div. 27, 93.
Pierce v. Tate, 27 M. 283—app. & e. 662; jury, 148.
Pierce v. Twitchell, 41 M. 344—det. 11.
Pierce v. Watkins, 74 M. 394—attch, 305, 315; j. p. 73.
Pierce, Clarke v.—82 M. 462.
Pierce, Dorsey v.—5 H. 173.
Pierce, Hoover v.—26 M. 627.
Pierce, Jones v.—2 Miss. Dec. 695.

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Pierce, Morgan v.—59 M. 210.
Pierce, Rowzee v.—75 M. 846.
Pieri v. Shieldsboro, 42 M. 493—mun. corp. 605.
Pierson, Ives v.—Freem. Ch. 220.
Pigford, A. H. George Co. v.—52 So. 796.
Pigg, Gross v.—73 M. 286.
Pigott, Southern Pine Co. v.—93 M. 281.
Pigott, State v.—54 So. 257.
Pigott, Walker v.—1 Miss. Dec. 190.
Pike County, Atkinson v.—73 M. 348.
Pike County, Barnes v.—51 M. 305.
Pike County, McComb City v.—86 M. 647.
Pike County, McComb City v.—91 M. 736.
Pike County, Quin v.—94 M. 356.
Pike, Harrison v.—48 M. 46.
Pilcher v. Drennan, 51 M. 873—abate. & r. 65; ex. & ad. 537, 537e.
Pilcher, Hardy v.—57 M. 18.
Pillar, Wilkinson v.—71 M. 678.
Pillow, Mountjoy v.—64 M. 705.
Pincard, Petrie v.—27 M. 624.
Pinchard, Halsey v.—6 H. 279.
Pinckard, Foster v.—5 S. & M. 792.
Pinckard, Robbins v.—5 S. & M. 51.
Pindell v. Harris, 57 M. 739—lim. of act. 89.
Pine Cone Lumber Co. v. White Sand Lumber Co. 38 So. 188—fraud. conv. 263.
Pine Grove Lumber Co. v. Lumber Co. 71 M. 944—cncts. 349; ev. 397.
Pine Lumber Co. v. Covington County, 87 M. 706—app. & e. 102.
Pinkston, National Mut. Loan Assn. v.—79 M. 468.
Pinkston, Patton v.—86 M. 651.
Pinson v. McGehee, 44 M. 229—lim. of act. 101.
Pinson v. Williams, 23 M. 64—dower, 11; eq. 327; ex. & ad. 433, 438.
Pinson, Bank of Holly Springs v.—58 M. 421.
Pinson, Harrington v.—30 M. 30.
Pinson, Meacham v.—60 M. 217.
Pintard v. Griffing, 32 M. 133—eject. 121.
Pintard v. Martin, Sm. & M. Ch. 126—eq. 23, 71; ven. & pur. 42, 112.
Pintard, Griffing v.—25 M. 173.
Pintard, Kempe v.—32 M. 324.
Piper v. Heatherington, 32 M. 306—costs, 103.
Pipes v. Buckner, 51 M. 848—partit. 5.
Pipes v. Farrar, 64 M. 514—tax. 727, 802.
Pipes v. Norton, 47 M. 61—acct. acti. on, 6; ev. 166, 178.
Pipes, Buckner v.—56 M. 366.
Pipes, Watson v.—32 M. 451.
Pipkin v. Haun, Freem. Ch. 254—app. & e. 148; dism. 57; eq. 430; judgm. 307, 338.
Pipkin, Lacoste v.—13 S. & M. 589.
Pitcher v. Armat, 5 H. 288—ex. & ad. 17, 22.
Pitchford, Cumberland Tel. &c. Co. v.—30 So. 41.
Pittman v. Chrisman, 59 M. 124—action, 53; j. p. 44.
Pittman v. Hopkins, 74 M. 563—assign. f. b. c. 383.
Pittman v. Lamb, 53 M. 594—app. & e. 944; eq. 376.
Pittman v. McClellan, 55 M. 299—eq. 419; lim. of act. 72a, 167.
Pittman v. Pittman, 59 M. 203—estop. 92; ex. & ad. 157, 368.
Pittman v. Planters' Bank, 1 H. 527—appr. 5; partners. 159, 204.
Pittman, Campbell v.—3 So. 455.
Pittman, Southern R. Co. v.—52 So. 207.
Pittman, Sparks v.—51 M. 511.
Pitts v. Montgomery, 79 M. 250—cncts. 115; g. will, 4.
Pitts v. Parker, 44 M. 247—frds. st. of, 62; spec. perf. 66; ven. & pur. 253, 254, 254b, 261, 268, 275.
Pitts v. State, 43 M. 472—ars. 26; crim. l. 468, 517, 552, 533, 563—hom. 5, 234.
Pitts v. Vicksburg, 72 M. 181—licens. 5½, 15, 16, 29; mun. corp. 621; tax. 1.
Pitts, Guarantee Co. of North American v.—78 M. 837.
Pitts, Insurance Co. of North America v.—88 M. 587.
Pitts, North America Ins. Co. v.—88 M. 587.
Plant v. Plant, 76 M. 560—assign. 64; can. of i. 44, 47; ins. 216.
Plant v. Shryock, 62 M. 821—mtg. 68, 171; ven. & pur. 230, 266.
Plant, Ales v.—61 M. 259.
Planter, Lindsey v.—23 M. 576.
Planters' Bank v. Black, 11 S. & M. 43—const. law, 53; execution, 201; judgm. 794; statut. 170.
Planters' Bank v. Calvit, 3 S. & M. 143—app. & e. 1145; judgm. 754; liens, 1.
Planters' Bank v. Cameron, 3 S. & M. 609—princ. & a. 49, 91, 94, 116, 150.
Planters' Bank v. Chewning, 5 H. 413—bills & n. 303, 508, 535.
Planters' Bank v. Conger, 12 S. & M. 527—bankr. 146; clks. of c. 72; judgm. 766; slaves, 2.
Planters' Bank v. Coulson, 6 H. 395—j. p. 44.
Planters' Bank v. Courtney, Sm. & M. Ch. 40 eq. 375; ven. & pur. 281.

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Planters' Bank v. Dodson, 9 S. & M. 527—mech. liens, 187; subrog. 13.
Planters' Bank v. Johnson, 7 S. & M. 449—ex. & ad. 333, 337, 358, 389.
Planters' Bank v. Markham, 5 H. 397—banks, 160; bills & n. 130, 393, 399, 404; cust. & u. 13.
Planters' Bank v. Neely, 7 H. 80—ex. & ad. 375, 379; fraud, 30; fraud. conv. 29a; new tr. 13, 115; sales, 226.
Planters' Bank v. Scott, 5 H. 246—execution, 348; judgm. 874.
Planters' Bank v. Sharpe, 4 S. & M. 17—abate. & r. 85; banks, 98; const. law, 125.
Planters' Bank v. Sharpe, 4 S. & M. 75—banks, 109, 114; corp. 426.
Planters' Bank v. Snodgrass, 4 H. 573—usury, 10, 51, 66, 146.
Planters' Bank v. Spencer, 3 S. & M. 305—app. & e. 934; execution, 348, 353, 357; judgm. 890.
Planters' Bank v. State, 6 S. & M. 628—banks, 70; statut. 160, 180.
Planters' Bank v. State, 7 S. & M. 163—banks, 3, 68.
Planters' Bank v. Stockman, Freem. Ch. 502—acct. 11; eq. 340; marshaling, 4; refer. 18, 19.
Planters' Bank v. Walker, 3 S. & M. 409—app. & e. 958; corp. 4; execution, 24, 338, 344; judgm. 775; mtg. 197, 372; plead. 236; proc. 148, 164; witn. 92.
Planters' Bank, Andrews v.—7 S. & M. 192.
Planters' Bank, Barker v.—5 H. 566.
Planters' Bank, Barlow v.—7 H. 129.
Planters' Bank, Barnard v.—4 H. 98.
Planters' Bank, Briggs v.—Freem. Ch. 574.
Planters' Bank, Bruner v.—23 M. 406.
Planters' Bank, Claiborn v.—2 H. 727.
Planters' Bank, Coffee v.—11 S. & M. 458.
Planters' Bank, Downs v.—1 S. & M. 261.
Planters' Bank, Ellis v.—7 H. 235.
Planters' Bank, Grant v.—4 H. 326.
Planters' Bank, Green v.—3 H. 43.
Planters' Bank, Harris v.—7 H. 346.
Planters' Bank, Harris v.—4 S. & M. 701.
Planters' Bank, Johnson v.—4 S. & M. 165.
Planters' Bank, Lewis v.—3 H. 267.
Planters' Bank, Lillard v.—3 H. 78.
Planters' Bank, McGuffie v.—Freem. Ch. 383.
Planters' Bank, Michie v.—4 H. 130.
Planters' Bank, Neely v.—4 S. & M. 113.
Planters' Bank, Pickett v.—5 S. & M. 470.
Planters' Bank, Pittman v.—1 H. 527.
Planters' Bank, Rainey v.—26 M. 177.
Planters' Bank, Saunders v.—2 S. & M. 287.
Planters' Bank, Soria v.—3 H. 46.
Planters' Bank, Templeton v.—5 H. 169.
Planters' Bank Thompson v.—2 S. & M. 476.
Planters, Bank, Valentine v.—Freem. Ch. 727.
Planters' Bank, Washington v.—1 H. 230.
Planters' Bank, Williams v.—57 M. 759.
Planters' Compress Assn. v. Hanes, 52 M. 469—weights, 8.
Planters' Compress Co. Peyton v.—63 M. 410.
Planters' Compress &c. Co. v. Ireys, 16 So. 386—app. & e. 909, 1033; corp. 397; offic. 79; wareh. 34; weights, 8.
Planters' Cotton-Press &c. Assn. Hanes v.—55 M. 654.
Planters' Ins. Co. v. Comfort, 50 M. 662—ins. 58, 558, 612, 733.
Planters' Ins. Co. v. Cramer, 47 M. 200—courts, 204; prohib. 16.
Planters' Ins. Co. v. Myers, 55 M. 479—ins. 97, 263, 274, 281, 379, 385.
Planters' Ins. Co. v. Ray, 52 M. 325—ins. 145.
Planters' Ins. Co. v. Williams, 60 M. 916—mal. pros. 21, 72.
Planters' Lumber Co. Turner v.—92 M. 767.
Planters' Oil Mill, Deviny v.—33 So. 492.
Planters' Oil-Mill &c. Co. v. Falls, 29 So. 786—app. & e. 187; sales, 161.
Planters' Oil-Mill &c. Co. Gillespie v.—76 M. 406.
Planters' Press, Greenville Compress v.—70 M. 669.
Planters' &c. Assn. Zimmerman v.—1 Miss. Dec. 256.
Planters' &c. Co. Patten-Worsham Drug Co. v.—86 M. 423.
Planters' &c. Mfg. Co. Gillespie v.—18 So. 120.
Plant, McAllister v.—49 M. 628.
Plant, McAllister v.—54 M. 106.
Plant, Market v.—1 So. 250.
Plant, Powell v.—23 So. 399.
Plant, Sharpley v.—79 M. 175.
Platner v. Johnson, 26 M. 142—trover, 2.
Platt, Lorance v.—67 M. 183.
Pleas v. Thomas, 75 M. 495—ease. 18, 20.
Pleasants v. Glasscock, Sm. & M. Ch. 17—cred. s. 24; disc. 4; eq. 43, 138, 146, 148, 232; ex. & ad. 544; trusts, 344.
Pleasants v. Smith, 90 M. 440—eq. 43.
Plenny v. Ferrill, 11 So. 6—deeds, 114.
Plummer v. Plummer, 37 M. 185—div. 75, 79; judgm. 508, 577; statut. 160, 213.
Plummer v. West, 41 M. 69—j. p. 86.
Poag, Senatobia Oil Co. v.—86 M. 457.
Podesta, Aaron v.—60 M. 82.

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Poindexter v. Cunningham, 41 So. 3—frds. st. of, 17; land. & t. 212.
Poindexter v. Henderson, W. 176—inj. 14, 36; waste, 17.
Poindexter v. La Roche, 7 S. & M. 699—eq. 410, 413; paymt. 40; refer. 55; witn. 100.
Poindexter v. Turner, W. 349—plead. 431.
Poindexter, Boone v.—12 S. & M. 640.
Poindexter, Brown v.—10 S. & M. 596.
Poindexter, Dickson v.—Freem. Ch. 721.
Poindexter, Hudson v.—42 M. 304.
Poindexter, Rawlings v.—14 S. & M. 66.
Poindexter, Rawlings v.—26 M. 654.
Poindexter, West v.—W. 303.
Pointer v. Trotter, 10 S. & M. 537—indians, 15.
Pointer, Como v.—87 M. 712.
Pointer, Cowles v.—26 M. 253.
Pointer, Thurman v.—67 M. 297.
Poitevent v. Hancock County, 58 M. 810—counties, 36, 110; deeds, 126.
Pole Stock Lumber Co. v. Oakedale Lumber Co. 54 So. 596—ev. 390.
Polk v. Covington County, 77 M. 803—paup. 45.
Polk v. Dale, 93 M. 664—mtg. 342e, 350.
Polk v. Oliver, 56 M. 566—partners. 241, 288.
Polk v. Seal, 25 So. 661—replev. 88.
Polk v. Seminary, 89 M. 293—crim. l. 260.
Polk v. State, 65 M. 433—chat. m. 230.
Polk v. Tunica County, 52 M. 422—counties, 170, 210, 213; mand. 108, 109.
Polk, Alexander v.—39 M. 737.
Polk, Elledge, 48 So. 241.
Polk, Peterson v.—67 M. 163.
Polk, Shacklett v.—51 M. 378.
Polk, Wilson v.—13 S. & M. 131.
Polkinghorne v. Hendricks, 61 M. 366—bills & n. 242; plead. 194; princ. & s. 108; usury, 44, 100, 146.
Polkinghorne v. Martinez, 65 M. 272—assign. f. b. c. 154.
Pollard v. Eckford, 50 M. 631—ex. & ad. 437; judgm. 870, 870b, 870d; sci. fa. 1.
Pollard v. Mobile Sav. Bank, 60 M. 946—garn. 146.
Pollard v. Parish, 23 M. 573—j. p. 140.
Pollard v. Phalen, 53 So. 453—inj. 15; plead. 193.
Pollard v. Phœnix Ins. Co. 63 M. 244—ins. 2, 641; licens. 39.
Pollard v. State, 53 M. 410—app. & e. 1063; crim. l. 561, 570, 572, 775.
Pollard v. Stovall, 60 M. 266—replev. 5.
Pollard v. Thomas, 61 M. 150—chat. m. 177.
Pollard, Phenix Ins. Co. v.—63 M. 641.
Pollard, Stanton v.—24 M. 154.
Pollard, Topp v.—24 M. 682.
Polle v. Rouse, 73 M. 713—fixt. 9; mtg. 342d; replev. 3.
Pollen v. James, 45 M. 129—bills & n. 503; ev. 432; hus. & w. 86, 228, 243.
Pollock v. Buie, 43 M. 140—courts, 198, 202a, 202c; ex. & ad. 31, 508, 508a; inf. 102; judgm. 475.
Pollock v. Butler, 23 So. 577—app. & e. 998, 1002; fraud. conv. 158.
Pollock v. Helm, 54 M. 1—banks, 191; ev. 402.
Pollock v. Okolona Sav. Inst. 61 M. 293—assign. f. b. c. 295, 356; banks, 134; eq. 51, 150.
Pollock v. Simmons, 76 M. 198—sales, 240.
Pollock v. Sykes, 74 M. 700—assign. f. b. c. 2, 8, 104, 107, 111, 134, 353, 339.
Pollock v. Williams, 42 M. 88—partners. 184.
Pollock, Billingsley v.—69 M. 759.
Pollock, Buie v.—2 Miss. Dec. 151, 426.
Pollock, Buie v.—55 M. 309.
Pollock, Cogburn v.—54 M. 639.
Pollock, Selleck v.—69 M. 870.
Pomet v. Scranton, W. 406—mtg. 162.
Pond v. State, 47 M. 39—ind. 11a; int. liq. 9.
Pons v. State, 49 M. 1—ev. 368; int. liq. 89, 234; statut. 158, 159, 160.
Pontotoc v. Fulton, 79 M. 511—mun. corp. 925.
Pool v. Doster, 59 M. 258—ex. & ad. 436; princ. & s. 147; subrog. 33.
Pool v. Ellis, 64 M. 555—ex. & ad. 368, 388, 437; jud. s. 21, 24, 26; subrog. 1, 16, 33; tax. 674, 726, 735, 802.
Pool v. Hill, 44 M. 306—dism. 23; plead. 85, 272, 351; princ. & s. 126.
Pool v. Myers, 13 S. & M. 466—ev. 461; witn. 105.
Pool, Canton Cotton-Warehouse Co. v.—78 M. 147.
Pool, Louisville &c. R. Co. v.—72 M. 487.
Poole v. McLeod, 1 S. & M. 391—action, 50; bills & n. 460; judgm. 306, 307.
Poole v. State, 56 So. 184—crim. l. 785, 1172.
Poole, Allen v.—54 M. 323.
Poole, Meridian v.—88 M. 108.
Pope v. Andrews, Sm. & M. Ch. 135—fraud, 50; fraud. conv. 78, 158, 185; witn. 91, 101.
Pope v. Armstrong, 3 S. & M. 214—atty. & c. 182.
Pope v. Bowman, 27 M. 194—bills & n. 445; ex. & ad. 437.
Pope v. Bowman, 31 M. 639—subrog. 4.

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Pope v. Pope, 40 M. 516—fraud. conv. 7, 13, 158, 171, 242; sales, 234.
Pope v. State, 36 M. 121—crim. l. 865, 924, 926, 929, 957, 1040, 1142, 1163, 1174.
Pope v. State, 56 M. 790—crim. l. 784.
Pope v. State, 63 M. 53—crim. l. 202, 292.
Pope, Bowman v.—33 M. 94.
Pope, Coat Lumber Co. v.—43 So. 434.
Poppenheimer, Parrott v.—16 So. 911.
Porter v. Casper, 54 M. 359—hus. & w. 120, 149, 240.
Porter v. Deterly, 1 S. & M. 163—app. & e. 66; j. p. 192.
Porter v. Duglass, 27 M. 379—app. & e. 272, 906; bankr. 137; excep. 13.
Porter v. Forshee, 41 M. 337—j. p. 170.
Porter v. Grisham, 3 H. 75—app. & e. 372, 386.
Porter v. Haley, 55 M. 66—hus. & w. 58.
Porter v. Johnson, 2 H. 736—judgm. 157.
Porter v. Kilpatrick, 24 M. 414—judgm. 403, 428; new tr. 96.
Porter v. Porter, 7 H. 106—app. & e. 321, 323, 325; bast. 9; des. & d. 88, 315.
Porter v. Porter, 41 M. 116—div. 220; excep. 1; hus. & w. 285.
Porter v. State, 23 M. 578—gr. jury, 3, 5, 11.
Porter v. State, 57 M. 300—hom. 142, 292.
Porter v. State, 1 Miss. Dec. 555—crim. l. 1157.
Porter v. State, 83 M. 23—mal. mis. 1; tresp. 76, 79, 80.
Porter v. Staten, 64 M. 421—hus. & w. 138, 151, 231.
Porter v. Still, 63 M. 357—ev. 90; tax. 439; trial, 25.
Porter v. Stone, 70 M. 291—chat. m. 136; partit. 37.
Porter v. Water Valley, 70 M. 560—mun. corp. 616.
Porter v. West, 64 M. 548—assign. f. b. c. 214; garn. 200.
Porter, Alexander v.—88 M. 585.
Porter, Dixon v.—23 M. 84.
Porterfield v. Butler, 47 M. 165—app. & e. 662; hus. & w. 230; judgm. 18; plead. 162, 175, 180.
Porter, Furness v.—W. 442.
Porter, Jones v.—59 M. 628.
Porter, Lehman v.—73 M. 216.
Porter, Nixon v.—34 M. 697.
Porter, Nixon v.—38 M. 401.
Porter, Ross v.—72 M. 361.
Porter, Scott v.—44 M. 364.
Porter, Short v.—44 M. 533.
Porter, Speight v.—26 M. 286.
Porter, Stingler v.—42 M. 449.
Porter, Wharton v.—10 S. & M. 305.
Portevant v. Neylans, 38 M. 104—ex. & ad. 315.
Portevant v. Pendleton, 23 M. 25—abate. & r. 48, 65; ex. & ad. 120.
Port Gibson v. Moore, 13 S. & M. 157—corp. 617; mun. corp. 48.
Port Gibson Bank, Jackson v.—85 M. 645.
Port Gibson Brick &c. Co. Chamberlin-Hunt Academy v.—80 M. 517.
Port Gibson Brick &c. Co. Miller v.—78 M. 170.
Port Gibson Mfg. Co. Rothrock v.—80 M. 517.
Port Gibson, Roberts v.—89 M. 75.
Portwood v. Baskett, 64 M. 213—tax. 60, 606, 608.
Portwood v. Feld, 72 M. 542—app. & e. 516, 597; inj. 27.
Portwood v. Montgomery County, 52 M. 523—counties, 9, 210; mand. 13, 108.
Portwood, Feld v.—7 So. 492.
Portwood, Lee v.—41 M. 109.
Posey v. Maddox, 65 M. 193—judgm. 439.
Posey v. State, 86 M. 141—crim. l. 1031, 1144, 1170½; gr. jury, 3.
Posey v. West Const. Co. 92 M. 736—partners. 139.
Posey, Lissa v.—64 M. 352.
Postal Tel. Co. v. Alabama &c. R. Co. 68 M. 314—em. dom. 128, 150, 238; ev. 113.
Postal Tel. Co. v. Rhett, 33 So. 412—tel. & t. 65.
Postal Tel. Co. v. Shannon, 91 M. 476—statut. 167, 285.
Postal Tel. Co. v. Willis, 93 M. 540—cust. & u. 1.
Postal Tel. &c. Co. v. Rhett, 35 So. 829—tel. & t. 65.
Postal Tel. &c. Co. v. State, 71 M. 555—com. 59; tel. & t. 30.
Postal Tel. &c. Co. v. Wells, 82 M. 733—tel. & t. 54, 62.
Postal Tel. &c. Co. Clay v.—70 M. 406.
Postal Tel. &c. Co. Jacobs v.—76 M. 278.
Postal Tel. &c. Co. Mobile &c. R. Co. v.—76 M. 731.
Postal Tel. &c. Co. Shaw v.—79 M. 670.
Postell, Lipscomb v.—38 M. 76.
Poston v. Mhoon, 49 M. 620—abate. & r. 73; app. & e. 228; forc. e. & d. 42; j. p. 141.
Post, White v.—91 M. 685.
Potera v. Brookhaven, 95 M. 774—electr. 14, 19; neg. 85, 136, 141; trial, 194, 240, 244.
Potter v. Prescott, 2 H. 686—trial, 332.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Potter v. Springfield Milling Co. 75 M. 532—princ. & a. 26, 116.
Potter, Atchison v.—6 S. & M. 120.
Potter, Hart v.—80 M. 796.
Potter, Hunt v.—58 M. 96.
Potts v. Canton Warehouse Co. 70 M. 462—bound. 3; deeds, 114.
Potts v. Gray, 60 M. 57—partit. 114.
Potts v. Hines, 57 M. 735—courts, 119; ins. p. 95; lim. of act. 146.
Potts, Canton Warehouse Co. v.—68 M. 637.
Potts, Canton Warehouse Co. v.—69 M. 31.
Potts, Compress Co. v.—68 M. 637.
Potts, Denniston v.—11 S. & M. 36.
Potts, Dennistoun v.—26 M. 13.
Potts, Hines v.—56 M. 346.
Potts, Stewart v.—49 M. 749.
Poulas, Carrier v.—87 M. 595.
Pounder, Alabama &c. R. Co. v.—82 M. 568.
Pounds v. Clark, 70 M. 263—can. of i. 19; home. 12, 132, 208.
Pounds v. State, 60 M. 925—recogn. 11.
Pouns v. Gartman, 29 M. 133—eq. 119, 431; ex. & ad. 346, 441; ven. & pur. 266, 279.
Pouns, Gartman v.—12 S. & M. 290.
Powe, Lehman v.—95 M. 446.
Powell v. Burrus, 35 M. 605—app. & e. 984; courts, 198; ex. & ad. 318, 488, 495.
Powell v. Carbry, 4 S. & M. 86—ex. & ad. 415c; judgm. 342.
Powell v. Cooper, 42 M. 221—ex. & ad. 104, 237, 415e.
Powell v. East Tennessee &c. R. Co. 8 So. 738—carr. 314.
Powell v. Jones, 12 S. & M. 506—champ. 4; ev. 463.
Powell v. McKee, 81 M. 229—tax. 362, 413.
Powell v. Mills, 30 M. 231—carr. 4.
Powell v. Mills, 37 M. 691—carr. 4, 117, 120; ferries, 32; trial, 248.
Powell v. Plant, 23 So. 399—can. of i. 5, 19, 43; cncts. 93, 96; eq. 5, 7, 8; ev. 419; plead. 386; tax. 346, 445.
Powell v. Powell, Freem. Ch. 134—trusts, 71.
Powell v. Powell, 27 M. 783—dower, 80; marr. 4, 40.
Powell v. Russell, 88 M. 549—cncts. 170.
Powell v. Smith, 74 M. 142—agric. 10, 11, 15; land. & t. 242, 244, 250, 252a; liens, 16; mast. & s. 82; statut. 213; trial, 135.
Powell v. Watson, 66 M. 176—app. & e. 676; eject. 68; int. liq. 75.
Powell v. State, 61 M. 319—crim. l. 858; larc. 67.
Powell v. State, 67 M. 119—crim. l. 834; hom. 69, 287, 309; parent & c. 2.
Powell v. State, 96 M. 608—int. liq. 147.
Powell v. State, 20 So. 4—crim. l. 763, 772; seduct. 37, 47.
Powell v. State, 23 So. 266—crim. l. 399, 539.
Powell v. Stowers, 47 M. 577—plead. 34; ven. & pur. 3, 4.
Powell, Andrews v.—41 M. 729.
Powell, Clymer v.—56 M. 672.
Powell, Gibson v.—5 S. & M. 712.
Powell, Lowenstein v.—68 M. 73.
Powell, Madison County v.—71 M. 618.
Powell, Madison County v.— 75 M. 762.
Powell, Nugent v.—63 M. 99.
Powell, State v.—77 M. 543.
Powell, St. Mary's Orphan Asylum v.—2 Miss. Dec. 81.
Powell, Vaughn v.—65 M. 401.
Power v. Telford, 60 M. 195—const. law, 191; replev. 3.
Power, Adams v.—48 M. 450.
Power, Adams v.—52 M. 828.
Powers v. Penny, 59 M. 5—const. law, 285; lim. of act. 4; tax. 679, 688.
Powers v. Presgroves, 38 M. 227—jury, 124, 131; libel, 58, 94, 102, 111, 123; witn. 353.
Powers v. Sample, 69 M. 67—home. 70.
Powers v. Sample, 72 M. 187—home. 19.
Powers v. State, 74 M. 777—crim. l. 377, 765, 789; hom. 215.
Powers v. State, 83 M. 691—crim. l. 191, 270, 285, 994, 1037, 1055; judges, 16.
Powers v. Wright, 62 M. 35—attch. 293.
Powers, Red v.—69 M. 242.
Powers, State v.—52 M. 198.
Power, Young v.—41 M. 197.
Poythress v. Mobile &c. R. Co. 92 M. 638—mun. corp. 657.
Poythress v. State, 56 So. 168—forg. 29.
Pradat v. Ramsey, 47 M. 24—elec. 227, 234, 283, 297.
Pradat, Drysdale v.—45 M. 445.
Pradat, McCaleb v.—25 M. 257.
Prairie Lodge v. Smith, 58 M. 301—corp. 388, 462, 512; estop. 92; mech. liens, 276; plead. 217, 242.
Prairie Lodge, Sadler v.—59 M. 572.
Prather v. Prather, 52 So. 449—wills, 93, 96.
Pratt v. Canton Cotton Co. 51 M. 470—cncts. 143; corp. 84; subscrip. 17.
Pratt v. Hargreaves, 75 M. 897—app. & e. 704; wills, 240, 286.
Pratt v. Hargreaves, 76 M. 955—wills, 205.
Pratt v. Hargreaves, 77 M. 892—wills, 190, 291.
Pratt, Blythe v.—62 M. 707.
Pratt, Clark v.—11 So. 631.

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Pratt, Dodds v.—64 M. 123.
Pratt, Howie v.—83 M. 15.
Preira v. Silva, 4 S. & M. 735—app. & e. 321.
Prentiss v. Mellen, 1 S. & M. 521—judgm. 17, 103.
Prentiss, Beazley v.—13 S. & M. 97.
Prentiss, Jefferson College v.—29 M. 46.
Prescott v. Francis, 4 S. & M. 633—dep. 102.
Prescott v. State, 18 So. 683—burg. 40.
Prescott, Potter v.—2 H. 686.
Presgroves, Powers v.—38 M. 227.
Presley v. Anderson, 42 M. 274—app. & e. 1170; judgm. 218; proc. 134.
Presley v. Quarles, 31 M. 151—ev. 220.
Presley v. Rodgers, 24 M. 520—chat. m. 89; execution, 40, 41; sales, 148.
Presley v. Simmons, 24 M. 527—trusts, 182.
Presley v. Stribling, 24 M. 527—trusts, 182.
Presley, State v.—91 M. 377.
Presly v. Donaldson, 33 M. 92—princ. & s. 190.
Presly, White v.—54 M. 313.
Pressgrove v. Comfort, 58 M. 644—est. 8.
Pressler, Davis v.—5 S. & M. 459.
Pressley, New Orleans &c R. Co. v.—45 M. 66.
Pressly v. Ellis, 48 M. 574—bankr. 20; liens, 1; princ. & a. 48, 61; pub. lands, 54, 55; trusts, 179.
Prester, Ralph v.—28 M. 744.
Prestidge v. Cooper, 54 M. 74—fraud. conv. 207.
Prestidge v. Pendleton, 24 M. 80—eq. 143, 148; ex. & ad. 120, 367; mtg. 444.
Prestige v. Pendleton, 28 M. 379—courts, 202c; ex. & ad. 37, 464, 486, 508.
Preston v. Banks, 71 M. 601—partit. 54; tax. 809, 812, 816, 828.
Preston v. Harris, 24 M. 247—execution, 171; garn. 229.
Preston v. State, 25 M. 383—crim. l. 813, 1089; excep. 20; hom. 38, 250, 295.
Preston v. Threefoot, 24 So. 703—sales, 42, 245.
Preston, Carter v.—51 M. 423.
Preston, Holmes v.—70 M. 152.
Preston, Holmes v.—71 M. 541.
Preston, Jackson v.—93 M. 366.
Preston, Kane v.—24 M. 133.
Preston, Tatun v.—53 M. 654.
Preston, Thompson v.—73 M. 587.
Prestridge, Pendleton v.—12 S. & M. 302.
Prestridge, Smith v.—6 S .& M. 478.
Prewett v. Buckingham, 28 M. 92—lim. of act. 36; partners. 114, 258c, 321.
Prewett v. Caruthers, 7 H. 304—contin. 53; judgm. 128, 203.
Prewett v. Caruthers, 12 S. & M. 491—bankr. 434.
Prewett v. Coopwood, 30 M. 369—app. & e. 185, 680, 1001, 1003, 1175; eq. 327; ev. 225, 265; fraud. conv. 172, 237; plead. 377.
Prewett v. Crump, 23 M. 574—app. & e. 66.
Prewett v. Dobbs, 13 S. & M. 431—chat. m. 34, 35, 57, 82, 89; execution, 36, 37; land. & t. 269; sales, 148.
Prewett v. Land, 36 M. 495—cred. s. 11, 20, 22; hus. & w. 31b, 168; inf. 79, 91; trusts, 193½, 194, 375.
Prewett v. Nash, 50 M. 584—j. p. 170, 189.
Prewett v. Standifer, 8 S. & M. 493—execution, 348.
Prewett, Coopwood v.—30 M. 206.
Prewett, Fry v.—56 M. 783.
Prewitt v. Bennett, 7 S. & M. 101—plead. 293, 351.
Prewitt v. State, 65 M. 437—crim. l. 854; trial, 303.
Price v. Anderson, 65 M. 410—courts, 45; judges, 2, 29.
Price v. Bloom, 44 M. 73—plead. 232.
Price v. Crone, 44 M. 571—inf. 73, 79; partit. 18.
Price v. Ferguson, 66 M. 404—deeds, 118; tax. 697, 699.
Price v. Gulport, 52 So. 486—int. liq. 233, 236.
Price v. Martin, 46 M. 489—fraud. conv. 76; mtg. 172; ven. & pur. 238.
Price v. Mitchell, 10 S. & M. 179—ex. & ad. 314g, 314j, 315.
Price v. Sinclair, 5 S. & M. 254—paymt. 63; plead. 164.
Price v. State, 36 M. 531—app. & e. 214; crim. l. 181, 183, 292, 636, 867, 1056, 1144; hom. 18, 160.
Price v. State, 38 So. 41—crim. l. 58; int. liq. 236; witn. 399.
Price, Bloom v.—44 M. 73.
Price, Illinois Cent. R. Co. v.—72 M. 862.
Price, Kenneday v.—57 M. 771.
Price, Kountz v.—40 M. 341.
Price, La Tourette v.—28 M. 702.
Price, Marks v.—27 So. 600.
Price, Marks v.—28 So. 721.
Price, Rector v.—3 H. 321.
Price, Tinnin v.—27 M. 619.
Price, Tinnin v.—31 M. 422.
Prichard v. Martin, 27 M. 305—mast. & s. 30, 31, 34, 38, 41, 63.

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Priebatsch v. Baptist Church, 66 M. 345—mech. liens, 293.
Priebatsch, Greenwood Lodge No. 135 A. F. & A. M. v.—83 M. 120.
Priebatsch, Nugent v.—61 M. 402.
Priestly v. Watkins, 62 M. 798—const. law, 169; counties, 185.
Priestly, Howard v.—58 M. 21.
Priestly, Journey v.—70 M. 584.
Prigh, Foster v.—12 S. & M. 416.
Prim v. Kittredge, W. 390—paymt. 63.
Prince v. Crawford, 50 M. 344—app. & e. 988, 994; cust. & u. 22; partners. 145, 216, 218; trial, 140.
Prince v. State, 93 M. 263—crim. l. 721, 814.
Prince, Coxwell v.—19 So. 237.
Prince, Phebe v.—W. 131.
Prine v. State, 73 M. 838—hom. 190, 310; trial, 194.
Pringle v. Dunkley, 14 S. & M. 16—wills, 640.
Pringle v. Hunt, 31 M. 351—ex. & ad. 314f.
Pringle, Alexander v.—27 M. 558.
Pringle, Brannon v.—94 M. 215.
Pringle, Brannon v.—46 So. 161.
Printard v. Griffing, 32 M. 133—eject. 30.
Pritchard v. Myers, 3 S. & M. 42—app. & e. 1025, 1050; execution, 198, 201; new tr. 108.
Pritchard v. Myers, 11 S. & M. 169—app. & e. 1028, 1068; execution, 151a, 154b, 155d; new tr. 160; sheriffs, 79.
Pritchard, Doe v.—11 S. & M. 327.
Probate Judge v. Alexander, 31 M. 297—ex. & ad. 307; remaind. 12; slaves, 7.
Probate Judge v. Green, 1 H. 146—ex. & ad. 120a, 275; witn. 94.
Probate Judge v. Hairston, 4 H. 242—ex. & ad. 208, 431, 532.
Probate Judge v. Johnson, 4 H. 680—ex. & ad. 537f.
Probate Judge v. Johnston, 1 H. 297—ex. & ad. 537f.
Probate Judge v. Phipps, 5 H. 59—ex. & ad. 128.
Probate Judge v. Thompson, 2 H. 808—ex. & ad. 532, 537g; plead. 204.
Probate Judge, Carter v.—2 S. & M. 42.
Probate Judge, Moore v.—W. 310.
Probate Judge, Phipps v.—5 H. 59.
Probate Judge, Shropshire v.—4 H. 142.
Prosby, Weathersby v.—1 H. 98.
Proctor v. Hart, 72 M. 288—lim. of act. 140, 164, 167.
Prodot v. McCaleb, 24 M. 169—app. & e. 166.
Prophet v. Lundy, 63 M. 603—tax. 259, 688.
Prophit v. Robinson, 34 M. 141—ven. & pur. 299.
Prophit, Brown v.—53 M. 649.
Proskauer, Howard v.—57 M. 247.
Proskey v. West, 8 S. & M. 711—app. & e. 1040; attch. 132, 134, 211; plead. 106, 218.
Prosser v. Leatherman, 4 H. 237—ex. & ad. 99.
Prosser v. Yerby, 1 H. 87—ex. & ad. 26, 38, 120a.
Province, Chicago &c. R. Co. v.—61 M. 288.
Provine v. Thornton, 92 M. 395—mtg. 171, 342e, 358.
Prude, State v.—76 M. 543.
Prussell v. Knowles, 4 H. 90—app. & e. 169, 186, 691, 906; crim. l. 957; ev. 212; new tr. 65, 143; trial, 338, 344; venue, 77.
Pryor v. State, 39 So. 1012—hom. 216.
Pryor, Anderson v.—10 S. & M. 620.
Pryor, Davis v.—6 S. & M. 114.
Pucket v. State, 71 M. 733—crim. l. 935.
Puckett v. Fore, 77 M. 391—licens. 39; usury, 99.
Puckett v. Graves, 6 S. & M. 384—app. & e. 5, 502, 520, 1096; excep. 56; execution, 153d, 154b.
Puckett v. McDonald, 6 H. 269—ex. & ad. 337, 358, 389; judgm. 428.
Puckett v. Redman, 2 H. 688—bills & n. 528.
Puckett v. State, 71 M. 192—crim. l. 304; int. liq. 36, 37, 39, 241.
Puckett, Wildberger v.—78 M. 650.
Puffer Mfg. Co. v. Dearman, 54 So. 310—sales, 456.
Pugh v. Boyd, 38 M. 326—app. & e. 257; atty. & c. 182, 192.
Pugh v. Dorsey, 8 S. & M. 379—eq. 45.
Pugh v. Holt, 27 M. 461—execution, 40; judgm. 654, 678; mtg. 33, 244, 530, 540.
Pugh v. Illinois Cent. R. Co. 23 So. 356—r. r. 333.
Pugh, Friedlander v.—43 M. 111.
Pugh, Hendricks v.—57 M. 157.
Pugh, Hinds v.—48 M. 268.
Pugh, Wilson v.—32 M. 196.
Pugh, Wilson v.—61 M. 449.
Pugh, Yandell v.—53 M. 295.
Pulliam v. Illinois Cent. R. Co. 75 M. 627—neg. 98; r. r. 252.
Pulliam v. Pulliam, Freem. Ch. 348—div. 26; hus. & w. 119, 202.
Pulliam v. Taylor, 50 M. 251—acc. & s. 8, 9.
Pulliam v. Taylor, 50 M. 551—fraud. conv. 241.
Pulling, McGraw v.—Freem. Ch. 357.

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Pullman Co. v. Kelly, 86 M. 87—app. & e. 1063; carr. 410; dam. 216.
Pullman Co. v. Stearn, 88 M. 390—carr. 411.
Pullman Palace Car Co. v. Adams, 78 M. 814—com. 69.
Pullman Palace Car Co. v. Ehrman, 65 M. 383—carr. 410.
Pullman Palace Car Co. v. Lawrence, 74 M. 782—app. & e. 201; carr. 409, 411; corp. 666; dam. 92, 127, 181; mast. & s. 308; parties, 1; torts, 2; trial, 131; venue, 12.
Pullman Palace Car Co. Cassedy v.—17 So. 373.
Pulpus v. State, 82 M. 548—crim. l. 422, 427; hom. 113, 174, 300g.
Pulpus v. State, 84 M. 49—hom. 169, 170.
Punchard v. Rundell, 1 H. 508—land. & t. 271.
Purnell v. Frank, 68 M. 639—land. & t. 229, 229½.
Purnell, Alabama &c. R. Co. v.—69 M. 652.
Purvis v. Rees, 55 So. 481—j. p. 164.
Purvis v. State, 71 M. 706—crim. l. 129, 134, 1050, 1085, 1146; jury, 70.
Purvis v. Woodward, 78 M. 916—usury, 95.
Purvis v. Woodward, 78 M. 922—eq. 345; inj. 122; usury, 2, 94.
Purvis, Daniel v.—50 M. 261.
Purvis, Pyland v.—87 M. 433.
Purvis, Ramey v.—38 M. 499.
Puryear, McAlexander v.—48 M. 420.
Putnam, Archer v.—12 S. & M. 286.
Pyland v. Purvis, 87 M. 433—judgm. 641; mun. corp. 1017.
Pyles, Johnson v.—11 S. & M. 189.

Q

Quackenboss v. Insurance Co. 50 So. 444—ins. 402, 658.
Quarles v. Hiern, 70 M. 259—app. & e. 543, 1165; plead. 340.
Quarles v. Hiern, 70 M. 891—execution, 273, 275; judgm. 957.
Quarles, Pressley v.—31 M. 151.
Queen v. Vick, 28 M. 662—costs, 273.
Queen City Mfg. Co. v. Blalack, 18 So. 800—app. & e. 252, 882; attch. 34.
Queen City Mfg. Co. Love Mfg. Co. v.—74 M. 290.
Queen Ins. Co. v. Betbeze, 53 So. 592—new tr. 83.
Queens Ins. Co. Rivara v.—62 M. 720.
Quick, Bush v.—90 M. 32.
Quick, Ross v.—89 M. 29.
Quillin v. Paine, 94 M. 696—sales, 315.
Quin v. Coleman, 42 M. 386—dower, 22, 28.
Quin v. Hart, 85 M. 71—interpl. 1, 22.
Quin v. Mosier, 21 So. 303—sales, 471.
Quin v. Myles, 59 M. 375—app. & e. 282; execution, 50, 54; partners. 162.
Quin v. Pike County, 94 M. 356—high. 111.
Quin v. State, 65 M. 479—dis. c. 6.
Quin v. State, 82 M. 75—const. law, 43.
Quine v. Quine, 9 S. & M. 155—partners. 249.
Quin, Ostrander v.—84 M. 230.
Quinn v. Moss, 12 S. & M. 365—app. & e. 1051; courts, 202b; ex. & ad. 314g; inf. 31a; wills, 221; witn. 85.
Quinn v. Southern R. Co. 21 So. 6—r. r. 446.
Quinn, Boyd v.—22 So. 802.
Quinn, Simms v.—58 M. 221.
Quinn, Supreme Lodge K. P. v.—78 M. 525.
Quintini v. Bay St. Louis, 64 M. 483—const. law, 51, 278; inj. 105; nuis. 19, 80.
Quintini, State v.—76 M. 498.
Quitman County v. Stritze, 69 M. 460—quiet. t. 33.
Quitman County v. Stritze, 70 M. 320—counties, 103.
Quitman County, Forsdick v.—25 So. 294.
Quitman Lumber Co. v. Turner, 48 So. 819—app. & e. 1171.

R

Rabb v. Griffin, 26 M. 579—curt. 4, 8; des. & d. 52; hus. & w. 10, 11.
Rabb v. Washington County, 62 M. 589—eject. 33; pub. lands, 51.
Rabb, Hereford v.—19 So. 201.
Rabb, Oakey v.—Freem. Ch. 546.
Rabe v. Fyler, 10 S. & M. 440—app. & e. 181, 243; forc. e. & d. 11, 14, 18, 28; land. & t. 15.
Rabe, Nevit v.—5 H. 653.
Raby v. Batiste, 27 M. 731—slaves, 25.
Radford v. Hull, 30 M. 712—sheriffs, 122.
Radford, Sturges v.—2 Miss. Dec. 379.
Ragan v. Cargill, 24 M. 540—app. & e. 1050; dep. 1, 48, 105.
Ragan v. Gray, 27 M. 645—bills & n. 327; fraud. conv. 29a, 29b.
Ragan v. Harrell, 52 M. 818—forc. e. & d. 16.
Ragan v. State, 67 M. 332—int. liq. 223.
Ragan, Crittenden v.—89 M. 185.
Ragan, Griffin v.—52 M. 78.
Ragan, Wear v.—30 M. 83.
Ragland v. Green, 14 S. & M. 194—eq. 22; ex. & ad. 314b, 379, 473.
Ragsdale v. Alabama &c. R. Co. 67 M. 106—tax. 798, 800.
Ragsdale v. Caldwell, 2 H. 930—judgm. 134; plead. 431.

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Ragsdale v. Franklin, 25 M. 143—bills & n. 2.
Ragsdale v. Meridian Land &c. Co. 71 M. 284—crim. l. 338; witn. 150, 157; ven. & pur. 132, 165, 178.
Ragsdale v. Ragsdale, 68 M. 92—trusts, 92½, 97.
Ragsdale v. Vicksburg &c. R. Co. 62 M. 480—app. & e. 1182; courts, 103; judgm. 570; r. r. 82.
Ragsdale, Coffee v.—14 So. 454.
Ragsdale, Hewlett v.—68 M. 703.
Ragsdale, Kimbrough v.—69 M. 674.
Ragsdale, McLean v.—31 M. 701.
Ragsdale, Meridian v.—67 M. 86.
Ragsdale, Mortimore v.—62 M. 86.
Ragsdale, Vicksburg &c. R. Co. v.—46 M. 458
Ragsdale, Vicksburg &c. R. Co. v.—51 M
Ragsdale, Vicksburg &c. R. Co. v.—54
Raiford v. Mississippi Cent. R. Co. 43 M. 233—r. r. 441.
Raiford v. State, 87 M. 359—tresp. 84.
Raiford v. Weems, 68 M. 138—judgm.
Rail v. Dotson, 14 S. & M. 176—courts, 200½; ex. & ad. 29; life est. 3; powers, 24.
Rail, Calhoun v.—26 M. 414.
Railey v. Bacon, 26 M. 455—assign. 47, 83; banks, 77.
Railroad Commission, Gulf &c. R. Co. v.—94 M. 124.
Railroad Commission of Mississippi, Alabama &c. R. Co. v.—86 M. 667.
Railway &c. Assn. Stephens v.—75 M. 84.
Rainer, Farmers' Loan &c. Co. v.—96 M. 65.
Raines v. Baird, 84 M. 807—ven. & pur. 20.
Raines v. State, 81 M. 489—crim. l. 409; hom. 146, 158, 159, 162, 286, 286b.
Rainey v. Hinds County, 78 M. 308—counties, 1, 38, 105, 208, 226; em. dom. 98, 144, 146.
Rainey v. Hinds County, 79 M. 238—counties, 146; high. 117.
Rainey v. Lamb Hardwood Lumber Co. 91 M. 690—tax. 754, 771; ven. & pur. 231.
Rainey v. Planters' Bank, 26 M. 177—judgm. 119.
Rainey, Beck v.—28 M. 111.
Rainey, Clark v.—72 M. 151.
Rainey, Lockwood v.—19 So. 294.
Rainwater, Vicksburg v.—47 M. 547.
Rainwater, Vicksburg v.—52 M. 718.
Ralph v. Prester, 28 M. 744—dism. 59; judgm. 272.
Ramey v. Purvis, 38 M. 499—princ. & s. 126.
Ramey v. Woodward, 90 M. 777—elec. 148.
Ramoneda v. Loggins, 89 M. 225—mtg. 298, 413; subrog. 16.
Ramsey v. Barbaro, 12 S. & M. 293—app. & e. 185, 828; eq. 119, 417.
Ramsey v. Brown, 77 M. 124—cncts. 170.
Ramsey, Gulf &c. R. Co. v.—54 So. 440.
Ramsey, Pradat v.—47 M. 24.
Ramsey, Williams v.—52 M. 851.
Ramshur, Lumber Mineral Co. v.—54 So. 313.
Rand v. Peel, 74 M. 305—app. & e. 1180; arb. & a. 64.
Randal v. State, 4 S. & M. 349—larc. 10, 16.
Randall v. Johnson, 59 M. 317—bills & n. 129; cncts. 309.
Randall v. Kline, 44 M. 313—courts, 167; j. p. 41.
Randall v. Randall, 28 So. 19—div. 298.
Randall v. Smith, 96 M. 647—licens. 18.
Randel v. Yates, 48 M. 685—app. & e. 1011; eq. 356; int. rev. 19; partners. 22, 345; witn. 197.
Randle v. Richardson, 53 M. 176—partners. 83, 306, 332, 333.
Randle, Kayse v.—35 So. 422.
Randle, Koyse v.—83 M. 168.
Randle, McFarlane v.—41 M. 411.
Randle, Phœnix Ins. Co. v.—81 M. 720.
Randolph v. Doss, 3 H. 205—app. & e. 841; deeds, 198; dower, 7, 69, 74; ev. 173.
Randolph v. Govan, 14 S. & M. 9—app. & e. 1069; trial, 135, 213; witn. 82, 95.
Randolph v. Singleton, 12 S. & M. 439—app. & e. 1175, 1178; ex. & ad. 446, 533, 537g.
Randolph, Chew v.—W. 1.
Randolph, Parham v.—4 H. 435.
Randolph, Perry v.—6 S. & M. 335.
Randolph, Wiltburger v.—W. 20.
Rand, Warren County v.—88 M. 395.
Raney, Williamson v.—Freem. Ch. 112.
Rankin v. Butler, 2 S. & M. 473—app. & e. 518, 547; excep. 6.
Rankin v. Dulaney, 43 M. 197—attch. 1, 2, 217; proc. 134.
Rankin v. Holloway, 3 S. & M. 614—app. & e. 671; excep. 16; fraud. conv. 131.
Rankin v. Holloway, 3 S. & M. 620—fraud. conv. 140.
Rankin v. Sanders, 6 H. 52—bills & n. 131; judgm. 128.
Rankin County v. Busick, 22 So. 801—cncts. 143; deeds, 90; land. & t. 123.
Rankin County v. Watson, 70 M. 85—paup. 43.
Rankin County Savings Bank v. Johnson, 56 M. 125—excep. 35.
Rankin County Savings Institution, Gunn v.—2 Miss. Dec. 92.
Rankin, Dulaney v.—47 M. 391.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Rankin Mfg. Co. McLemore v.—68 M. 196.
Rankin, Young v.—4 H. 27.
Ransom v. Cothran, 6 S. & M. 167—atty. & c. 110; plead. 99.
Ransom, Harris v.—24 M. 504.
Rapp, Fletcher v.—Sm. & M. Ch. 374.
Rappleye v. Hill, 4 H. 295—app. & e. 1165; judgm. 233; statut. 267.
Rasberry v. Moye, 23 M. 320—cncts. 266, 341; sales, 346.
Ratcliff v. Ratcliff, 12 S. & M. 134—ex. & ad. 65; life est. 21; wills, 434.
Ratcliff v. State, 54 So. 947—ars. 37.
Ratcliffe v. Dougherty, 24 M. 181—hus. & w. 37, 49½.
Ratcliff, Smith v.—66 M. 683.
Ratcliff, Williams v.—42 M. 145.
Ratcliff, White v.—54 So. 658.
Ratliff v. Beale, 74 M. 247—const. law, 47, 48; statut. 57; tax. 575.
Ratliff v. Davis, 38 M. 107—courts, 198, 201; eq. 22; ex. & ad. 299, 495; guard. & w. 121, 122, 126, 146, 151; set-off, 36.
Ratliff v. Thompson, 61 M. 71—dep. 110.
Ratliff v. State, 2 Miss. Dec. 102—crim. l. 562.
Ratliff, Betts v.—50 M. 561.
Ratliffe v. Collins, 35 M. 581—hus. & w. 122.
Ratliff, Nelson v.—72 M. 656.
Rattray v. State, 61 M. 377—crim. l. 138; libel, 152.
Rawl v. State, 8 S. & M. 599—crim. l. 277, 285, 446, 1092; gr. jury, 12, 40.
Rawlings, Clower v.—9 S. & M. 122.
Rawlings v. Poindexter, 14 S. & M. 66—bills & n. 223, 440, 528; mon. recd. 1.
Rawlins v. Poindexter, 26 M. 654—ex. & ad. 431.
Rawlins, Estes v.—5 H. 258.
Rawls v. State, 70 M. 739—gaming, 90; ind. 110.
Rawls, Mask v.—57 M. 270.
Ray v. Kelly, 82 M. 597—trusts, 60.
Ray v. McCary, 26 M. 404—app. & e. 549, 671; new tr. 11, 182.
Ray v. Murdock, 36 M. 692—offic. 6; tax. 297, 671, 787.
Ray v. Patrick, 1 Miss. Dec. 162—mal. pros. 16, 72.
Ray v. Woolfolk, 1 S. & M. 523—bills & n. 416; plead. 206.
Rayborn v. Cothern, 43 So. 70—app. & e. 785.
Ray, Donly v.—6 So. 324.
Ray, Fitzpatrick v.—4 S. & M. 645.
Rayford, Comstock v.—1 S. & M. 423.
Ray, Harper v.—27 M. 622.
Raymond v. State, 54 M. 562—states, 191, 193, 199; statut. 237; set-off, 4.
Raymond R. Co. Stewart v.—7 S. & M. 568.
Ray, Planters' Ins. Co. v.—52 M. 325.
Ray, State v.—87 M. 183.
Ray, Yalabusha County v.—12 S. & M. 342.
Rea v. Englesing, 56 M. 463—ex. & ad. 17; inf. 5.
Rea v. Grubb, 39 So. 808—contin. 30.
Reabold v. State, 73 M. 236—convt. 10; crim. l. 1215.
Reach, Benjamin v.—65 M. 347.
Read v. Beall—see Reed v. Beall.
Read v. Brewer, 16 So. 350—bills & s. 97; hus. & w. 146½.
Read v. Brown, 36 M. 329—ex. & ad. 314c.
Read v. McLemore, 34 M. 110—comp. 10; princ. & s. 39.
Read v. Manning, 30 M. 308—statut. 183; wills, 184.
Read v. Renaud, 6 S. & M. 79—dism. 42; venue, 28.
Read, Chew v.—11 S. & M. 182.
Reading, Morgan v.—3 S. & M. 366.
Read, Manning v.—30 M. 308.
Read, Wooten v.—2 S. & M. 585.
Ready v. Hamm, 46 M. 422—dower, 25, 27; mtg. 339; quiet. t. 16; trusts, 160.
Reagland v. Green, 14 S. & M. 194—wills, 303.
Reardon v. Henson, 29 So. 764—licens. 39.
Reason v. State, 94 M. 290—crim. l. 522.
Reaves v. Dennis, 6 S. & M. 89—app. & e. 860; plead. 431, 433.
Reber v. Dowling, 65 M. 259—tax. 679; wills, 623.
Record, Vicksburg v.—1 Miss. Dec. 407.
Rector v. Alcorn, 88 M. 788—wills, 675.
Rector v. Price, 3 H. 321—cov. 26.
Rector v. Sauer, 69 M. 235—frds. st. of, 118, 158.
Rector v. Shippey &c. Co. 93 M. 254—app. & e. 1025; tresp. 68.
Rector, Armitage v.—62 M. 600.
Rector, Klein v.—57 M. 538.
Red v. Powers, 69 M. 242—garn. 36, 188.
Redd v. Thompson, 56 M. 230—app. & e. 1141.
Reddick v. State, 72 M. 1008—crim. l. 688, 721, 753, 919.
Reddick, Parker v.—65 M. 242.
Redding, Moore v.—69 M. 841.
Redditt v. Wall, 55 So. 45—high. 111.
Reddy v. Aldrich, 11 So. 828—eq. 41; mtg. 6.
Redfield v. Hewes, 67 M. 479—fraud. conv. 328.

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Redfield v. Montgomery, 71 M. 113—chat. m. 48.
Redhead v. Redhead, 83 M. 141—wills, 80.
Redman, Puckett v.—2 H. 688.
Redmond v. Banks, 60 M. 293—tax. 182, 679a.
Red, Moore v.—22 So. 948
Red, Murphy v.—64 M. 614.
Red Snapper Sauce Co. v. Bolling, 95 M. 752—ev. 440, 445; set-off, 25.
Red Snapper &c. Co. Bolling v.—53 So. 394.
Redus v. Gamble, 85 M. 165—j. p. 159, 164, 170.
Redus v. Hayden, 43 M. 614—curt. 3, 4; estop. 101; hus. & w. 11; jud. s. 18, 31.
Redus v. Holcomb, 27 So. 524—frds. st. of, 103, 105.
Redus v. State, 54 M. 712—ev. 178; sheriffs, 106, 138, 158, 169.
Redus v. Wofford, 4 S. & M. 579—afft. 11; app. & e. 516, 923; attch. 8, 91, 177, 194, 322; plead. 433.
Redus, Crawford v.—54 M. 700.
Redus, Ridgley Lodge No. 23, I. O. O. F. v.—78 M. 352.
Redus, Till v.—79 M. 125.
Redwine, Matthews v.—23 M. 233.
Redwine, Matthews v.—25 M. 99.
Reed v. Beall, 42 M. 472—const. law, 136, 186; tax. 31, 60.
Reed v. Benton &c. Co. 4 H. 257—plead. 127.
Reed v. Bullington, 49 M. 223—bankr. 187, 419, 420; judgm. 871.
Reed v. Cage, 4 H. 253—app. & e. 885; garn. 188.
Reed v. Carl, 3 S. & M. 74—fraud. conv. 13, 23.
Reed v. Coleman, 51 M. 835—hus. & w. 177.
Reed v. Gregory, 46 M. 740—proc. 96; ven. & pur. 279.
Reed v. Greenville, 83 M. 192—crim. l. 59; larc. 27.
Reed v. Haviland, 38 M. 323—execution, 326; judgm. 784.
Reed v. Heard, 53 So. 400—counties, 27; ev. 460; tax. 419, 764, 734b, 768.
Reed v. Mosely, 76 M. 1—marr. 38.
Reed v. Reed, 85 M. 126—div. 212.
Reed v. Reed, 53 So. 691—ev. 451, tax. 755.
Reed v. State, 62 M. 405—crim. l. 449, 479, 482, 485; com. 183.
Reed v. State, 24 So. 312—hom. 310.
Reed v. Wiley, 5 S. & M. 394—app. & e. 1016; ex. & ad. 415.
Reed, Bacon v.—27 M. 469.
Reed, Clark v.—12 S. & M. 552.
Reed, Dease v.—24 M. 239.
Reed, Delahuff v.—W. 74.
Reed, Lum v.—53 M. 71.
Reed, Lum v.—53 M. 73.
Reed, State v.—76 M. 211.
Reed, Stevenson v.—90 M. 341.
Reed, Wills v.—86 M. 446.
Reedy v. Armistead, 31 M. 353—ex. & ad. 437; ven. & pur. 279.
Reedy, Murphy v.—2 So. 167.
Reese v. Barbee, 61 M. 181—assa. 8.
Reese v. Lee County, 49 M. 639—counties, 27, 210; spec. perf. 59.
Reese, Barbee v.—60 M. 906.
Reese, McPherson v.—58 M. 749.
Reese, New Orleans &c. R. Co. v.—61 M. 581.
Reese, Sharpley v.—1 Miss. Dec. 523.
Reese, Taylor v.—44 M. 89.
Rees, Fitzgerald v.—67 M. 473.
Rees, Purvis v.—55 So. 481.
Rees, State v.—76 M. 435.
Reeves v. Burnham, 3 H. 25—judgm. 857.
Refuge Cotton Oil Co. Griffin v.—93 M. 477.
Refuge Cotton Oil Co. Miss. Levee Comm'rs v.—91 M. 480.
Refuge Cotton Oil Co. O'Neal v.—88 M. 617.
Refuge Oil-Mill Co., Bell v.—77 M. 387.
Regan v. State, 87 M. 422—crim. l. 829, 1037, 1150, 1166; hom. 300c.
Regan v. Stone, 4 S. & M. 691—app. & e. 73.
Regan v. Stone, 7 S. & M. 104—ex. & ad. 412.
Regan, Gray v.—23 M. 304.
Regan, Ingraham v.—23 M. 213.
Reid v. Gregory, 78 M. 247—judgm. 100, 117.
Reid v. Louisville &c. R. Co. 16 So. 675—proc. 31.
Reid v. State, 38 So. 320—burg. 40.
Reid v. Trowbridge, 78 M. 542—monop. 6; mun. corp. 227, 233, 234, 244, 987.
Reid v. Yazoo &c. R. Co., 74 M. 769—tax. 827.
Reid v. Yazoo &c. R. Co. 94 M. 639—app. & e. 356; carr, 317, 339, 341, 348; trial, 190, 253, 260.
Reid, Blackwell v.—41 M. 102.
Reid, Clement v.—9 S. & M. 535.
Reid, Fitzgerald v.—9 S. & M. 94.
Reid, Illinois Cent. R. Co. v.—93 M. 458.
Reid, Kelly v.—57 M. 89.
Reid, Whitcomb v.—31 M. 567.
Reid, Yazoo &c. R. Co. v.—90 M. 616.
Reily v. Carter, 75 M. 798—mtg. 532, 546.
Reily, Bramlett v.—3 So. 658.
Reily, Vanhouten v.—6 S. & M. 440.

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Reinhardt v. Carter, 49 M. 315—acct. acti. on, 14, 15; afft. 13; trial, 5.
Reinhardt v. Evans, 48 M. 230—witn. 140, 143.
Reinhardt v. Hines, 51 M. 344—acct. st. 4, 19; lim. of act. 146.
Relfe, Anspach v.—2 Miss. Dec. 243.
Relf, McNamee v.—52 M. 426.
Rembert v. Key, 58 M. 533—judgm. 645, 691; lim. of act. 83.
Rembert v. State, 56 M. 280—mal. mis. 3.
Rembert, Patrick v.—55 M. 87.
Renandine, Campe v.—64 M. 441.
Renand, Read v.—6 S. & M. 79.
Renardet, Stevenson v.—83 M. 392.
Reneau, Gulfport Cotton Oil &c. Co. v.—94 M. 904.
Reneau, Steppacher v.—25 M. 114.
Renfro, Hanna v.—32 M. 125.
Renfrow v. Shaw, 4 H. 651—slaves, 7.
Renich, Carroll v.—7 S. & M. 798.
Renno, Aetna Ins. Co. v.—93 M. 594.
Renno, Aetna Ins. Co. v—96 M. 172.
Reno v. Harper, 23 M. 154—eq. 321, 431.
Reno v. State, 88 M. 583—gaming, 94.
Reno, Harper v.—Freem. Ch. 323.
Rester, Shannon v.—69 M. 238.
Rester, Vickery v.—4 H. 293.
Retail Lumber Dealers' Assn. v. State, 95 M. 337—monop. 11, 17.
Reyfelt v. State, 73 M. 415—int. liq. 239.
Reynolds v. Alcorn County, 59 M. 132—paup. 43.
Reynolds v. Ingersoll, 11 S. & M. 249—atty. & c. 94; eject. 8; execution, 174.
Reynolds v. Nelson, 41 M. 83—eq. 181, 350, 372.
Reynolds v. Nye, Freem. Ch. 462—execution, 17, 218, 246, 250.
Reynolds v. Walker, 29 M. 250—guard. & w. 147a.
Reynolds, Barnes v.—4 H. 114.
Reynolds, Carpenter v.—42 M. 807.
Reynolds, Cook v.—58 M. 243.
Reynolds, Miller v.—4 So. 341.
Reynolds, Sessions v.—7 S. & M. 130.
Reynolds, Wightman v.—24 M. 675.
Rhett, Postal Tel. &c. Co. v.—33 So. 412.
Rhett, Postal &c. Co. v.—35 So. 829.
Rhett, Western Union Tel. Co. v.—50 So. 696.
Rhew, Branch Bank v.—37 M. 110.
Rhodes v. Hardy, 53 M. 587—arb. & a. 59, 80.
Rhodes v. McDonald, 24 M. 418—plead. 164; schools, 53.
Rhodes v. Sherrod, 8 S. & M. 97—excep. 27; judgm. 299, 321.
Rhodes, Busby v.—58 M. 237.
Rhodes, Cedar Rapids Nat. Bank v.—51 So. 717.
Rhodes, Davis v.—39 M. 152.
Rhodes, Freeman v.—3 S. & M. 329.
Rhodes, Kyle v.—71 M. 487.
Rhodes, McCreary v.—63 M. 308.
Rhodes, Tunica County v.—85 M. 500.
Rhodes, Williams v.—33 M. 137.
Rhonimus, State v.—47 M. 314.
Rhymes v. Jackson Electric &c. Co. 85 M. 140—app. & e. 997; st. r. r. 104; trial, 169.
Rhyne v. Guevara, 67 M. 139—eject. 115; home. 70, 190; land. & t. 61, 68.
Rials, State v.—1 Miss. Dec. 302.
Ricard v. Smith, 37 M. 644—app. & e. 67, 69, 359, 361; plead. 187.
Rice v. Harris, 76 M. 422—assign. f. b. c. 300, 334.
Rice v. Harrisson, 2 Miss. Dec. 403—fraud. conv. 103.
Rice v. Locke, 59 M. 189—app. & e. 154, 178; j. p. 31, 71.
Rice v. Maxwell, 13 S. & M. 289—bankr. 434.
Rice v. Patterson, 92 M. 666—partners, 169, 214; plead. 91, 108.
Rice v. Smith, 72 M. 42—const. law, 154; exemp. 50.
Rice v. Troup, 62 M. 186—atty. & c. 97; ev. 462; judgm. 846.
Rice v. Wright, 46 M. 679—eject. 26; statut. 276.
Rice, McCutchen v.—56 M. 455.
Rice Mercantile Co. Holden v.—51 So. 895.
Rice, Troup v.—49 M. 248.
Rich v. Calhoun, 12 So. 707—cncts. 332; courts, 119; j. p. 32.
Rich v. McLaurin, 83 M. 95—courts, 186; judges, 3, 12; mun. corp. 98, 107, 128.
Richard v. Mooney, 39 M. 357—attch. 205; replev. 33, 124.
Richards v. Fuqua, 28 M. 792—carr. 4, 107; ferries, 32.
Richards v. Lee, 91 M. 657—eject. 15; plead. 329.
Richards v. Mills, 31 M. 450—ex. & ad. 17; des. & d. 41.
Richards v. Patterson, 30 M. 583—statut. 159; tax. 699.
Richards v. Phillis, 28 So. 807—hab. corp. 113.
Richards v. State, 76 M. 268—ind. 124.

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Richards v. Vaccaro, 67 M. 516—attch. 39, 308; crim. l. 829; fraud. conv. 270.
Richards, Dixon v.—2 H. 771.
Richards, Effinger v.—35 M. 540.
Richards, Hardy v.—54 So. 76.
Richards, Hill v.—11 S. & M. 194.
Richards, Miles v.—W. 47.
Richards, Mills v.—34 M. 77.
Richards, Muse v.—70 M. 581.
Richardson v. Biglane, 81 M. 676—deeds, 30; eject. 85.
Richardson v. Board of Levee Comm'rs, 77 M. 518—em. dom. 225.
Richardson v. Borden, 42 M. 71—fixt. 1, 6, 11, 13, 21; land. & t. 61.
Richardson v. Bowman, 40 M. 782—ven. & pur. 254.
Richardson v. Brooks, 52 M. 118—eq. 10, 45, 150, 442; ex. & ad. 115; lim. of act, 38; judgm. 508.
Richardson v. Callihan, 73 M. 4—judgm. 643; land. & t. 292; tresp. 29, 45
Richardson v. Davis, 59 M. 15—j. p. 40; replev. 17.
Richardson v. Davis, 70 M. 219—assign. f. b. c. 128, 351; fraud. conv. 263, 306; partners. 241, 280.
Richardson v. Foster, 73 M. 12—app. & e. 202, 217, 1025; bills & n. 286; jury, 110; new tr. 45; partners. 146; trial, 158.
Richardson v. Futrell, 42 M. 525—acc. & s. 23; bailm. 2; princ. & a. 65, 162.
Richardson v. Levee Comm'rs, 68 M. 539—em. dom. 71, 139; ev. 143; lev. 19.
Richardson v. Lightcap, 52 M. 508—assign. 74; inj. 161; judgm. 874.
Richardson v. McLaurin, 69 M. 70—land. & t. 246, 252.
Richardson v. McLemore, 60 M. 315—cov. 26; ex. & ad. 101, 115.
Richardson v. Marqueze, 59 M. 80—assign. f. b. c. 97, 151, 154, 171, 231, 236.
Richardson v. Miller, 48 M. 311—partit. 13; ten. in c. 3, 35, 46.
Richardson v. O'Neal, W. 469—assum. 17; plead. 379.
Richardson v. Scott, 47 M. 236—tax. 608.
Richardson v. Stapleton, 60 M. 97—assign. f. b. c. 151, 184.
Richardson v. State, 68 M. 349—crim. l. 937.
Richardson v. State, 79 M. 289—crim. l. 200; ind. 74; weap. 17a.
Richardson v. State, 80 M. 115—crim. l. 538, 763, 781.
Richardson v. State, 11 So. 934—com. 67.
Richardson v. State, 28 So. 817—hom. 189, 269, 292.
Richardson v. State, 33 So. 441—burg. 30, 48.
Richardson v. Toliver, 71 M. 966—estop. 70; trial, 143.
Richardson v. Warwick, 7 H. 131—mech. liens, 258, 286, 290.
Richardson v. Wolfe, 31 M. 616—eq. 268.
Richardson, Baker v.—96 M. 394.
Richardson, Brochett v.—61 M. 766.
Richardson, Crane v.—73 M. 254.
Richardson, Davis v.—45 M. 499.
Richardson, Dunlap v.—63 M. 447.
Richardson, Dwight v.—12 S. & M. 325.
Richardson, Grayson v.—65 M. 222.
Richardson, Hirsch v.—65 M. 227.
Richardson, Hirsch v.—7 So. 323.
Richardson, Johnson v.—33 M. 462.
Richardson, Klein v.—64 M. 41.
Richardson, Lengsfield v.—52 M. 443.
Richardson, Randle v.—53 M. 176.
Richardson, Ricks v.—70 M. 424.
Richardson, Saunders v.—2 S. & M. 90.
Richardson, Smith v.—2 Miss. Dec. 287.
Richardson, State v.—86 M. 439.
Richardson, Stewart v.—32 M. 313.
Richardson, Vicksburg v.—90 M. 1.
Richberger v. American Exp. Co. 73 M. 161—mast. & s. 302, 302a, 302c, 306.
Richberger, Cochran v.—70 M. 843.
Richburger v. State, 90 M. 806—crim. l. 97, 411, 600, 602, 695, 699, 948, 954, 959, 996, 1032, 1037, 1064, 1146, 1168; embez. 3, 23, 25, 29, 30, 35, 44; ind. 110.
Richer, Stevens v.—1 H. 522.
Richie v. Duke, 70 M. 66—home. 204.
Richie v. McCoy, 13 S. & M. 541—bills & n. 397.
Rich Lumber Co. Phœnix Steam Laundry v.—53 So. 345.
Richmond v. Delay, 34 M. 83—dis. & d. 52; ex. & ad. 299.
Richmond &c. R. Co. v. Burnsed, 70 M. 437—carr. 237; r. r. 281, 359.
Richmond &c. R. Co. v. Chandler, 13 So. 267—r. r. 442, 447; trial, 252.
Richmond &c. R. Co. v. Rush, 71 M. 987—mast. & s. 140, 213, 243, 270, 296.
Richmond &c. R. Co. Buckner v.—72 M. 873.
Richmond &c. R. Co. Crawley v.—70 M. 340.
Richmond &c. R. Co. Rush v.—71 M. 987.
Richter v. Beaumont, 67 M. 285—tax. 530, 794; trial, 158.
Richter v. Beaumont, 71 M. 713—abate. & r. 72, 73; eject. 30.

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Ricketts v. Jolliff, 62 M. 440—ins. p. 66, 98.
Ricketts, Boyd v.—60 M. 62.
Ricketts, Money v.—62 M. 209.
Ricketts, State v.—67 M. 409.
Ricks v. Baskett, 68 M. 250—lev. 28g; quiet. t. 44; tax. 688, 721.
Ricks v. Hilliard, 45 M. 359—app. & e. 266; eq. 326; ex. & ad. 314a, 314g; des. & d. 88.
Ricks v. Richardson, 70 M. 424—courts, 475; eq. 43, 44; inj. 15.
Ricks, Butts v.—82 M. 533.
Rideout v. Mars, 54 So. 801—ins. 139.
Ridgely Lodge, No. 23, I. O. O. F. v. Redus, 78 M. 352—tax. 241.
Ridgeway v. Marshall, 5 H. 286—execution, 153d.
Ridgway, Dean v.—6 So. 236.
Ridley v. Ridley, 24 M. 648—attch. 171, 209, 217; statut. 187.
Ridley, Woods v.—27 M. 119.
Rienzi, Greene v.—87 M. 463.
Rigby v. Hardy, 4 So. 114—app. & e. 1175.
Rigby v. LeFevre, 58 M. 639—eq. 119; judgm. 71, 491.
Rigby, Adams v.—16 So. 599.
Rigby, Hamer v.—65 M. 41.
Rigby, Maulding v.—4 H. 222.
Riggs v. Coker, 69 M. 266—attch. 196; lis pens. 23.
Riggs v. Dyche, 2 S. & M. 606—banks, 192; paymt. 12; set-off, 40, 48.
Riggs v. State, 26 M. 51—crim. l. 855, 924, 957; hom. 127; ind. 71.
Riggs v. State, 30 M. 635—app. & e. 994; crim. l. 151, 564; hom. 231, 286b. 306.
Riggs, Buckingham v.—27 M. 751.
Riggs, McCrosky v.—9 S. & M. 107.
Riggs, McCrosky v.—12 S. & M. 712.
Right, Chance v.—W. 156.
Riley v. James, 73 M. 1—execution, 124; j. p. 32; sheriffs, 82.
Riley v. Moseley, 44 M. 37—des. & d. 2; ex. & ad. 263, 517, 518, 519.
Riley v. Ruffin, W. 425—bonds, 123.
Riley v. State, 43 M. 397—int. liq. 166, 171, 219, 223; slaves, 19.
Riley v. State, 18 So. 117—abduc. 2; crim. l. 823.
Riley v. Vanhouten, 4 H. 428—bills & n. 106; cncts. 153, 167, 332.
Riley, Easter v.—79 M. 625.
Riley, Kansas City &c. R. Co. v.—68 M. 765.
Riley, Wilkins v.—47 M. 306.
Riley, Woods v.—72 M. 73.
Rimer v. Dugan, 39 M. 477—cncts. 94; ven. & pur. 35, 37, 108, 115.
Rimmer v. Davis, 2 Miss. Dec. 531—ven. & pur. 287, 294.
Rimmer, Massey v.—69 M. 667.
Ring, Barnett v.—55 M. 97.
Ringo, Holman v.—36 M. 690.
Ringold, Millburn Gin &c. Co. v.—19 So. 675.
Rist v. State, 93 M. 841—ars. 38.
Ritcher v. State, 63 M. 304—int. liq. 157, 242.
Rittenhouse v. Leigh, 57 M. 697—estop. 90; partners. 33.
Rivara v. Queen's Ins. Co. 62 M. 720—app. & e. 1067; ev. 460; ins. 80, 336, 380, 388, 389, 556.
Rivers v. Kansas City &c. R. Co. 86 M. 571—carr. 357, 383.
Rivers v. Mulholland, 62 M. 766—mech. liens, 105.
Rivers v. Yazoo &c. R. Co. 90 M. 196—corp. 492.
Rivers, Cooper v.—95 M. 423.
Rivers, Marshall County v.—88 M. 45.
Rivers, Yazoo &c. R. Co. v.—93 M. 557.
Rives v. Nesmith, 64 M. 807—eject. 33; land. & t. 66.
Rives v. Odineal, 8 S. & M. 691—sales, 51.
Rives v. Patty, 43 M. 338—ex. & ad. 120a, 471.
Rives v. Patty, 74 M. 381—atty. & c. 63; ex. & ad. 418; work & lab. 4.
Rives v. Weaver, 36 M. 374—champ. 1, 4.
Rives, Coleman v.—24 M. 634.
Rives, Cook v.—13 S. & M. 328.
Rives, Elkin v.—82 M. 744.
Rives, McCoy v.—1 S. & M. 592.
Roach v. Anderson, 28 M. 234—frds. st. of, 82; propty. 9.
Roach v. Bennett, 24 M. 98—assign. f. b. c. 109; hus. & w. 31c, 144; judgm. 775.
Roach v. Brannon, 57 M. 490—attch. 39, 47, 375, 376, 378; estop. 68; fraud. conv. 228; partners, 245, 258d.
Roach v. Deering, 9 S. & M. 316—fraud. conv. 140.
Roach v. Jelks, 40 M. 754—guard. & w. ....
Roach v. Tallahatchie County, 78 M. 303—excep. 54.
Roache, McNeill v.—49 M. 436.
Roach, Irwin v.—W. 386.
Roach, Jordan v.—32 M. 481.
Roach, White v.—53 So. 622.
Roane v. Matthews, 75 M. 94—elec. 83; offic. 33; quo w. 9, 24.

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Roane, St. Louis &c. R. Co. v.—93 M. 7.
Robb v. Griffin, 26 M. 579—ex. & ad. 314b.
Robb v. Halsey, 11 S. & M. 140; eq. 45; execution, 84, 169; inf. 57; judgm. 334, 431; new tr. 10, 85; princ. & s. 39; usury, 2, 29, 99.
Robb v. McKinney, 27 M. 98—fraud. conv. 24.
Robb, Everman v.—52 M. 653.
Robbins v. McMillan, 26 M. 434—courts, 202b; estop. 27.
Robbins v. Pinckard, 5 S. & M. 51—bills & n. 423, 450; excep. 35.
Robbins Cotton Co. Mobile &c. R. Co. v.—94 M. 351.
Robbins, Hauser v.—61 M. 551.
Robbins, Warren v.—23 M. 309.
Roberds v. Mobile &c. R. Co. 74 M. 334—r. r. 406, 420.
Roberson v. Hobbs, 45 So. 365—attch. 47.
Roberts v. Barry, 42 M. 260—garn. 142, 166, 173, 177.
Roberts v. Bean, 5 S. & M. 590—assign. 83; atty. & c. 110; inj. 176.
Roberts v. Edmondson, 4 S. & M. 730—app. & e. 829.
Roberts v. Haley, 2 H. 886—plead. 412.
Roberts v. Kimmons, 65 M. 332—brok. 49, 61; cncts. 324; princ. & a. 81.
Roberts v. Mobile &c. R. Co. 32 M. 373—corp. 81, 88, 89.
Roberts v. Port Gibson, 89 M. 75—crim. l. 1077.
Roberts v. Roberts, 34 M. 322—des. & d. 64; ex. & ad. 471; lim. of act, 44; wills, 780.
Roberts v. Rogers, 28 M. 152—ex. & ad. 433, 444, 482.
Roberts v. Ross, 2 Miss. Dec. 274—inj. 116.
Roberts v. Sims, 64 M. 597—land. & t. 243, 248.
Roberts v. Singleton, 24 M. 438—app. & e. 1055; lim. of act, 200.
Roberts v. Starke, 47 M. 257—eq. 146, 148.
Roberts v. State, 55 M. 421—crim. l. 893; ind. 110, 125c, 125d.
Roberts v. State, 72 M. 110—forg. 28.
Roberts v. State, 72 M. 728—crim. l. 172.
Roberts v. Stewart, 31 M. 664—princ. & s. 108.
Roberts v. Thomas, 94 M. 219—home. 18.
Roberts v. Weiler, 52 M. 299—j. p. 89, 157.
Roberts v. Weiler, 55 M. 249—attach. 350; bankr. 435; judgm. 870e, 870g; j. p. 32; sci. fa. 4.
Roberts, Bowman v.—58 M. 126.
Roberts, Bramlett v.—68 M. 325.
Roberts, Davis v.—Sm. & M. Ch. 543.
Roberts, Edmunson v.—1 H. 322.
Roberts, Edmunson v.—2 H. 822.
Roberts, Edwards v.—7 S. & M. 544.
Roberts, Gresham v.—2 S. & M. 471.
Roberts, Hatch v.—41 M. 92.
Robertshaw v. Britton, 74 M. 873—bills & n. 476; plead. 379, 418.
Robertshaw v. Britton, 24 So. 307—bills & n. 97.
Robertshaw v. Hanway, 52 M. 713—dower, 17; ex. & ad. 44; home. 85; partners. 245, 258a.
Robertshaw, Hanway v.—49 M. 758.
Roberts, Maury v.—27 M. 225.
Roberts, Mobile &c. R. Co. v.—23 So. 393.
Roberts, Moody v.—41 M. 74.
Robertson v. Agricultural Bank, 28 M. 237—app. & e. 188; ex. & ad. 415e, 417.
Robertson v. Alford, 13 S. & M. 509—lim. of act. 5, 111.
Robertson v. Banks, 1 S. & M. 666—bills & n. 48; eq. 21; guard. & w. 51; hus. & w. 228; plead. 193, 221, 237, 430.
Robertson v. Blewett, 14 So. 33—champ. 4.
Robertson v. Bruner, 24 M. 242—app. & e. 678; hus. & w. 85.
Robertson v. Cloud, 47 M. 208—app. & e. 1007; cncts. 314; dam. 117; frds. st. of, 82; jury, 27; princ. & a. 39, 81; sales, 12.
Robertson v. Columbus Ins. &c. Co. 85 M. 234—fraud. conv. 7, 154b.
Robertson v. Crane, 27 M. 362—trover, 6.
Robertson v. Demoss, 23 M. 298—ex. & ad. 202, 223, 416.
Robertson v. Duncan, 2 Miss. Dec. 148—app. & e. 958.
Robertson v. Haun, Freem. Ch. 265—superseded. 1.
Robertson v. Hoy, 12 S. & M. 566—inj. 230.
Robertson v. Illinois Cent. R. Co. 17 So. 235—trial, 143.
Robertson v. Johnson, 40 M. 500—app. & e. 395, 794; eq. 119.
Robertson v. Robertson, 94 M. 645—wills, 188.
Robertson v. State, 87 M. 285—bail, 88, 93.
Robertson v. Ward, 12 S. & M. 490—hus. & w. 231.
Robertson v. Wells, 28 M. 90—arb. & a. 82.
Robertson v. Williams, 6 H. 579—forc. e. & d. 42.
Robertson, Anderson v.—24 M. 389.
Robertson, Anderson v.—32 M. 241.
Robertson, Bingaman v.—25 M. 390.
Robertson, Bingaman v.—25 M. 501.

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Robertson, Chambless v.—23 M. 302.
Robertson, Coulter v.—14 S. & M. 18.
Robertson, Coulter v.—24 M. 278.
Robertson, Deans v.—64 M. 195.
Robertson, Duncan v.—57 M. 820.
Robertson, Duncan v.—58 M. 390.
Robertson, Evans v.—54 M. 683.
Robertson, Hill v.—23 M. 306.
Robertson, Hill v.—24 M. 368.
Robertson, Kerr v.—5 H. 278.
Robertson, Lewis v.—13 S. & M. 558.
Robertson, Routh v.—11 S. & M. 382.
Robertson, Sanders v.—23 M. 389.
Robertson, Torry v.—24 M. 192.
Robertson, West v.—67 M. 213.
Roberts, Yazoo &c. R. Co. v.—88 M. 80.
Robeson, Hill v.—2 S. & M. 541.
Robinett v. Starling, 72 M. 652—corp. 241.
Robins v. Embry, Sm. & M. Ch. 207—assign. f. b. c. 35, 36, 42, 70, 85, 88, 89, 98; banks, 73; corp. 547, 550; fran. 6.
Robins v. Norcum, 4 S. & M. 332—assign. f. b. c. 346; ex. & ad. 82.
Robins, Goff v.—33 M. 153.
Robins, Mitchener v.—73 M. 383.
Robinson v. Aldridge, 34 M. 352—partners. 144, 217.
Robinson v. Amite County, 2 Miss. Dec. 75—tax. 196.
Robinson v. Boggan, 52 So. 705—forc. e. & d. 9, 17.
Robinson v. Bohn Mfg. Co. 71 M. 95—partners. 213, 216, 222.
Robinson v. Burritt, 66 M. 356—attch. 3; eject. 128; inf. 72; ins. p. 91.
Robinson v. Francis, 7 H. 458—app. & e. 906; contin. 15; disc. 22.
Robinson v. Gholson, 8 S. & M. 392—ex. & ad. 472.
Robinson v. Goings, 63 M. 500—carr. 94; dam. 92; partners. 174; tresp. 56.
Robinson v. Green, 6 H. 223—execution, 326; judgm. 784, 789, 791, 800.
Robinson v. Harbour, 42 M. 795—cncts. 278; cov. 26; ven. & pur. 273, 275, 303.
Robinson v. Jones, 65 M. 520—ins. p. 89, 91.
Robinson v. Jones, 68 M. 794—eject. 132; estop. 2, 91.
Robinson v. Lane, 14 S. & M. 161—bills & n. 452; ex. & ad. 100; guar. 8, 88; judgm. 951.
Robinson v. Leflore, 59 M. 148—trusts, 63½, 71, 81.
Robinson v. Lewis, 68 M. 69—tax. 674.
Robinson v. Mhoon, 68 M. 712—j. p. 192, 197.
Robinson v. Moore, 76 M. 89—lim. of act. 86, 169.
Robinson v. Noel, 49 M. 253—ack. 23, 35.
Robinson v. Painter, 8 S. & M. 613—execution, 154b.
Robinson v. Parker. See Doe v. Parker.
Robinson v. Payne, 58 M. 690—deeds, 124; hus. & w. 118, 119, 144.
Robinson v. Sanders, 24 M. 391—mast. & s. 2, 73.
Robinson v. Soule, 56 M. 549—bankr. 387; replev. 99, 123.
Robinson v. Spears, 21 So. 554—app. & e. 1169; trial, 252.
Robinson v. Stadeker, 59 M. 3—hus. & w. 78, 228.
Robinson v. State, 47 M. 423—ex. & ad. 529; sheriffs, 157.
Robinson v. State, 16 So. 201—crim. l. 761; hom. 273.
Robinson v. Thompson, Sm. & M. Ch. 454—partners. 245.
Robinson v. Vicksburg, 54 So. 858—app. & e. 1050, 1064; em. dom. 79, 101.
Robinson v. White, 7 S. & M. 39—land. & t. 270, 273.
Robinson, Alston v.—49 M. 348.
Robinson, Brooks v.—54 M. 272.
Robinson, Black v.—61 M. 54.
Robinson, Black v.—62 M. 68.
Robinson, Conger v.—4 S. & M. 210.
Robinson, Frank v.—65 M. 162.
Robinson, Frazer v.—42 M. 121.
Robinson, Georgia Pac. R. Co. v.—68 M. 643.
Robinson, Glasscock v.—13 S. & M. 85.
Robinson, Gray v.—95 M. 1.
Robinson, Green v.—3 H. 105.
Robinson, Green v.—5 H. 80.
Robinson, Harrill v.—61 M. 153.
Robinson, Hendricks v.—56 M. 694.
Robinson, McReary v.—12 S. & M. 318.
Robinson, Malone v.—12 So. 709.
Robinson Mercantile Co. v. Thompson, 74 M. 847—princ. & a. 26, 103.
Robinson Mercantile Co. McGraw v.—95 M. 828.
Robinson, Moffett v.—2 Miss. Dec. 704.
Robinson-Norton Co. Kelly Banking Co. v.—71 M. 141.
Robinson, Prophit v.—34 M. 141.
Robinson, Sands v.—12 S. & M. 704.
Robinson, Skipwith v.—24 M. 688.
Robinson, Spears v.—71 M. 774.
Robinson, Stuart v.—80 M. 290.
Robinson, Virden v.—59 M. 28.
Robinson, Wood v.—3 S. & M. 271.

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Robinson &c. Lumber Co. v. Gage, 27 So. 999—mast. & s. 101, 150.
Robins, Terry v.—5 S. & M. 291.
Robison v. Miller, 57 M. 237—interest, 22; judgm. 247; proc. 135.
Robley v. Withers, 95 M. 318—fraud. conv. 294; mtg. 162.
Robson v. Benton &c. Co. 7 S. & M. 724—banks, 207; garn. 2.
Robson, Cason v.—29 M. 97.
Robson, Carson v.—29 M. 97.
Robson, Ex parte, W. 412—mand. 141.
Robson, Harris v.—68 M. 506.
Robubson, Whitaker v.—8 S. & M. 349.
Roby, Stephens v.—27 M. 744.
Rocco v. State, 37 M. 357—app. & e. 1025, 1040; crim. l. 194, 197, 267, 292, 1116, 1167; gr. jury, 41; ind. 158; witn. 72, 309.
Rocket, May v.—25 M. 375.
Rockett, May v.—25 M. 233.
Rockhold v. State, 5 H. 291—crim. l. 1072.
Rodd v. Durbridge, 53 M. 694—eq. 340; parties, 80; ven. & pur. 280.
Roden, Gray v.—24 M. 667.
Rodewald, Nesbitt v.—43 M. 304.
Rodewald, Wilson v.—49 M. 506.
Rodewald, Wilson v.—61 M. 228.
Rodge v. Kelly, 88 M. 209—const. law 287.
Rodgers v. Hattiesburg, 55 So. 481—crim. l. 260a, 1033, 1105, 1131.
Rodgers v. Hunter, 8 S. & M. 640—bills & n. 301; judgm. 195; plead. 289.
Rodgers v. Kline, 56 M. 808—libel, 19, 56, 102, 128; plead. 229, 237, 258.
Rodgers v. State, 21 So. 130—crim. l. 823, 1172; hom. 285.
Rodgers, McBain v.—29 So. 91.
Rodgers, Pressley v.—24 M. 520.
Rodgers, State v.—29 So. 73.
Rodgers, Yazoo &c. R. Co. v.—80 M. 200.
Rodney v. Seelye, 54 M. 537—eq. 392, 452; guard. & w. 76.
Roe, Bowman v.—62 M. 513.
Roebuck, Bolton v.—77 M. 713.
Rogers v. Galloway, 3 H. 58—app. & e. 384.
Rogers v. Hahn, 63 M. 578—int. liq. 68, 75.
Rogers v. McDaniel, 3 H. 172—app. & e. 66, 494, 502, 548.
Rogers v. Mayer, 59 M. 524—hus. & w. 119; trusts, 45.
Rogers v. Rogers, 43 So. 434—ev. 419; wills, 88.
Rogers v. Sample, 33 M. 310—usury, 48.
Rogers v. State, 82 M. 479—crim. l. 814; hom. 300g.
Rogers v. State, 88 M. 38—gr. jury, 36.
Rogers v. Tullos, 51 M. 685—ex. & ad. 104, 508a; paymt. 12a.
Rogers, Bratton v.—62 M. 281.
Rogers, Harrison County v.—85 M. 578.
Rogers, Hines v.—W. 486.
Rogers, Hoff v.—67 M. 208.
Rogers, Jones v.—85 M. 802.
Rogers, Jones v.—38 So. 310.
Rogers, Kell v.—28 M. 83.
Rogers, Lehr v.—3 S. & M. 468.
Rogers, McClintock v.—12 S. & M. 702.
Rogers, Nelson v.—41 M. 635.
Rogers, Roberts v.—28 M. 152.
Rogers, Western Union Tel. Co. v.—68 M. 748.
Rogers, Whitfield v.—26 M. 84.
Rogge, Lemon v.—11 So. 470.
Rogillio, French v.—40 So. 68.
Rohrbacher v. Jackson, 51 M. 735—int. liq. 645; statut. 57.
Rollins v. Callender, Freem. Ch. 295—mtg. 171, 536.
Rollins v. Thompson, 13 S. & M. 522—eq. 141, 215; execution, 126, 270, 292, 348; judgm. 793, 800, 844; sheriffs, 123.
Rollins, Hyman v.—70 M. 412.
Rollins, New Orleans &c. R. Co. v.—36 M. 384.
Rollins, Wanita Woolen Mills v.—75 M. 253.
Rolls v. State, 52 M. 391—app. & e. 200; crim. l. 193½, 636, 878, 1085, 1165; hom. 342; jury, 115.
Romano v. Vicksburg &c. R. Co., 39 So. 781—electr. 19; trial, 143.
Romano v. Yazoo &c. R. Co. 87 M. 721—em. dom. 288, 294, 307, 308.
Romano, Thomas v.—82 M. 256.
Romanski v. Thompson, 11 So. 828—banks, 164; plead. 34.
Romberger v. Water Valley, 63 M. 218—prohib. 20.
Romoneda v. Jackson, 93 M. 92—acct. acti. on, 9.
Rooks v. Alabama &c. R. Co. 28 So. 821—r. r. 405.
Rooks, Alabama &c. R. Co. v.—78 M. 91.
Roos, Summers v.—42 M. 749.
Root v. McFerrin, 37 M. 17—adv. pos. 77; courts, 33; des. & d. 1, 88, 333, 337; judgm. 919; lim. of act. 70a.
Root, Anderson v.—8 S. & M. 362.
Rootes v. Thomas, 85 M. 493—plead. 303.
Roots v. Cohen, 12 So. 593—execution, 172.
Roots, Wetherbee v.—72 M. 355.
Rosaman v. Okolona, 85 M. 583—weap. 11.

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Rosamond v. State, 1 Miss. Dec. 122—crim. l. 1172; hom. 286b.

Roscoe, Jahier v.—62 M. 699.

Rose v. Louisville &c. R. Co. 70 M. 725—carr. 384; dam. 209; r. r. 217.

Rose v. Watson, 54 M. 673—acct. acti. on, 15; trial, 5.

Rose v. Wilkins, 78 M. 401—ben. assn. 6; ins. 727.

Rosedale, Clark v.—70 M. 542.

Rosedale Grocery Co. Sells v.—72 M. 590.

Rose, Mays v.—Freem. Ch. 703.

Rosenbaum v. Carlisle, 78 M. 882—mech. liens, 109.

Rosenbaum v. Hammack, 51 So. 213—judgm. 252.

Rosenbaum v. Meridian Light & R. Co. 38 So. 321—st. r. r. 57.

Rosenbaum v. Meridian Nat. Bank, 73 M. 267—cncts. 147; paymt. 38.

Rosenbaum v. Rosenbaum, 82 M. 454—partners. 239.

Rosenbaum v. Scott, 40 So. 485—judgm. 431; new tr. 166.

Rosenbaum, Aust v.—74 M. 893.

Rosenbaum, Bishop v.—58 M. 84.

Rosenbaum, Bryant v.—62 M. 191.

Rosenbaum, Davis Sewing Mach. Co. v.—16 So. 340.

Rosenstock v. Mississippi Home Ins. Co. 82 M. 674; ins. 282.

Rosenthal v. Enevoldsen, 61 M. 532—ex. & ad. 423.

Rosette v. Bay St. Louis, 52 So. 785—crim. l. 351, 421; judges, 26; mun. corp. 592; offic. 41.

Rose, West Point Tel. &c. Co. v.—76 M. 61.

Ross v. Baldwin, 65 M. 570—hus. & w. 138.

Ross v. Barland, W. 489—eq. 89; pub. lands, 105, 115, 119.

Ross v. Duncan, Freem. Ch. 587—fraud, 40; slaves, 22; trusts, 11, 45, 336; wills, 1.

Ross v. Fowler, 42 M. 293—attch. 253.

Ross v. Garey, 7 H. 47—app. & e. 502, 528, 530; excep. 9; execution, 194; judges, 28; new tr. 156.

Ross v. Hawthorne, 55 M. 551—execution, 189; exemp. 136; sheriffs, 131.

Ross v. Holloway, 60 M. 553—garn. 187; judgm. 436.

Ross v. Houston, 25 M. 591—princ. & a. 177; ven. & pur. 37.

Ross v. Lane, 3 S. & M. 695—counties, 57; judgm. 372; mand. 7, 121, 179, 187; tax. 297, 551, 906¾.

Ross v. Mims, 7 S. & M. 121—app. & e. 906; excep. 32; ex. & ad. 26.

Ross. v. McIntyre, 53 M. 133—app. & e. 643.

Ross v. Natchez &c. R. Co. 61 M. 12—j. p. 44; r. r. 442.

Ross v. Natchez &c. R. Co. 62 M. 23—r. r. 446.

Ross v. Nesmith, 2 Miss. Dec. 389—hus. & w. 11.

Ross v. Porter, 72 M. 361—home. 164.

Ross v. Quick, 89 M. 29—app. & e. 484.

Ross v. Ross, 89 M. 66—div. 208.

Ross v. Simpson County, 51 So. 597—counties, 126.

Ross v. Sims, 27 M. 359—judgm. 195; lim. of act. 130; plead. 225.

Ross v. Wardlaw, 3 So. 74—chat. m. 157.

Ross v. Wilson, 7 S. & M. 753—ev. 433, 460; mtg. 43; princ. & s. 147; subrog. 13, 18.

Ross v. Wimberly, 60 M. 345—ev. 83; mand. 102; mun. corp. 48.

Ross, Bowers v.—55 M. 213.

Ross, Bright v.—11 S. & M. 289.

Ross, Cox v.—56 M. 481.

Ross, Dent v.—52 M. 188.

Rossel, Levy v.—82 M. 68.

Rossel, Levy v.—82 M. 527.

Rosser, Beck v.—68 M. 72.

Ross-Mehan &c. Foundry Co. v. Pascagoula Ice Co. 72 M. 608—assign. 78; dism. 56, 78; eq. 17, 118; sales, 203, 309, 315, 450, 464, 478.

Rosson, Lesley v.—39 M. 368.

Ross, Roberts v.—2 Miss. Dec. 274.

Ross, Sevier v.—Freem. Ch. 519.

Ross, Shivers v.—91 M. 246.

Ross, Sims v.—8 S. & M. 557.

Ross, Stewart v.—50 M. 776.

Ross, Thompson v.—26 M. 198.

Ross, Walker v.—65 M. 523.

Ross, Young v.—31 M. 556.

Rotenberry v. Yalabusha County, 67 M. 470—counties, 105, 107.

Rothars v. Illinois Cent. R. Co. 25 So. 665—r. r. 341.

Rothenberg v. Bradley, 10 So. 922—assign. f. b. c. 118.

Rothenberg v. Packard, 52 So. 458—cncts. 278.

Rothrock Const. Co. v. Port Gibson Mfg. Co. 80 M. 517—garn. 42, 183; parties, 75

Rothschild v. Hatch, 54 M. 554—adv. pos. 59; app. & e. 1051; crim. l. 1169; eject. 90; ev. 271; hus. & w. 34; wills, 205; witn. 126, 143, 159.

Rouse, Polle v.—73 M. 713.

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Rouse, Saucier v.—12 So. 481.
Rouss, Perkins v.—78 M. 343.
Routh v. Agricultural Bank, 12 S. & M. 161—app. & e. 231, 1027; ev. 343; new tr. 104, 160; princ. & a. 2, 118, 145; statut. 288; trial, 82; witn. 106.
Routh v. Helm, 6 H. 127—witn. 82, 112.
Routh v. Robertson, 11 S. & M. 382—bills & n. 411.
Routh, Iler v.—3 H. 276.
Routh, Wilcox v.—9 S. & M. 476.
Roux v. Gulfort, 52 So. 485—crim. l. 789.
Rowan v. Adams, Sm. & M. Ch. 45—cncts. 138; paymt. 31; slaves, 7b; ven. & pur. 229.
Rowan v. Decell, 83 M. 718—ex. & ad. 442.
Rowan v. Lamb, 83 M. 45—app. & e. 1177; costs, 235, 241.
Rowan v. Odenheimer, 5 S. & M. 44—bills & n. 411, 526; dep. 87.
Rowan, Adams v.—8 S. & M. 624.
Rowan, Garland v.—2 S. & M. 617.
Rowan, James v.—6 S. & M. 393.
Rowan, King v.—82 M. 1.
Rowan, Lamb v.—81 M. 369.
Rowan, Lamb v.—83 M. 45.
Rowe v. Beers, 59 M. 371—eject. 8; judgm. 706; ven. & pur. 279, 295.
Rowe v. Cannon, 84 M. 101—j. p. 160, 161.
Rowe, Coleman v.—4 S. & M. 747.
Rowe, Coleman v.—5 H. 460.
Rowell, Childs v.—58 M. 512.
Rowell, Laurel v.—84 M. 435.
Rowe, Moore v.—53 So. 626.
Rowland v. Dalton, 36 M. 702—partners. 211. 213; plead. 93, 231.
Rowland v. Gridley, 1 H. 210—sheriffs, 138.
Rowland v. Hoover, 2 H. 769—bills & n. 528.
Rowland v. State, 83 M. 483—hom. 41.
Rowland, Bennett v.—1 Miss. Dec. 569.
Rowland, Bright v.—3 H. 398.
Rowley v. Cummings, 1 S. & M. 340—app. & e. 1040; attch. 128, 253; plead. 218.
Rowley, Cummings v.—1 S. & M. 340.
Rowzee v. Pierce, 75 M. 846—dedi. 56, 58, 59, 65; inj. 114.
Roy v. First Nat. Bank, 33 So. 494—ev. 511.
Roy v. First Nat. Bank, 37 So. 641—attch. 330, 367.
Roy v. Heard, 38 M. 544—garn. 96, 102, 138.
Royal, Gunning v.—59 M. 45.
Royal Ins. Co. v. Board of Levee Com'rs, 95 M. 168—statut. 38.
Royal Ins. Co. Board of Levee Com'rs v.—96 M. 832.
Royal Ins. Co. Conithan v.—91 M. 386.
Roy, Harrison v.—39 M. 396.
Royston v. Illinois Cent. R. Co. 67 M. 376—carr. 284, 321; trial, 70.
Royston, Houston v.—7 H. 543.
Royston, Houston v.—1 S. & M. 238.
Royston, Levy v.—84 M. 15.
Rozelle v. Dickerson, 63 M. 538—hus. & w. 171; usury, 42, 102.
Rozelle, Woods v.—75 M. 782.
Rubon v. Stephan, 25 M. 253—bonds, 125, 144; inj. 181, 185.
Rucker v. Dyer, 44 M. 591—ex. & ad. 129, 351.
Rucker v. Lambdin, 12 S. & M. 230—ex. & ad. 495; wills, 116, 117, 625; witn. 140, 468, 712.
Rucker v. State, 67 M. 328—gaming, 62; Sunday, 2.
Rucker v. State, 71 M. 680—hom. 350b; witn. 356.
Rucker v. State, 18 So. 121—crim. l. 561, 786, 789.
Rucker v. State, 24 So. 311—crim. l. 199.
Rucks v. Great Southern &c. Tel. Co. 23 So. 454—trial, 143.
Rucks v. Taylor, 49 M. 552—ex. & ad. 2, 519; lim. of act. 2, 56; mtg. 415; princ. & s. 190.
Rucks, Cocke v.—34 M. 105.
Rucks, Morris v.—62 M. 76.
Rudolph, Bell v.—70 M. 234.
Ruff v. Cockerell, 31 M. 57—ex. & ad. 456.
Ruff v. Montgomery, 83 M. 184—app. & e. 395.
Ruff v. Montgomery, 83 M. 185—app. & e. 151; princ. & s. 116, 194, 197.
Ruff v. Smith, 31 M. 59; abate. & r. 65; ex. & ad. 37, 453, 537; judgm. 843.
Ruff, Hickman v.—55 M. 549.
Ruffin, Illinois Cent. R. Co. v.—3 So. 578.
Ruffin, Riley v.—W. 425.
Ruff, St. Louis &c. R. Co. v.—95 M. 165.
Ruff, Vaughn v.—54 So. 837.
Rule v. Broach, 58 M. 552—dower, 33, 57; eject. 22; ex. & ad. 349; guard. & w. 87; judgm. 577.
Rule v. Rule, 39 So. 782—app. & e. 1028.
Rule v. State, 22 So. 872—crim. l. 396; perj. 30.
Rule v. Taylor, 4 S. & M. 577—app. & e. 961.
Rulon v. Lintol, 2 H. 891—new tr. 102, 149.
Rulon, Cornell v.—3 H. 54.
Rundell, Punchard v.—1 H. 508.
Rundle v. Pegram, 49 M. 751—marr. 1, 18, 26, 38.
Runnells v. Jackson, 1 H. 358—spec. perf. 93.

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Runnells v. State, W. 146—clks. of c. 2, 8.
Runnells, Smith v.—W. 144.
Runnels v. Jackson, 1 H. 358—cncts. 211; trusts, 70.
Runnels v. State, W. 146—const. law 45.
Runnels v. State, 96 M. 92—crim. l. 789, 829.
Runnels, Strong v.—2 H. 607.
Runt v. Illinois Cent. R. Co. 88 M. 575—death, 31, 35.
Rupert v. Dantzler, 12 S. & M. 697—judgm. 784.
Rupert v. Grant, 6 S. & M. 433—dep. 39; new tr. 21, 89, 95; princ. & s. 108.
Rush v. Broussard, 30 So. 635—cncts. 108.
Rush v. Pearson, 92 M. 153—usury, 95.
Rush, Bank of Mississippi v.—W. 265.
Rushing v. Keys, 4 S. & M. 191—plead. 164.
Rushing v. Lockard, 58 M. 660—judgm. 747.
Rushing v. Rushing, 52 M. 329—app. & e. 1171; dam. 197; replev. 96, 116, 140.
Russ v. Wingate, 30 M. 440—ack. 28, 49; hus. & w. 85.
Russel v. Smith Grain Co. 80 M. 688—banks, 273; carr. 50, 54; sales, 226.
Russel, Chrestman v.—73 M. 452.
Russel, Lamb v.—81 M. 382.
Russel, McAfee v.—29 M. 84.
Russell v. Cheatham, 8 S. & M. 703—bankr. 20, 208, 418.
Russell v. Clingan, 33 M. 535—garn. 180.
Russell v. Denson, 54 So. 439—dism. 12; plead. 242.
Russell v. Johnson, 39 So. 782—bills & n. 104.
Russell v. McDougall, 3 S. & M. 234—ex. & ad. 26, 531; guard. & w. 30; hus. & w. 87; judgm. 24, 128a, 306, 307, 321, 916.
Russell v. Miller, 53 So. 495—carr. 12, 195.
Russell v. Mobile &c. R. Co. 87 M. 806—carr. 177, 185.
Russell v. Moffitt, 6 H. 303—eq. 375; spec. perf. 16.
Russell v. Moore, 8 S. & M. 700—ev. 576; j. p. 175.
Russell v. State, 53 M. 367—app. & e. 1048; crim. l. 354, 479, 829, 924, 1144, 1174; jury, 109; witn. 268.
Russell v. Stevens, 70 M. 685—chat. m. 12, 48.
Russell v. Watt, 41 M. 602—gifts, 25, 40; ven. & pur. 49, 275.
Russell, Exchange Nat. Bank v.—81 M. 169.
Russell, Ford v.—Freem. Ch. 42.
Russell, Ingraham v.—3 H. 304.
Russell, Mahaffey v.—54 So. 807.
Russell, Powell v.—88 M. 549.
Russell, State v.—53 So. 954.
Russ, Lavinge v.—36 M. 326.
Russom, McCaa v.—52 M. 639.
Rutherford v. Jamieson, 65 M. 219—home. 38, 122.
Rutherford v. Munce, W. 370—dower, 15.
Rutherford, Parsons v.—84 M. 70.
Rutland v. Brister, 53 M. 683—frds. st. of, 78; ven. & pur. 254, 275.
Rutland, Eskridge v.—77 M. 784.
Rutland, McIntosh v.—88 M. 718.
Rutland, Weise v.—71 M. 933.
Rutledge, Hubbard v.—52 M. 581.
Rutledge, Hubbard v.—57 M. 7.
Ryan v. Freeman, 36 M. 175—curt. 5.
Ryan v. Mississippi Valley &c. R. Co. 62 M. 162—adv. pos. 100; app. & e. 838.
Ryan v. Paine, 66 M. 678—banks, 80.
Ryan, Leggett v.—55 M. 379.
Ryan, Louisville &c. R. Co. v.—64 M. 399.
Rye, Beeks v.—77 M. 358.
Rylee v. State, 75 M. 352—crim. l. 785.
Rylee v. State, 22 So. 890—crim. l. 785a.

S

Sadler v. Murrah, 3 H. 195—bills & n. 125; dep. 42.
Sadler v. State, 53 So. 783—crim. l. 636.
Sadler v. Hoover, 31 M. 260—interest, 32; nova. 1.
Sadler v. Mobile Life Ins. Co., 60 M. 391—ins. 73, 94, 625.
Sadler v. Prairie Lodge, 59 M. 572—garn. 212; judgm. 16, 490.
Sadler v. Sadler, 3 So. 413—cncts. 351.
Sadler v. Sadler, 60 M. 251—mills, 138.
Sadler v. State, 53 So. 783—crim. l. 636.
Sadler, Alcorn v.—66 M. 221.
Sadler, Alcorn v.—71 M. 634.
Saffaracus v. Bennett, 6 H. 277—attch. 209, 210.
Saffarans v. Terry, 12 S. & M. 690—attch. 201, 217; indians, 24; judg. 17a.
Saffold v. Barnes, 39 M. 399—corp. 255, 262.
Saffold v. Horne, 71 M. 762—eq. 367.
Saffold v. Horne, 72 M. 470—ack. 6; cncts. 157; deeds, 208; stip. 14; witn. 53.
Saffold v. State, 60 M. 928—app. & e. 230; judgm. 17a.
Saffold v. State, 76 M. 258—crim. l. 126, 761, 814; hom. 300d, 300f.
Saffold v. State, 26 So. 945—crim. l. 761.
Sage, Land &c. Co. Hubbard v.—81 M. 616.
Sagory v. Bayless, 13 S. & M. 153—eq. 430; judgm. 298.

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St. Clair v. Kansas City &c. R. Co. 76 M. 473—carr. 275.
St. Clair v. Kansas City &c. R. Co. 77 M. 789—carr. 254, 259.
St. Louis &c. Ins. Co. Harlow v.—54 M. 425.
St. Louis &c. R. Co. v. Garner, 51 So. 273—carr. 265, 277a.
St. Louis &c. R. Co. v. Roane, 93 M. 7—carr. 352, 382.
St. Louis &c. R. Co. v. Ruff, 95 M. 165—r. r. 383.
St. Louis &c. R. Co. v. Sanderson, 54 So. 885—app. & e. 283, 880; carr. 320.
St. Louis &c. R. Co. Lackey v.—94 M. 893.
St. Louis &c. R. Co. Salter v.—47 So. 897.
St. Mary's Orphan Asylum v. Powell, 2 Miss. Dec. 81—ex. & ad. 479, 510.
Sale v. French, 61 M. 170—attch. 217.
Sale v. Saunders, 24 M. 24—execution, 32; hus. & w. 10; wills, 436.
Sale, French v.—60 M. 516.
Sale, French v.—63 M. 386.
Sale, Hariston v.—6 S. & M. 634.
Salley, Young v.—83 M. 362.
Sallis, Cansler v.—54 M. 446.
Sallis, Yazoo &c. R. Co. v.—89 M. 636.
Salmon v. Smith, 58 M. 399—cred. s. 50; eq. 344; fraud. conv. 269.
Salter v. Embrey, 18 So. 373—can. of i. 19; eq. 43; home. 162.
Salter v. St. Louis &c. R. Co. 47 So. 897—app. & e. 1134.
Salter, Higdon v.—76 M. 766.
Sam v. Fore, 12 S. & M. 413—hab. corp. 3; slaves, 21; statut. 288.
Sam v. State, 13 S. & M. 189—crim. l. 277; ind. 23; jury, 83, 98, 100, 103.
Sam v. State, 31 M. 480—crim. l. 923, 1142; judges, 8; jury, 133.
Sam v. State, 33 M. 347—ars. 1, 26; crim. l. 517, 533, 563; slaves, 18c.
Sample v. Bridgeforth, 72 M. 293—bills & n. 100; sales, 36.
Sample v. Lane, 45 M. 556—guard. & w. 38, 45, 47, 68.
Sample v. Pickens, Sm. & M. Ch. 501—paymt. 12.
Sample v. Verona, 94 M. 264—elec. 313; mun. corp. 112; statut. 105.
Sample-Carter Co. v. Cox, 22 So. 801—ven. & pur. 77.
Sample, Powers v.—69 M. 67.
Sample, Powers v.—72 M. 187.
Sample, Rogers v.—33 M. 310.
Sampson v. Breed, W. 267—execution, 154b; statut. 226.
Samuel, Hill v.—31 M. 307.
Samuels, Picard v.—64 M. 822.
Samuel Wymond Cooperage Co. Miss. Eastern R. Co. v.—93 M. 73.
Sanders v. Douglass, 3 S. & M. 454—ex. & ad. 408, 437; inj. 26.
Sanders v. Dowell, 7 S. & M. 206—acct. 20; courts, 85; eq. 422; jud. s. 21; proc. 144.
Sanders v. Goodbar, 23 So. 583—assign. f. b. c. 137.
Sanders v. McDowell, 4 H. 9—app. & e. 165.
Sanders v. Robertson, 23 M. 389—ex. & ad. 433; judgm. 145; lim. of act. 143.
Sanders v. Simmons, 12 So. 850—eject. 121.
Sanders v. Smith, 5 So. 514—bills & n. 452.
Sanders v. Sorrell, 65 M. 288—ex. & ad. 381.
Sanders v. State, 73 M. 444—crim. l. 721.
Sanders v. State, 74 M. 531—app. & e. 553.
Sanders v. Young, 31 M. 111—partners. 220, 271.
Sanders, Burrow v.—57 M. 211.
Sanders, Cumberland Tel. &c. Co. v.—83 M. 357.
Sanders, Illinois Cent. R. Co. v.—93 M. 107.
Sanders, Kennedy v.—90 M. 524.
Sanders, Lyon v.—23 M. 530.
Sanderson, St. Louis &c. R. Co. v.—54 So. 885.
Sanders, Perkins v.—56 M. 733.
Sanders, Rankin v.—6 H. 52.
Sanders, Robinson v.—24 M. 391.
Sanders, Yazoo &c. R. Co. v.—87 M. 607.
Sandford v. Campbell, 7 S. & M. 107—acct. acti. on, 1; dam. 198; judgm. 128.
Sandidge, Hopkins v.—31 M. 668.
Sandifer v. Grantham, 62 M. 412—ex. & ad. 137; wills, 693.
Sandifer v. Mackey, 3 So. 570—ex. & ad. 24.
Sandifer, Brinson v.—90 M. 41.
Sandler v. Bowles, 42 M. 414—cov. 26.
Sands v. Robinson, 12 S. & M. 704—gr. jury, 41; libel, 43; witn. 72.
Sands, McCrary v.—1 Miss. Dec. 226.
Sanford v. Eastabutchie Lumber Co. 83 M. 478—mtg. 6; ven. & pur. 228.
Sanford v. Meridian, 52 M. 383—dedi. 1, 49; tax. 606.
Stanford v. State, 91 M. 158—crim. l. 306; blasph. 1.
Sanford v. Starling &c. Co. 69 M. 204—chat. m. 32, 74; cncts. 104; int. liq. 327.
Sanford, Illinois Cent. R. Co. v.—75 M. 862.
Sanford, McDonald v.—88 M. 633.
Santacruz v. Santacruz, 44 M. 714—app. & e. 69; eq. 141, 179; mtg. 453.
Sarah v. State, 28 M. 267—hom. 25, 135;

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ind. 125a, 130, 132, 133, 139, 140; slaves, 18b.
Saratoga Lumber Co., Gambrell Lumber Co. v.—87 M. 773.
Sardis &c. R. Co. v. McCoy, 85 M. 391—trial, 187.
Sargent, Lexington v.—64 M. 621.
Sartor v. Sartor, 39 M. 760—wills, 86, 88, 222, 315.
Sartor, Haughton v.—71 M. 357.
Sartorious v. State, 24 M. 602—crim. l. 261, 763; larc. 41; rec. s. goods, 8, 9; trial, 41; witn. 285.
Sartorius, Knowland v.—46 M. 56.
Satterwhite v. Littlefield, 13 S. & M. 302—app. & e. 181, 984; ex. & ad. 104, 482, 495, 507, 519.
Saucier v. Amari, 63 M. 276—excep. 35, 57.
Saucier v. Rouse, 12 So. 481—inj. 26.
Saucier v. State, 95 M. 226—crim. l. 416; ind. 160; perj. 29, 30, 35, 37.
Saucier, Campe v.—68 M. 278.
Saucier, Louisville &c. R. Co. v.—1 So. 511.
Saucier, Smith v.—40 So. 328.
Sauls Bros. & Co. Greenburg v.—91 M. 410.
Saunder, Carter v.—2 H. 851.
Saunders v. Columbus Life &c. Co. 43 M. 583—attch. 129, 145, 177, 322, 327.
Saunders v. Douglass, 3 S. & M. 454—ex. & ad. 428.
Saunders v. Erwin, 2 H. 732—afft. 9, 12; dep. 2, 31; offic. 106.
Saunders v. Jordan, 54 M. 428—execution, 188; replev. 3.
Saunders v. McLean, 65 M. 397—ten. in c. 18.
Saunders v. Mitchell, 61 M. 321—bankr. 25, 146, 438; ins. p. 91, 101.
Saunders v. Morse, 3 H. 101—venue, 75.
Saunders v. Planters' Bank, 2 S. & M. 287—ex. & ad. 409, 410, 412, 415; insolv. 47, 84.
Saunders v. Richardson, 2 S. & M. 90—bills & n. 428; paymt. 12.
Saunders v. Saunders, 14 S. & M. 81—wills, 247, 418.
Saunders v. Saunders, 49 M. 327—app. & e. 413; lim. of act. 70a.
Saunders v. Stephenson, 94 M. 676—ex. & ad. 227.
Saunders, Adams v.—89 M. 784.
Saunders, Adams v.—93 M. 520.
Saunders, Coleman v.—5 H. 287.
Saunderson, Aberdeen v.—8 S. & M. 663.
Saunderson, Neal v.—2 S. & M. 572.
Saunderson, Phillips v.—Sm. & M. Ch. 462.
Saunders, Sale v.—24 M. 24.
Saunders, Walker v.—1 Miss. Dec. 50.
Savage v. Dowd, 54 M. 728—estop. 3; fraud. conv. 95, 103; judgm. 786.
Savage v. Laclede Bank, 62 M. 586—bills & n. 329.
Savage, Carpenter v.—93 M. 233.
Savings B. and L. Assn. v. Tart, 81 M. 276—des. & d. 127, 131; guard. & w. 182b.
Savings Institution, Wallace v.—49 M. 616.
Savings &c. Assn. v. Tart, 30 So. 693—app. & e. 69.
Sawyer v. Smith, 41 M. 554—attch. 20.
Sawyers, Watson v.—54 M. 64.
Saxon v. Ames, 47 M. 565—courts, 200¼, 202, 202a; des. & d. 98, 108; inf. 89.
Saxony Mills v. Wagner, 94 M. 233—corp. 641, 642, 668; garn. 56.
Sayer, Rector v.—69 M. 235.
Sayers, Williams v.—79 M. 50.
Sayle, Brett v.—60 M. 192.
Sayler, Supreme Conclave Knights of Damon v.—32 So. 50.
Scraggs v. State, 8 S. & M. 722—crim. l. 364, 405, 636; hom. 327.
Scales v. Anderson, 26 M. 94—action, 26; use & o. 6; ven. & pur. 191.
Scales, Hemingway v.—42 M. 1.
Scales, Home Ins. Co. v.—71 M. 975.
Scales, McLemore v.—68 M. 47.
Scales, Weimer v.—74 M. 1.
Scanland, Kerningham v.—6 H. 540.
Scanlan, Jackson v.—65 M. 481.
Scanlan, Vicksburg &c. R. Co. v.—63 M. 413.
Scarboro, Bodly v.—5 H. 729.
Scarborough v. Elmer, 87 M. 508—tax. 799.
Scarborough v. Harrison Naval Stores Co. 95 M. 497—app. & e. 515, 553; atty. & c. 87.
Scarborough v. Smith, 52 M. 517—new tr. 163; witn. 379.
Scarborough v. Webb, 59 M. 449—bailm. 12; trover, 12.
Scarborough, Donnelly v.—91 M. 584.
Scarver v. State, 53 M. 407—crim. l. 818; larc. 23, 75.
Schaffer, Foster v.—84 M. 197.
Scharff v. Chaffe, 68 M. 641—attch. 251.
Scharff v. Fonda, 71 M. 627—judgm. 569.
Scharff v. Lisso, 63 M. 213—lim. of act. 2, 169; plead. 223.
Scharff v. Noble, 67 M. 143—action, 48; bonds, 122; judgm. 629; partners. 184.
Scharff v. Zimmerman, 60 M. 760—judgm. 784.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Scherck v. Montgomery, 81 M. 426—corp. 128, 133; inj. 5.
Scherck v. Moyse, 94 M. 259—frds. st. of, 110, 158; ven. & pur. 342.
Scherck, Smith v.—60 M. 491.
Scherling, Barney v.—40 M. 320.
Schiaffino v. Christ, 96 M. 801—hus. & w. 150; mech. liens, 277.
Schild, Georgia Home Ins. Co. v.—73 M. 128.
Schirling v. Scites, 41 M. 644—atty. & c. 69.
Schlicht v. Callicott, 76 M. 487—app. & e. 47; land. & t. 22, 270.
Schlottman v. Hoffman, 73 M. 188—ev. 449, 454; wills, 441.
Schmidlapp v. Currie, 55 M. 597—partners. 180, 183.
Schmidt, Davis v.—68 M. 736.
Schmidt, Trowbridge v.—82 M. 475.
Schoolfield v. Hirsh, 71 M. 55—garn. 51; judgm. 844.
Schoolfield v. Wilkings, 60 M. 238—hus. & w. 149.
Schrader v. State, 84 M. 593—crim. l. 829, 1115, 1166½, 1171; hom. 169, 300c; jury, 110.
Schragg, Yazoo &c. R. Co. v.—84 M. 125.
Schuler v. Murphy, 91 M. 518—garn. 105; partit. 26.
Schulherr v. Bordeaux, 64 M. 59—elec. 270.
Schullherr v. State, 68 M. 227—estop. 92; int. liq. 86, 88.
Schulherr, Meridian Waterworks Co. v.—17 So. 167.
Schultz, Illinois Cent. R. Co. v.—87 M. 321.
Schumpert v. Dillard, 55 M. 348—bills & n. 430; comp. 14; judgm. 716; lim. of act. 117; mtg. 14, 43, 148, 307, 460; partners. 64.
Schumpert, Conwill v.—2 Miss. Dec. 546.
Schwab, Williams v.—56 M. 338.
Schwall v. State, 21 So. 660—crim. l. 1159; lewd. 1.
Schwartz v. Lieber, 79 M. 257—mtg. 608½.
Schwartz v. Lieber, 32 So. 954—mtg. 38.
Schwartz, Adams v.—80 M. 660.
Schwartz, Morgan v.—66 M. 613.
Scites, Schirling v.—41 M. 644.
Scofield v. Pensons, 26 M. 402—j. p. 44, 141.
Scott v. Billgerry, 40 M. 119—eq. 2, 23; jury, 9; sales, 173; states, 18b; u. s. 26.
Scott v. Bonner, 11 So. 791—trial, 143.
Scott v. Calvit, 3 H. 148—eq. 243; ex. & ad. 143; wills, 422.
Scott v. Cleveland, 33 M. 447—paymt. 42.
Scott v. Freeland, 7 S. & M. 409—guard. & w. 70, 99, 104; trusts, 231.
Scott v. Hamblin, 3 S. & M. 285—disc. 19; paymt. 12; usury, 19.
Scott v. James, 3 H. 307—hus. & w. 11; wills, 629.
Scott v. Loomis, 13 S. & M. 635—ev. 178, 180.
Scott v. Metcalf, 13 S. & M. 563—assign. 74; bills & n. 286, 433, 455, 480.
Scott v. Neely, 140 U. S. 106—eq. 2.
Scott v. Nichols, 27 M. 94—const. law, 208; jury, 19; lim. of act. 56; princ. & s. 181, 189.
Scott v. Peebles, 2 S. & M. 546—judgm. 250; libel, 6, 23, 74, 79, 100; plead, 63, 204; trial, 330.
Scott v. Porter, 44 M. 364—app. & e. 925; courts, 34; guard. & w. 58, 77, 159, 161; judgm. 639.
Scott v. Searles, 1 S. & M. 590—app. & e. 374.
Scott v. Searles, 5 S. & M. 25—courts, 202c; inj. 110; new tr. 115; partners. 258; statut. 223, 225.
Scott v. Searles, 7 S. & M. 498—eq. 22; ex. & ad. 92, 170.
Scott v. Scott, 73 M. 575—div. 89; eq. 15; home. 118b, 133; hus. & w. 283.
Scott v. State, 31 M. 473—app. & e. 267; crim. l. 1038, 1056; ind. 107, 110, 203; slaves, 19.
Scott v. State, 56 M. 287—hom. 115, 186; trial, 267.
Scott v. State, 60 M. 268—crim. l. 970, 1184; ind. 189, 191.
Scott v. State, 62 M. 781—burg. 1.
Scott v. State, 70 M. 247—crim. l. 1111, 1142, 1143; hab. corp. 30; jury, 32.
Scott v. State, 80 M. 197—crim. l. 595, 600, 721½.
Scott v. State, 91 M. 156—forg. 20.
Scott v. State, 92 M. 833—witn. 393.
Scott v. State, 39 So. 1012—witn. 381.
Scott v. State, 42 So. 184—crim. l. 823; hom. 300, 300e.
Scott v. Terry, 37 M. 65—des. & d. 41.
Scott v. Tupper, 8 S. & M. 280—partners. 245.
Scott v. Watkins, 2 S. & M. 233—app. & e. 671; witn. 82, 101, 112.
Scott v. Windham, 73 M. 76—corp. 258, 274, 275; execution, 158; garn. 108, 188.
Scott v. Wood, 41 M. 661—sales, 150, 345.
Scott v. Yazoo &c. R. Co. 72 M. 37—r. r. 446.

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Scott, Babcock v.—1 H. 100.
Scott County, Duncan v.—64 M. 38.
Scott County, Haskins v.—51 M. 406.
Scott County, Simmons v.—68 M. 37.
Scott, Ex parte, 11 So. 657—crim. l. 979, 1184; hab. corp. 1, 30.
Scott, Ferguson v.—49 M. 500.
Scott, Fitch v.—3 H. 314.
Scottish-American Mortg. Co. v. Buckley, 81 M. 599—deeds, 133.
Scottish-American Mortg. Co. v. Bunckley, 88 M. 641—estop. 55, 94, 95; judgm. 736; mtg. 171; quiet t. 48; ten. in c. 35.
Scottish-American Mortgage Co. v. Butler, 54 So. 666—aliens, 5; lim. of act. 88; mtg. 342c.
Scottish-American Mortg. Co. Butler v.—93 M. 215.
Scottish &c. Ins. Co. v. Enslie, 78 M. 157—ins. 500, 623.
Scott, Keller v.—2 S. & M. 81.
Scott, Lampley v.—24 M. 528.
Scott, Mills v.—62 M. 525.
Scott, Miss. &c. R. Co. v.—7 H. 79.
Scott, Montgomery v.—61 M. 409.
Scott, Peyton v.—2 H. 870.
Scott, Planters' Bank v.—5 H. 246.
Scott, Richardson v.—47 M. 236.
Scott, Rosenbaum v.—40 So. 485.
Scott, Searles v.—6 S. & M. 246.
Scott, Searles v.—14 S. & M. 94.
Scott, Ward v.—57 M. 826.
Scott, Yazoo &c. R. Co. v.—95 M. 43.
Scranton v. Bosarge, 19 So. 194—eject. 68.
Scranton, Chidsey v.—70 M. 449.
Scranton, Pomet v.—W. 406.
Scroggins v. Foster, 76 M. 318—land. & t. 245.
Scroggins v. Howarth, 23 M. 514—judgm. 408.
Scruggs v. Blair, 44 M. 406—partners. 45, 246.
Scruggs, Illinois Cent. R. Co. v.—69 M. 418.
Scruggs, Memphis &c. R. Co. v.—50 M. 284.
Scruggs, Viser v.—49 M. 705.
Scudder v. Seals, W. 154—hab. corp. 8; slaves, 4, 9.
Scully v. Lowenstein, 56 M. 652—judgm. 428, 713, 739.
Scurr, Chicago &c. R. Co. v.—59 M. 456.
Seal v. Donnelly, 60 M. 658—ferries, 9.
Seal v. State, 13 S. & M. 286—crim. l. 923; gaming, 63, 105; gr. jury, 40; ind. 24.
Seal v. State, 2 Miss. Dec. 450—crim. l. 187.
Seale, Bowen v.—45 M. 30.
Seales, Wallace v.—36 M. 53.
Seal, Harrison County v.—66 M. 129.
Seal, Hewes v.—80 M. 437.
Seal, Nixon v.—78 M. 363.
Seal, Nixon v.—27 So. 875.
Seal, Pennington v.—49 M. 518.
Seal, Polk v.—25 So. 661.
Seals v. Perkins, 96 M. 704—tax. 434, 688, 734, 734a, 734b, 761, 802.
Seals v. Williams, 80 M. 234—forc. e. & d. 4, 9.
Seals, Blodgett v.—78 M. 522.
Seals, Scudder v.—W. 154.
Seal, Weddell v.—45 M. 726.
Seaman, Hyman v.—33 M. 185.
Seaman's Illinois Cent. R. Co. v.—79 M. 106.
Seaman, Water Val. Mfg. Co. v.—53 M. 655.
Searcy, Davis v.—79 M. 292.
Searles v. Alabama &c. R. Co. 69 M. 186—carr. 187.
Searles v. Kelly &c. Co. 88 M. 228—mtg. 342e, 356.
Searles v. Scott, 6 S. & M. 246—ex. & ad. 22; partners. 258; rec. 29.
Searles v. Scott, 14 S. & M. 94—acct. 22; courts, 198, 202c; eq. 12, 22; ex. & ad. 74, 99, 120, 508a, 509.
Searles v. Smith. See Russel v. Smith Grain Co.
Searles v. Western Assur. Co. 88 M. 260—app. & e. 1027; ins. 469, 614.
Searles, Adler v.—86 M. 406.
Searles, Alabama &c. R. Co. v.—71 M. 744.
Searles, American Steel Hoop Co. v.—93 M. 1.
Searles, Scott v.—1 S. & M. 590.
Searles, Scott v.—5 S. & M. 25.
Searles, Scott v.—7 S. & M. 498.
Searles, Sun Mut. Ins. Co. v.—73 M. 62.
Searles, Wilkinson v.—70 M. 392.
Searles, Yazoo &c. R. Co. v.—85 M. 520.
Sears v. Gunter, 39 M. 338—execution, 193.
Seasongood, Cockrell v.—33 So. 76.
Seavey & Co. v. Godbold, 54 So. 838—land. & t. 254.
Seavy v. Bennett, 64 M. 735—lim. of act. 61.
Seawell, Kirk v.—2 S. & M. 571.
Seelbinder v. Illinois Cent. R. Co. 73 M. 84—r. r. 102.
Seelye, Rodney v.—54 M. 537.
Seibe, Funchess v.—27 M. 634.
Seibles, Lewis v.—65 M. 251.
Seide, Southern Express Co. v.—67 M. 609.
Selcer, Ferriday v.—Freem. Ch. 258.
Selden v. Coffee, 55 M. 41—deeds, 109; tax. 362½, 419, 764.

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Self v. Howland, 23 M. 264—hus. & w. 152, 179.
Self v. State, 90 M. 58—crim. l. 404, 475.
Sellars v. Kelly, 45 M. 323—contin. 23; hus. & w. 58, 138; replev. 21.
Selleck v. Macon Compress &c. Co. 72 M. 1019—eq. 5; parties, 4; wareh. 11.
Selleck v. Pollock, 69 M. 870—assign. f. b. c. 124, 171.
Sellers v. Talby, 33 M. 582—ex. & ad. 337.
Sellers, Ex parte, W. 414—app. & e. 28.
Sellers, Guice v.—43 M. 52.
Sellers, Lindsey v.—25 M. 169.
Sells v. Grocery Co. 72 M. 590—assign. f. b. c. 2; corp. 326, 426, 544, 550, 617.
Selma &c. R. Co. v. Anderson, 51 M. 829—corp. 80, 90; trial, 197.
Selph v. Howland, 23 M. 264—mech. liens, 65.
Selser v. Ferriday, 13 S. & M. 698—det. 8, 19; judgm. 422, 428; witn. 112.
Selser v. Wilkinson, W. 108—judgm. 107.
Selser, Fernday v.—4 H. 506.
Seltzer v. Fuller, 6 S. & M. 185—witn. 410.
Seminary, Gandsi v.—95 M. 315.
Seminary, Gulf &c. R. C. v.—81 M. 237.
Seminary, Polk v.—89 M. 293.
Semmes v. Patterson, 65 M. 6—garn. 90, 96.
Semmes v. Wheatley, 7 So. 430—can. of i. 54; home. 70.
Semmes, Coleman v.—56 M. 321.
Semple v. McGatagan, 10 S. & M. 98—eq. 360; judgm. 407; new tr. 102.
Semple v. Vicksburg, 62 M. 63—mast. & s. 304; mun. corp. 747.
Senatobia Educational Assn. Blackbourn v.—74 M. 852.
Senatobia Oil Co. v. Poag, 86 M. 457—licens. 18.
Senior v. Brogan, 66 M. 178—trial, 112, 314.
Senter, Jamison v.—56 M. 194.
Sergeant, Johns v.—45 M. 332.
Serpentine v. State, 1 H. 256—crim. l. 517, 522; ind. 58, 87.
Servis v. Beatty, 32 M. 52—const. law, 19; courts, 198; eq. 2, 182; ex. & ad. 135; ven. & pur. 254, 254a, 274; witn. 82, 234.
Sessions v. Bacon, 23 M. 272—hus. & w. 171.
Sessions v. Jones, 6 H. 123—can. of i. 2; execution, 154.
Sessions v. Kell, 30 M. 458—guard. & w. 13.
Sessions v. Reynolds, 7 S. & M. 130—ack. 18; app. & e. 181, 689; champ. 1; deeds, 8, 20, 121; ev. 342, 343; ven. & pur. 233.
Sessions, Bingham v.—6 S. & M. 13.
Sevier v. McWhorter, 27 M. 442—assign. 59; judgm. 799.
Sevier v. Minnis, 71 M. 473—hus. & w. 168; tax. 674.
Sevier v. Ross, Freem. Ch. 519—execution, 172, 270.
Sevier v. Vicksburg &c. R. Co. 61 M. 8—carr. 272, 281.
Seward, Blumenfeld v.—71 M. 342.
Sewell v. Continental Casualty Co. 92 M. 857—ins. 363, 392.
Sexton v. Coahoma County, 86 M. 380—counties, 52; pub. lands, 55; tax. 175.
Seynour, State v.—78 M. 134.
Shackelford v. Brown, 72 M. 380—eq. 338, 345, 348; tax. 809.
Shackelford v. Douglass, 31 M. 95—lim. of act. 140, 186.
Shackelford v. Franks, 25 M. 49—assign. 20.
Shackelford v. Hooker, 54 M. 716—bills & n. 68, 83; ev. 449.
Shackelford v. Levy, 63 M. 125—costs, 21; judgm. 272.
Shackelford v. New Orleans &c. R. Co. 37 M. 202—cust. & u. 2; r. r. 17.
Shackelford v. Smith, 61 M. 5—inj. 244.
Shackelford, Crowder v.—35 M. 321.
Shackelford, New Orleans &c. R. Co. v.—87 M. 610.
Shackelford, Hoover v.—23 M. 520.
Shackelford, Weatherby v.—37 M. 559.
Shackelford, Trahern v.—3 H. 73.
Shackleford v. Mississippi Cent. R. Co. 52 M. 159—abate. & r. 36; parties, 49; r. r. 140.
Shackleford, Baughn v.—48 M. 255.
Shackleford, Duke v.—56 M. 552.
Shackleford, Hunt v.—55 M. 94.
Shackleford, Hunt v.—56 M. 397.
Shackleford, Lansdale v.—W. 149.
Shackleford, Long v.—25 M. 559.
Shackleford, State v.—56 M. 648.
Shacklett v. Polk, 51 M. 378—cncts. 133, 144; hus. & w. 84, 85, 110½; logs, 34; sales, 202; war, 15.
Shaefer v. Minor, 1 H. 218—bonds, 123.
Shafer, Hirsch v.—66 M. 439.
Shaffer v. State, 1 H. 238—crim. l. 631; ind. 20, 25; jury, 70.
Shafner, Fearing v.—62 M. 791.
Shaifer, Easterling v.—38 So. 230.
Shands, Holmes v.—26 M. 639.
Shanks v. Chambless, W. 249—ten. in c. 9.
Shanks v. Greenville, 57 M. 168—land. & t. 248; sheriffs, 113.
Shanks v. State, 51 M. 464—offic. 64.
Shanks, State v.—88 M. 410.

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Shannon v. Blum, 60 M. 828—attch. 63; princ. & a. 145.
Shannon v. Davis, 64 M. 717—life est. 5; trusts, 369; wills, 684.
Shannon v. Georgia State B. & L. Assn. 78 M. 955—b. & l. assn. 25, 33, 46.
Shannon v. Rester, 69 M. 238—dism. 22; parties, 95.
Shannon v. Summers, 86 M. 619—ev. 159, 183; ex. & ad. 346, 363, 380; jud. s. 45, 53.
Shannon v. Summers, 50 So. 693—eject. 113.
Shannon, Bookout v.—59 M. 378.
Shannon, Bunch v.—46 M. 525.
Shannon, Georgia State B. & L. Assn. v.—80 M. 642.
Shannon, Howell v.—80 M. 598.
Shannon, Pate v.—69 M. 372.
Shannon, Postal Tel. Co. v.—91 M. 476.
Shannon, Stokes v.—55 M. 593.
Shannon, Waller v.—53 M. 500.
Shantz, Picard v.—70 M. 381.
Sharbrough, Thames v.—27 So. 834.
Sharkey v. State, 33 M. 353—gaming, 64.
Sharkey County, Evans v.—89 M. 302.
Sharkey County, Williams v.—74 M. 122.
Sharkey, Vicksburg &c. R. Co. v.—1 Miss. Dec. 158.
Sharman v. Staten, 8 So. 851—eq. 268; ven. & pur. 280.
Sharp, Beal v.—1 Miss Dec. 325.
Sharp, Brown v.—81 So. 712.
Sharpe v. Maxwell, 30 M. 589—ev. 248; hus. & w. 5.
Sharpe v. Spengler, 48 M. 360—mech. liens, 286.
Sharpe, Dunton v.—1 Miss. Dec. 231.
Sharpe, Dunton v.—70 M. 850.
Sharpley v. Plant, 79 M. 175—ex. & ad. 26, 367, 380; mtg. 342d, 372.
Sharpley v. Reese, 1 Miss. Dec. 523—sales, 265.
Sharpe, Planters' Bank v.—4 S. & M. 17.
Sharpe, Planters' Bank v.—4 S. & M. 75.
Sharp, Hyland v.—88 M. 567.
Shattuck v. Daniel, 52 M. 834—state, 18c; tax. 3, 622, 656.
Shattuck v. Miller, 50 M. 386—action, 48; execution, 187; indem. 15; judgm. 715; j. p. 44; sheriffs, 89, 126; statut. 239.
Shattuck v. State, 51 M. 50—cmpt. 19, 30, 53, 66; hab. corp. 22, 81, 94.
Shattuck v. State, 51 M. 575—escape, 6, 10; offic. 66; sheriffs, 104.
Shattuck v. Young, 2 S. & M. 30—des. & d. 91; ex. & ad. 314d, 314f, 314g.
Shattuck, Beall v.—53 M. 358.
Shattuck, Shirley v.—28 M. 13.
Shaughnessey, McLaughlin v.—42 M. 520.
Shaughnessy, American Burial Case Co. v.—59 M. 398.
Shaw v. Alexander, 32 M. 229—parties, 57.
Shaw v. Brown, 35 M. 246—citiz. 1, 11; eq. 324, 327; slaves, 12; states, 4.
Shaw v. Brown, 42 M. 309—abate. & r. 85; attch. 211; plead. 155, 252, 253, 254, 355.
Shaw v. Laurel Oil &c. Co. 92 M. 340—judgm. 570.
Shaw v. McCandless, 36 M. 296—chat. m. 82; ship. 3, 30.
Shaw v. Millsaps, 50 M. 380—eq. 115, 117, 367; execution, 172; fraud. conv. 172, 311.
Shaw v. Postal Tel. Cable Co. 79 M. 670—tel. & t. 54.
Shaw v. State, 79 M. 21—crim. l. 561, 666½; hom. 167.
Shaw v. State, 79 M. 577—crim. l. 855, 957.
Shaw v. Stribling, 2 Miss. Dec. 280—acct. 12; ref. of inst. 21.
Shaw v. Thompson, Sm. & M. Ch. 628—execution, 178; ex. & ad. 45.
Shaw v. Woffard, 82 M. 143—anim. 47.
Shaw, Burke v.—59 M. 443.
Shaw, Dutton v.—38 So. 638.
Shaw, McCord v.—27 So. 602.
Shaw, Mullins v.—77 M. 900.
Shaw, Renfrow v.—4 H. 651.
Shaw, Wildberger v.—84 M. 442.
Shay v. Holmes, 25 So. 872—quiet. t. 35; tax. 135.
Shearer v. Shearer, 50 M. 113—eq. 215, 232.
Shearer v. Winston, 33 M. 149—adv. pos. 12; partit. 15, 26.
Shedd, Weil v.—8 So. 329.
Sheehan v. Kearney, 82 M. 688—app. & e. 1169; ev. 85, 90, 478; wills, 21, 51, 55, 111, 154, 322, 418.
Sheffield v. Friedberg, 84 M. 188—eq. 418.
Sheffield, Griffin v.—38 M. 359.
Sheffield, Werner Sawmill Co. v.—89 M. 12.
Sheffy, Liverpool &c. Ins. Co. v.—71 M. 919.
Shehan, Condon v.—46 M. 710.
Shelby v. Alcorn, 36 M. 273—offic. 1, 30.
Shelby v. Brown, 24 So. 531—agric. 11; app. & e. 525, 553.
Shelby v. Offutt, 51 M. 128—aband. 1; new tr. 182; trial, 267; war, 10.
Shelby, Kilcrease v.—23 M. 161.
Shelby, Leach v.—58 M. 681.
Shelby, Thompson v.—3 S. & M. 296.
Shelby, Yazoo &c. R. Co. v.—95 M. 155.
Shell, Heckingbottom v.—3 S. & M. 588.

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Shell, Mitchell v.—49 M. 118.
Shell, Thomas v.—76 M. 556.
Shell, Wilborn v.—59 M. 205.
Shelton v. Baldwin, 26 M. 439—slaves, 9; statut. 184.
Shelton v. Hamilton, 23 M. 496—courts, 88, 97; execution, 69, 351.
Shelton v. Keirn, 45 M. 106—pub. lands, 51, 54, 105, 110.
Shelton v. Laird, 68 M. 175—guard. & w. 64, 119; trusts, 355.
Shelton v. Thompson, 53 So. 538—pub. lands, 142.
Shelton, Bellamy v.—26 M. 250.
Shelton, Brooks v.—54 M. 353.
Shelton, Brooks v.—74 M. 243.
Shelton, McLeod v.—42 M. 517.
Shelton, Smith v.—1 Miss. Dec. 78.
Shelton, Vanzant v.—40 M. 332.
Shelton, Wright v.—Sm. & M. Ch. 399.
Shepard, Barker v.—42 M. 277.
Shepherd v. State, 89 M. 147—gr. jury, 8.
Shepherd, Ferguson v.—58 M. 804.
Shepherd, Henry v.—52 M. 125.
Shepherd, Trager v.—18 So. 122.
Sheppard, Equitable Securities Co. v.—78 M. 217.
Sheppard, Gadberry v.—27 M. 203.
Shepprie v. State, 79 M. 740—crim. l. 918; jury, 103.
Sherley, Bruner v.—27 M. 407.
Sherman v. Bank, 66 M. 648—attch. 162, 322; execution, 8.
Sherman v. Grenada, 51 M. 186—mun. corp. 745, 747.
Sherman v. Lovejoy, 30 M. 105—app. & e. 1097.
Sherman, Collins v.—31 M. 679.
Sherman, Jenkins v.—77 M. 884.
Sherman, Jones v.—56 M. 559.
Sherman, Mitchell v.—Freem. Ch. 120.
Sherrod v. State, 90 M. 856—ind. 145; witn. 406.
Sherrod v. State, 93 M. 774—crim. l. 191, 636.
Sherrod, Rhodes v.—8 S. & M. 97.
Sherwood v. Houston, 41 M. 59—attch. 308; ev. 340.
Shewalter v. Brown, 35 M. 423—licens. 15.
Shewalter v. Ford, 34 M. 417—plead. 146; sales, 275, 281; slaves, 7a; set-off, 12.
Shields v. Graves, 6 H. 262—app. & e. 545, 672, 1169; execution, 153d, 154b; excep. 9.
Shields v. State, 87 M. 429—hom. 192, 195.
Shields v. Taylor, 13 S. & M. 127—judgm. 195, 572; plead. 79, 173, 222, 245.
Shields v. Taylor, 25 M. 13—assign. 10, 20, 49; atty. & c. 116; paymt. 19.
Shields v. Thomas, 71 M. 260—banks, 80; trusts, 49.
Shieldsboro, Pieri v.—42 M. 498.
Shields, Building &c. Assn. v.—71 M. 630.
Shields, Mayer v.—59 M. 107.
Shields, Natchez v.—74 M. 871.
Shields, Natchez Building &c. Assn. v.—71 M. 630.
Shields, Paddock v.—57 M. 340.
Shine v. State, 42 M. 331—crim. l. 888; larc. 81.
Shines v. Hamilton, 87 M. 384—elec. 227, 269, 283.
Shingleur v. Western Union Tel. Co. 72 M. 1030—tel. & t. 39, 52, 57.
Shingleur-Johnson Co. v. Canton Cotton-Warehouse Co. 78 M. 875—app. & e. 173, 181; wareh. 11, 29.
Shipp v. McKee, 80 M. 741—inf. 30, 31, 72; partit. 12.
Shipp v. New South B. & L. Assn. 81 M. 17—mtg. 342e.
Shipp v. Wheeless, 33 M. 646—guard. & w. 42, 104; wills, 590.
Shippers' Compress Co. Buntyn v.—63 M. 94.
Shippers' Compress Co. Timberlake v.—72 M. 323.
Shippey &c. Co. Rector v.—93 M. 254.
Shipp, Wells v.—W. 353.
Ship, Smith v.—1 H. 234.
Shirley v. Conway, 44 M. 434—adv. pos. 110; eject. 110, 113; judgm. 299, 323.
Shirley v. Fearne, 33 M. 653—det. 25; ev. 386, 459; judgm. 643, 951; partners. 138; plead. 264; records, 20; trover, 36.
Shirley v. Shattuck, 28 M. 13—trusts, 176, 182, 227, 231, 307, 313, 314.
Shirley, Besancon v.—9 S. & M. 457.
Shirley, Fearn v.—31 M. 301.
Shirley, Gill v.—55 M. 814.
Shirley, Hoyle v.—94 M. 466.
Shirley, Minter v.—45 M. 376.
Shirley, Steele v.—3 S. & M. 196.
Shirley, Steele v.—9 S. & M. 382.
Shirly v. Fearne, 33 M. 653—ev. 369, 374.
Shivers v. Farmers' Mut. Fire Ins. Co. 55 So. 965—ev. 10, 460; ins. 146, 163, 275.
Shivers v. Ross, 91 M. 246—ins. 614.
Shivers v. Simmons, 54 M. 520—estop. 92; quiet. t. 8, 17.
Shlenker, Hartford Fire Ins. Co. v.—80 M. 667.
Shlomberg, Jackson v.—70 M. 47.
Shoape, Love v.—W. 508.

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Shoe Co. v. Sykes, see Perry-Mason Shoe Co. v. Sykes.
Shoe Co. Crum v.—72 M. 458.
Shoemaker v. Coleman, 94 M. 619—mun. corp. 664.
Short v. New Orleans &c. R. Co. 69 M. 848—mast. & s. 86, 87, 264, 265.
Short v. Porter, 44 M. 533—ex. & ad. 95, 266, 351, 389a; paymt. 18.
Short v. State, 82 M. 473—crim. l. 967, 1049.
Shorter v. Lesser, 54 So. 155—partit. 77.
Short, Harmon v.—8 S. & M. 433.
Short, Higginbottom v.—25 M. 160.
Short, Yazoo & Miss. Delta v.—38 So. 330.
Shotwell v. Covington, 69 M. 735—courts, 88; mand. 70; statut. 225¾.
Shotwell v. Ellis, 42 M. 439—cncts. 133.
Shotwell v. Hamblin, 23 M. 156—bills & n. 452; excep. 28; execution, 344; sheriffs, 89.
Shotwell v. Kilgore, 26 M. 125—mech. liens, 109.
Shotwell v. Lawson, 30 M. 27—deeds, 108; eq. 45; lis pens. 25.
Shotwell v. Louisville &c. R. Co. 69 M. 541—estop. 32, 92; lev. 4, 28f.
Shotwell v. Shotwell, Sm. & M. Ch. 51—div. 199, 234.
Shotwell v. Taliaferro, 25 M. 105—cred. s. 24; fraud. conv. 184; judges, 16.
Shotwell v. Webb, 23 M. 375—jud. s. 16.
Shotwell, Darcey v.—49 M. 631.
Shotwell, Lawson v.—27 M. 630.
Shotwell, Millsaps v.—76 M. 923.
Shotwell, Soule v.—52 M. 236.
Shotwell, Walker v.—13 S. & M. 544.
Shoults v. Kemp, 57 M. 218—lim. of act. 176, 181, 186; plead. 162, 217.
Shows v. State, 92 M. 92—crim. l. 916, 954.
Shows, McKenzie v.—70 M. 388.
Shrader v. State, 21 So. 307—crim. l. 1069, 1089, 1106.
Shrader, Bay v.—50 M. 326.
Shrader, State v.—72 M. 541.
Shrimpton v. Warmack, 72 M. 208—cncts. 280; sales, 346.
Shrock v. Bowden, 4 H. 426—bills & n. 462; plead. 431, 433; judgm. 134.
Shropshire v. Probate Judge, 4 H. 142—ex. & ad. 535; judgm. 106, 745; plead. 164, 236, 255.
Shubert v. State, 66 M. 446—crim. l. 789, 824, 1166½; jury, 78, 116.
Shulherr v. Bordeaux, 64 M. 59—int. liq. 6.
Shull, Donoghue v.—85 M. 404.
Shumaker, Hines v.—95 M. 477.
Shumaker, Hines v.—52 So. 705.
Shumate, White v.—50 M. 130.
Shurley v. State, 90 M. 415—ind. 137.
Shurtliff v. Witherspoon, 1 S. & M. 613—ex. & ad. 495.
Shryock, Morris v.—50 M. 590.
Shryock, Plant v.—62 M. 821.
Sibley, Wilson v.—54 M. 656.
Sides v. State, 96 M. 638—hom. 276.
Sides, Cramer v.—87 M. 241.
Sigman v. Lundy, 66 M. 522—eq. 359; tax. 679, 802.
Sigman, Adams v.—89 M. 844.
Sigman, Norfleet v.—41 M. 631.
Sigman, Oglesby v.—58 M. 502.
Sikemeier v. Jacob, 92 M. 562—sales, 178.
Sillers v. Lester, 48 M. 513—chat. m. 124, 138.
Silliman, Partee v.—44 M. 272.
Silva, Preirva v.—4 S. & M. 735.
Silver v. Kent, 60 M. 124—carr. 94, 105; dam. 142.
Silverberg, Isaacs v.—87 M. 185.
Silverberg, State v.—78 M. 858.
Silverberg, Tennison v.—77 M. 750.
Silver Creek Nav. &c. Co. v. Mangum, 64 M. 682—nav. wat. 1; waters, 59, 62.
Silver Creek Nav. &c. Co. v. Yazoo &c. R. Co. 90 M. 345—nav. wat. 26.
Silver Creek, Carlisle v.—85 M. 380.
Simmon, Pollosk v.—76 M. 198.
Simmons v. Atkinson, 69 M. 862—alt. of inst. 1.
Simmons v. Cutreer, 12 S. & M. 584—plead. 382; sales, 40, 269, 355; slaves, 7a; trial, 139.
Simmons v. Felder, 1 Miss. Dec. 484—app. & e. 169.
Simmons v. Gordon, 53 So. 623—partit. 115.
Simmons v. Henderson, Freem. Ch. 493—eq. 3; ex. & ad. 469; rec. 36.
Simmons v. Holmes, 49 M. 134—eq. 22; ex. & ad. 435; inj. 38; pub. lands, 51; schools, 18.
Simmons v. Hutchinson, 81 M. 351—app. & e. 1009; mtg. 171.
Simmons Hardware Co. v. Todd, 79 M. 163—princ. & a. 145.
Simmons v. Ingram, 60 M. 886—cred. s. 24; dower, 10; ex. & ad. 453; fraud. conv. 103, 105, 180, 184, 207, 237, 272; trusts, 92½.
Simmons v. Lard, W. 159—inj. 43.
Simmons v. Means, 8 S. & M. 397—ev. 166, 376; phys. 24.
Simmons v. Miller, 40 M. 19—army & n. 20; states, 4.
Simmons v. Mississippi Union Bank, 3 S. & M. 781—usury, 27.

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Simmons v. North, 3 S. & M. 67—eq. 5; frds. st. of, 119; judgm. 780; ref. of inst. 27.
Simmons v. Ormond, 22 So. 875—app. & e. 909; quiet. t. 48.
Simmons v. Parker, 1 Miss. Dec. 456—plead. 373; subrog. 5.
Simmons v. Pickett, 24 M. 467—lim. of act. 70.
Simmons v. Scott County, 68 M. 37—tax. 495.
Simmons v. State, 61 M. 243—crim. l. 424, 520, 531, 532, 775.
Simmons v. Thomas, 43 M. 31—hus. & w. 218; plead. 135.
Simmons, Andrews v.—68 M. 732.
Simmons, Bank of Newton v.—49 So. 616.
Simmons, Cocks v.—57 M. 183.
Simmons, Edwards v.—27 M. 302.
Simmons, Foster v.—40 M. 585.
Simmons, Griswold v.—50 M. 123.
Simmons, Griswold v.—50 M. 137.
Simmons, Hancock County v.—86 M. 302.
Simmons, Howard v.—43 M. 75.
Simmons, Leggett v.—7 S. & M. 348.
Simmons, Masonic Benefit Assn. v.—86 M. 470.
Simmons, Morton v.—2 S. & M. 601.
Simmons, Presley v.—24 M. 527.
Simmons, Sanders v.—12 So. 850.
Simmons, Shivers v.—54 M. 520.
Simmons, State v.—70 M. 485.
Simmons, Turner v.—54 So. 658.
Simmons, Wolf v.—75 M. 539.
Simmons, Wright v.—1 S. & M. 389.
Simms v. Forbes, 86 M. 412—ev. 243, 317; neg. 115, 122; witn. 405.
Simms v. Quinn, 58 M. 221—estop. 68; sheriffs, 100, 123.
Simon v. State, 36 M. 636—crim. l. 531; slaves, 18c.
Simon v. State, 37 M. 288—crim. l. 519, 531.
Simon, Hoffman v.—52 M. 302.
Simon, Holmes v.—71 M. 245.
Simon, Hutchinson v.—57 M. 628.
Simons, Kaufman v.—80 M. 189.
Simonton v. Bacon, 49 M. 582—cncts. 11, 96, 266; eq. 142; ins. p. 66, 98; ven. & pur. 108.
Simpson v. Bowden, 23 M. 524—app. & e. 1028; new tr. 41.
Simpson v. Goodman, 92 M. 89—ins. 188.
Simpson v. McGlathery, 52 M. 723—escrows, 11; spec. perf. 106.
Simpson v. Millsaps, 80 M. 239—wills, 618.
Simpson v. Smith Sons Gin &c. Co. 75 M. 505—app. & e. 865; judgm. 777.
Simpson v. State, 56 M. 297—app. & e. 169; crim. l. 1085, 1184.
Simpson, Cain v.—53 M. 521.
Simpson County v. Buckley, 81 M. 474—counties, 31.
Simpson County v. Buckley, 85 M. 713—elec. 293; judgm. 702.
Simpson County, Ross v.—51 So. 597.
Simpson, Ezelle v.—42 M. 515.
Simpson, Turberville v.—94 M. 154.
Simpson, Williams v.—70 M. 113.
Sims v. Boaz, 11 S. & M. 318—ven. & pur. 102, 334, 339.
Sims v. Eiland, 57 M. 83, 607—fraud, 13; plead. 192.
Sims v. Hodges, 65 M. 211—eject. 40; ex. & ad. 524; see Sims v. Walden.
Sims v. Hundly, 2 H. 896—chat. m. 257.
Sims v. Hutchins, 8 S. & M. 328—frds. st. of, 125.
Sims v. McIntyre, 8 S. & M. 324—app. & e. 1003; paymt. 35.
Sims v. Nash, 1 H. 271—ex. & ad. 421; judgm. 856, 870d.
Sims v. Ross, 8 S. & M. 557—parties, 4; partners. 198; plead. 382.
Sims v. Sims, 30 M. 333—ex. & ad. 219, 437, 481; lim. of act. 132.
Sims v. State, 66 M. 33—crim. l. 186.
Sims v. State, 28 So. 819—hom. 244.
Sims v. Stilwell, 3 H. 176—ex. & ad. 95.
Sims v. Talbot, 27 M. 487—garn. 69; judgm. 385, 822.
Sims v. Vanmeter Lumber Co. 96 M. 449—spec. perf. 73, 75.
Sims v. Walden, 3 So. 457—ex. & ad. 519, 520, 524; ven. & pur. 2; wills, 434; see Sims v. Hodges.
Sims v. Warren, 67 M. 278—tax. 348, 419.
Sims v. Warren, 68 M. 447—ev. 451, 461; tax. 734b, 810.
Sims v. Wilkins, 5 S. & M. 234—bills & n. 198, 443.
Sims v. Yazoo &c. Plank Road Co. 38 M. 23—turnpikes, 37.
Sims, Chapman v.—53 M. 154.
Sims, Gibbs v.—41 M. 706.
Sims, Illinois Cent. R. Co. v.—77 M. 325.
Sims, Liddell v.—9 S. & M. 596.
Sims, Mizell v.—39 M. 331.
Sims, Nelson v.—23 M. 383.
Sims, Osburn v.—62 M. 429.
Sims, Roberts v.—64 M. 597.
Sims, Ross v.—27 M. 359.
Sims, State v.—80 M. 381.

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Sinai v. Louisville &c. R. Co. 71 M. 547—em. dom. 92; waters, 54, 118.
Sinclair v. State, 87 M. 330—hom. 194; witn. 338.
Sinclair, Archer v.—49 M. 343.
Sinclair, McGrath v.—55 M. 89.
Sinclair, Price v.—5 S. & M. 254.
Sinclair, Tourney v.—3 H. 324.
Sinclair, Weathersby v.—43 M. 189.
Sing, Broach v.—57 M. 115.
Singleterry, Gulf &c. R. Co. v.—78 M. 772.
Singleton v. Garrett, 23 M. 195—ex. & ad. 508a.
Singleton v. State, 71 M. 782—convt. 5; crim. l. 390; hom. 29, 166, 294.
Singleton, Davis v.—2 H. 673.
Singleton, Randolph v.—12 S. & M. 439.
Singleton, Roberts v.—24 M. 438.
Sinnott, Atkinson v.—67 M. 502.
Sintes v. Barber, 78 M. 585—judgm. 407; tax. 787.
Sintes, Barber v.—28 So. 722.
Sistrunk v. Wilson, 54 So. 89—ev. 434.
Sitler v. Walker, Freem. Ch. 77—partners. 220.
Sivley v. Sivley, 96 M. 134—app. & e. 454, 456; trial, 29.
Sivley v. Sivley, 51 So. 457—hus. & w. 333, 334.
Sivley v. Summers, 57 M. 712—eject. 37; ex. & ad. 225, 380, 386, 414, 416, 437; judgm. 17, 243, 405, 419, 706; jud. s. 11; lim. of act. 114; subrog. 41.
Sizer, Gordon v.—39 M. 805.
Sizer, Green v.—40 M. 530.
Skaggs v. Nelson, 25 M. 88—frds. st. of, 62; ven. & pur. 254, 261, 275.
Skates v. State, 64 M. 644—crim. l. 594, 927; hom. 291; trial, 295.
Skeen v. State, 16 So. 495—crim. l. 321, 823, 1088, 1144.
Skegogg, Phipps v.—30 M. 241.
Skillman, Coca-Cola Co. v.—91 M. 677.
Skinner v. Collier, 4 H. 396—bills & n. 130; new tr. 70; trial, 59, 76.
Skinner v. Jayne, 24 M. 567—assign. 28; execution, 145, 153e, 171; judgm. 875.
Skinner v. State, 53 M. 399—crim. l. 1159; jury, 98, 110.
Skinner v. Wilson, 61 M. 90—estop. 68; execution, 75; sheriffs, 100, 123.
Skinner, Green v.—72 M. 254.
Skipwith v. Dodd, 24 M. 487—frds. st. of, 74; inj. 36; lev. 18; tax. 769; waste, 17.
Skipwith v. Robinson, 24 M. 688—princ. & a. 1, 10, 54, 122, 150; trusts, 176; ven. & pur. 231.
Skipwith, Webster v.—26 M. 341.
Skipwith, Winn v.—14 S. & M. 14.
Skipworth v. Mobile &c. R. Co. 95 M. 50—r. r. 311; trial, 143.
Slack v. Slack, 26 M. 287—des. & d. 101.
Slack v. Swaim, 8 So. 545—eject. 92.
Slack, Haynes v.—32 M. 193.
Slater, Englehard v.—7 H. 538.
Slaton v. Alcorn, 51 M. 72—ex. & ad. 217; subrog. 10.
Slaughter v. Garland, 40 M. 172—des. & d. 2; dower, 2; wills, 778.
Slaughter v. Garland, 6 So. 647—ex. & ad. 437.
Slaughter v. Meridian &c. R. Co. 95 M. 251—em. dom. 101, 117.
Slaughter v. State, 16 So. 242—crim. l. 778; hom. 145, 234.
Slaughter, Clark v.—34 M. 65.
Slaughter, Clark v.—38 M. 64.
Slaughter, Meridian Light &c. Co. v.—53 M. 952.
Slaughter, Nye v.—27 M. 638.
Slaughter, Yazoo &c. R. Co. v.—92 M. 289.
Slavens, Wheeler v.—13 S. & M. 623.
Slayden-Kirksey Woolen Mills, Gulledge v.—75 M. 297.
Slaydon v. McDonald, 82 M. 504—plead. 412.
Slaydon v. Mitchell, 2 Miss. Dec. 436—libel, 100, 102.
Sledge v. Boone, 57 M. 222—guard. & w. 161; inf. 111, 113.
Sledge v. Dickson, 81 M. 501—eq. 238.
Sledge v. Jacobs, 58 M. 194—guard. & w. 108; jud. s. 24; lim. of act. 83, 85.
Sledge v. Obenchain, 58 M. 670—fraud. conv. 207; hus. & w. 177; mtg. 307; nova. 4.
Sledge v. Obenchain, 59 M. 616—app. & e. 119, 984.
Sledge v. Yazoo &c. R. Co. 87 M. 566—r. r. 278, 387.
Sledge, Ball v.—82 M. 747.
Sledge, Dickson v.—38 So. 673.
Sledge, Harris v.—21 So. 783.
Sleeper, Weathersby v.—42 M. 732.
Slidell Liquor Co. Durham v.—94 M. 140.
Slidell Liquor Co. Hayes v.—55 So. 356.
Sloan v. Johnson, 14 S. & M. 47—atty. & c. 126; ex. & ad. 111; statut. 244.
Sloan v. State, 65 M. 490—crim. l. 90; int. liq. 197.
Sloan v. State, 71 M. 459—perj. 29, 33.
Sloan, Bowdre v.—69 M. 369.

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Sloan, Murphy v.—24 M. 658.
Sloan, Stephenson v.—65 M. 407.
Slocumb v. Holmes, 1 H. 139—acct. acti. on, 1; lim. of act. 183; paymt. 49.
Slomburg, Kosciusko v.—68 M. 469.
Smart v. Whaley, 6 S. & M. 308—dower, 5.
Smart, Gardner v.—23 So. 356.
Smedes v. Ilsley, 68 M. 590—bills & n. 455; inj. 26; judgm. 635, 814.
Smedes & Marshall, State v.—26 M. 47.
Smiley v. Meyer, 55 M. 555—hus. & w. 100, 218.
Smiley, Gaines v.—7 S. & M. 53.
Smith v. Aberdeen, 25 M. 458—mun. corp. 956; tax. 27, 44.
Smith v. Allen, 39 M. 469—exemp. 83; fraud. conv. 51; hus. & w. 49½.
Smith v. Bank, 60 M. 69—garn. 234.
Smith v. Bell, 2 Miss. Dec. 684—judgm. 564.
Smith v. Berry, 1 S. & M. 321—app. & e. 925; ex. & ad. 412, 415, 415c, 419; judgm. 342.
Smith v. Bobb, 12 S. & M. 322—land. & t. 268, 270.
Smith v. Bowdre, 69 M. 692—assign. f. b. c. 88.
Smith v. Boykin, 61 M. 110—bailm. 67; crim. l. 1069.
Smith v. Bradley, 6 S. & M. 179—judgm. 500.
Smith v. Bradley, 6 S. & M. 485—eq. 119, 120, 420, 430; inf. 87, 109; judgm. 103.
Smith v. Brothers, 86 M. 241—tax. 764.
Smith v. Brown, 28 M. 810—exemp. 3; statut. 254.
Smith v. Bruner, 23 M. 508—garn. 144.
Smith v. Burns, 25 M. 422—ex. & ad. 475.
Smith v. Burns, 72 M. 966—lis pens. 23; mech. liens, 268.
Smith v. Butts, 72 M. 269—mech. liens, 212.
Smith v. Calcote, 41 M. 656—app. & e. 494, 502, 785.
Smith v. Cassedy, 75 M. 916—tax. 631, 674.
Smith v. Cauthen, 54 So. 844—ven. & pur. 18, 352.
Smith v. Charles, 24 So. 968—relig. soc. 24.
Smith v. Chew, 35 M. 153—courts, 202c; ex. & ad. 337, 380.
Smith v. Clopton, 48 M. 66—princ. & s. 109, 126, 128, 168.
Smith v. Cohea, 3 H. 35—attch. 322; proc. 64, 135.
Smith v. Commercial Bank, 6 S. & M. 83—plead. 16, 187, 351.
Smith v. Corporation of Oxford, 91 M. 651—crim. l. 1032, 1091.
Smith v. Cozart, 45 M. 698—eq. 173, 360, 417.
Smith v. Craig, 10 S. & M. 447—courts, 198, 199; judges, 24; partit. 40.
Smith v. Cromer, 66 M. 157—app. & e. 154; attch. 213; bills & n. 395.
Smith v. Crutcher, 27 M. 455—bills & n. 460, 540; dism. 23, 28.
Smith v. Cunningham, 79 M. 425—adv. pos. 62; hus. & w. 9.
Smith v. Deeson, 14 So. 40—mtg. 360, 361, 369.
Smith v. Denny, 90 M. 434—tax. 809.
Smith v. Denson, 2 S. & M. 326—courts, 202c; ex. & ad. 333, 337, 345, 348, 358, 362, 367, 375, 410.
Smith v. Elder, 7 S. & M. 507—app. & e. 917; bills & n. 131; plead. 418; witn. 120.
Smith v. Elder, 14 S. & M. 100—app. & e. 258, 917, 1097; judgm. 195, 572.
Smith v. Ely &c. Dry Goods Co. 79 M. 266—corp. 551, 569.
Smith v. Estell, 34 M. 527—ex. & ad. 454; exemp. 30.
Smith v. Eubank, 89 M. 838—j. p. 134.
Smith v. Everett, 50 M. 575—eq. 2, 37; ex. & ad. 537a.
Smith v. Everly, 4 H. 178—judgm. 784, 789.
Smith v. Fonda, 64 M. 551—nav. wat. 1.
Smith v. Forbes, 89 M. 141—mtg. 136; ven. & pur. 193.
Smith v. Francis, 7 S. & M. 507—witn. 84.
Smith v. Frank Gardener Hardware &c. Co. 83 M. 654—judgm. 117; j. p. 122.
Smith v. German Bank, 60 M. 69—garn. 157.
Smith v. Gibbs, 2 S. & M. 479—bills & n. 393, 401, 408.
Smith v. Gill, 52 M. 607—partners. 327.
Smith v. Gulfport &c. Co. 95 M. 190—st. r. r. 106.
Smith v. Half Acre, 6 H. 582—const. law, 11, 13, 14, 15; judges, 7; offic. 50; statut. 187.
Smith v. Harrington, 49 M. 771—inj. 148.
Smith v. Harris, 1 Miss. Dec. 210—app. & e. 934; eq. 181.
Smith v. Hawkins, 47 So. 429—bast. 63.
Smith v. Henry, 35 M. 369—hus. & w. 7, 119, 130.
Smith v. Herring, 10 S. & M. 518—attch. 253, 367.
Smith v. Hickman, 24 So. 973—tax. 419.
Smith v. Holifield, 54 So. 84—app. & e. 339, 372.
Smith v. Hurd, 7 H. 188—courts, 201; ex. & ad. 314f, 430, 473, 510, 512.
Smith v. Hurd, 8 S. & M. 682—app. & e. 909; ex. & ad. 83, 475, 478, 504.

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Smith v. Jeffreys, 16 So. 377—chat. m. 288; eq. 232; trusts, 105.
Smith v. Jones, 65 M. 276—execution, 124; land. & t. 229, 229c, 229e; j. p. 36.
Smith v. Kelley, 23 M. 167—bast. 1, 9.
Smith v. Kirkland, 89 M. 647—mtg. 869a.
Smith v. Lacey, 86 M. 295—attch. 191; bankr. 433.
Smith v. Louisville &c. Co. 62 M. 510—nav. wat. 20.
Smith v. McWhorter, 74 M. 400—mtg. 186; partit. 25; trusts, 95, 365.
Smith v. Mississippi &c. R. Co. 6 S. & M. 179—corp. 90; ev. 178, 183.
Smith v. Mixon, 73 M. 581—app. & e. 204, 225, 840; execution, 64.
Smith v. Montgomery, 11 S. & M. 284—execution, 117, 153.
Smith v. Moore, 3 H. 40—ex. & ad. 18; witn. 69.
Smith v. Mulheim, 57 M. 591—attch. 74.
Smith v. Munger, 93 M. 627—judgm. 66; lis pens. 23; mtg. 182.
Smith v. Natchez Steamboat Co. 1 H. 479—corp. 89, 90, 600; dep. 110, 111; ev. 164, 352, 582; new tr. 89, 95; witn. 112.
Smith v. Nelson, 57 M. 138—counties, 52; tax. 301.
Smith v. Nevitt, W. 370—sales, 1, 115.
Smith v. Newlon, 62 M. 230—fraud. conv. 308; j. p. 36.
Smith v. Nolen, 2 H. 735—app. & e. 1025, 1034.
Smith v. Otley, 26 M. 291—eject. 15; execution, 277; mech. liens, 198; mtg. 315.
Smith v. Pattison, 45 M. 619—abate. & r. 72; app. & e. 526; eq. 119, 403; inf. 89, 104; judgm. 220; ven. & pur. 285.
Smith v. Prestridge, 6 S. & M. 478—bills & n. 496.
Smith v. Ratcliff, 66 M. 683—exemp. 31; home. 79.
Smith v. Richardson, 2 Miss. Dec. 287—courts, 88, 93; est. 5; est. tail, 1.
Smith v. Runnells, W. 144—bills & n. 508.
Smith v. Saucier, 40 So. 328—tresp. 62.
Smith v. Scherck, 60 M. 491—lim. of act. 143; home. 12.
Smith v. Shelton, 1 Miss. Dec. 78—chat. m. 267, 268.
Smith v. Ship, 1 H. 234—execution, 326; judgm. 784.
Smith v. Smith, 1 H. 102—const. law, 208; jury, 9, 10.
Smith v. Smith, 3 H. 216—ex. & ad. 228, 431.
Smith v. Smith, 47 M. 211—div. 14, 123; marr. 18.
Smith v. Sparkman, 55 M. 649—sales, 1, 12.
Smith v. Stansel, 93 M. 69—partit. 63, 99, 114.
Smith v. State, 13 S. & M. 140—execution, 18, 130; ex. & ad. 454.
Smith v. State, 28 M. 728—crim. l. 277, 285; gr. jury, 22.
Smith v. State, 39 M. 521—assa. 47; hom. 84.
Smith v. State, 55 M. 410—jury, 104.
Smith v. State, 55 M. 513—false pret. 3, 40, 49, 50; jury, 131.
Smith v. State, 57 M. 822—ind. 125d, 129; jury, 136.
Smith v. State, 58 M. 867—crim. l. 561, 598, 1033, 1154; hom. 31, 174; ind. 32, 308; ind. 34, 87; jury, 131; witn. 338.
Smith v. State, 1 Miss. Dec. 19—crim. l. 1157; hom. 146, 167; jury, 110; venue, 61.
Smith v. State, 61 M. 754—crim. l. 280, 575, 680, 1153, 1166½; jury, 81, 109; trial, 41.
Smith v. State, 67 M. 116—crim. l. 200, 292.
Smith v. State, 75 M. 542—crim. l. 813, 814, 834, 885; hom. 188, 286c, 300c, 300e.
Smith v. State, 76 M. 728—bailm. 94; sci. fa. 9, 13.
Smith v. State, 82 M. 793—rob. 16.
Smith v. State, 86 M. 315—bailm. 41; crim. l. 240.
Smith v. State, 87 M. 627—crim. l. 721.
Smith v. State, 90 M. 111—crim. l. 600, 721, 763b; witn. 344.
Smith v. State, 94 M. 255—int. liq. 223.
Smith v. State, 95 M. 786—crim. l. 1163, 1168; hom. 27, 179.
Smith v. State, 18 So. 116—ind. 140.
Smith v. State, 24 So. 316—weap. 17b.
Smith v. State, 25 So. 491—judgm. 17a, 247.
Smith v. State, 38 So. 335—bailm. 93.
Smith v. State, 56 So. 179—ev. 518; states, 146; statut. 223.
Smith v. Team, 16 So. 492—neg. 67, 93, 141; trial, 41, 190.
Smith v. Thompson, 2 Miss. Dec. 70—rem. of c. 96.
Smith v. Union Bank, 13 S. & M. 240—app. & e. 803.
Smith v. Vicksburg, 54 M. 615—licens. 8; mun. corp. 621; statut. 158, 160.
Smith v. Vicksburg, 86 M. 577—mun. corp. 914.
Smith v. Walker, Sm. & M. Ch. 432—lost inst. 13, 17, 18, 21.
Smith v. Walker, 8 S. & M. 131—judgm. 428; usury, 99.

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Smith v. Walker, 10 S. & M. 584—eject. 95; execution, 325, 351.
Smith v. Walsh, 63 M. 584—app. & e. 976; estop. 104; mtg. 353, 372.
Smith v. Warren, 2 H. 895—plead. 164, 433.
Smith v. Wells, 46 M. 64—ex. & ad. 150, 399, 537h; inj. 251.
Smith v. Westmoreland, 12 S. & M. 663—lim. of act. 5, 152.
Smith v. Willis, 78 M. 243—lev. 23.
Smith v. Williams, 36 M. 545—app. & e. 733; hus. & w. 111.
Smith v. Williams, 38 M. 48—ack. 35, 49; dep. 66; hus. & w. 194.
Smith v. Winston, 2 H. 601—deeds, 25, 121; des. & d. 142; execution, 69, 258, 275; judgm. 870c; plead. 384; ven. & pur. 37.
Smith, Alexander v.—4 S. & M. 258.
Smith, Allen v.—72 M. 689.
Smith, Barclay v.—36 So. 449.
Smith, Beatty v.—2 S. & M. 567.
Smith, Boush v.—2 S. & M. 512.
Smith, Breck v.—44 M. 690.
Smith, Brown v.—5 H. 387.
Smith, Buchanan v.—43 M. 90.
Smith, Buckingham v.—23 M. 521.
Smith, Burnett v.—93 M. 566.
Smith, Butler v.—35 M. 457.
Smith, Cheairs v.—37 M. 646.
Smith, Chemical Charcoal Co. v.—38 So. 232.
Smith, Cohn v.—64 M. 816.
Smith, Cohn v.—94 M. 517.
Smith Co. v. Jones, 75 M. 325—app. & e. 1038; bailm. 50; hab. corp. 18.
Smith, Coppock v.—54 M. 640.
Smith County v. Ashley, 56 So. 165—anim. 47.
Smith County, Klein v.—54 M. 254.
Smith County, Klein v.—58 M. 540.
Smith, Covel v.—68 M. 296.
Smith, Day v.—87 M. 395.
Smith, Dillahunty v.—7 H. 673.
Smith, Dunn v.—12 S. & M. 602.
Smith, Edwards v.—35 M. 197.
Smith, Enos v.—7 S. & M. 85.
Smither v. Fitch, 1 S. & M. 541—garn. 148.
Smither v. Keyes, 30 M. 179—gaming, 19; judgm. 347, 355.
Smithey v. State, 93 M. 257—crim. l. 100, 187, 258.
Smith, Flournoy v.—3 H. 62.
Smith, Fox v.—39 M. 350.
Smith, Gilpin v.—11 S. & M. 109.
Smith, Grafton v.—66 M. 408.
Smith Grain Co. Russel v.—80 M. 688.
Smith, Grand Lodge K. P. v.—89 M. 718.
Smith, Guerrant v.—48 M. 90.
Smith, Guess v.—56 So. 166.
Smith, Hardy v.—3 S. & M. 316.
Smith, Helm v.—2 S. & M. 403.
Smith, Hibernia Bank &c. Co. v.—89 M. 298.
Smith, Hoffman v.—61 M. 544.
Smith, Houston v.—2 S. & M. 597.
Smith, Hurd v.—5 H. 562.
Smith, Illinois Cent. R. Co. v.—70 M. 344.
Smith, Illinois Cent. R. Co. v.—85 M. 349.
Smith, Jackson v.—68 M. 53.
Smith, Jackson v.—4 So. 119.
Smith, Jones v.—33 M. 215.
Smith, Johns v.—56 M. 727.
Smith, Kansas City &c. R. Co. v.—72 M. 677.
Smith, Kelsey v.—1 H. 68.
Smith, Kerl v.—96 M. 827.
Smith, Louisville &c. R. Co. v.—67 M. 15.
Smith, McFarland v.—W. 172.
Smith, Mackey v.—7 So. 222.
Smith, Martin v.—65 M. 1.
Smith, Maury v.—46 M. 81.
Smith, Merchants' &c. Assn. v.—3 So. 249.
Smith, Merchants' &c. Co. v.—79 M. 142.
Smith, Miss. Cotton Oil Co. v.—33 So. 443.
Smith, Miss. Cotton Oil Co. v.—95 M. 528.
Smith, Miss. Mills Co. v.—69 M. 299.
Smith, Murray v.—28 M. 31.
Smith, Nelson v.—12 S. & M. 662.
Smith, Oliver v.—94 M. 1.
Smith, Oliver v.—94 M. 879.
Smith, Ott v.—68 M. 773.
Smith, People's Bank v.—75 M. 753.
Smith, Pfeifer v.—2 Miss. Dec. 461.
Smith, Phœnix Ins. Co. v.—95 M. 347.
Smith, Pleasants v.—90 M. 440.
Smith, Powell v.—74 M. 142.
Smith, Prairie Lodge v.—58 M. 301.
Smith, Randall v.—96 M. 647.
Smith, Ricard v.—37 M. 644.
Smith, Rice v.—72 M. 42.
Smith, Ruff v.—31 M. 59.
Smith, Salmon v.—58 M. 399.
Smith, Sanders v.—5 So. 514.
Smith, Sawyer v.—41 M. 554.
Smith, Scarborough v.—52 M. 517.
Smith, Shackelford v.—61 M. 5.
Smith Sons Gin &c. Co. Simpson v.—75 M. 505.
Smith, State v.—68 M. 79.
Smith, State v.—47 So. 478.
Smith, State v.—72 M. 420.
Smith, State v.—87 M. 551.
Smith, Stephenson v.—23 M. 507.
Smith, Storm v.—43 M. 497.

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Smith, Street v.—85 M. 359.
Smith, Swan v.—57 M. 548.
Smith, Swan v.—58 M. 875.
Smith, Tant v.—1 Miss. Dec. 305.
Smith, Taylor v.—54 M. 50.
Smith, Van Winkle v.—26 M. 491.
Smith, Wallis v.—2 S. & M. 220.
Smith, Walker v.—19 So. 102.
Smith, Watts v.—24 M. 77.
Smith, Welch v.—65 M. 394.
Smith, Wells v.—44 M. 296.
Smith, Whitton v.—Freem. Ch. 231.
Smith, Winkle v.—26 M. 491.
Smith, Yazoo City Transp. Co. v.—78 M. 140.
Smith, Yazoo &c. R. Co. v.—68 M. 359.
Smith, Yazoo &c. R. Co. v.—82 M. 656.
Smith, Yazoo &c. R. Co. v.—90 M. 44.
Smokey, Johnson v.—4 So. 788.
Smothers v. Jackson, 92 M. 327—crim. l. 379; mun. corp. 120.
Smokey v. Johnson, 4 So. 787—contin. 23; trial, 135.
Smokey v. Peters-Calhoun Co. 66 M. 471—attch. 294; sheriffs, 119, 126, 130.
Smokey v. Wack, 57 M. 832—attch. 306.
Smylie, Courtney v.—W. 497.
Smythe v. Allen, 67 M. 146—usury, 10, 21, 120.
Smythe v. Burns, 25 M. 422—ex. & ad. 101.
Smythe, Houston v.—66 M. 118.
Snead, Brooks v.—50 M. 416.
Sneed v. Assurance Co. 72 M. 51—licens. 39.
Sneed v. British-America Assurance Co. 73 M. 279—ins. 335.
Sneed v. Gilman, 44 So. 830—land. & t. 22, 49; statut. 241.
Sneed v. Morehead, 70 M. 690—inn. 10.
Sneed, Bullock v.—13 S. & M. 293.
Sneed, Gulf &c. R. Co. v.—84 M. 252.
Snell v. Fewell, 64 M. 655—deeds, 208; eq. 345; witn. 143.
Snider v. Udell Woodenware Co. 74 M. 353—ack. 5; eq. 25; hus. & w. 47; trusts, 81.
Snider, Bates v.—59 M. 497.
Snider, Duff v.—54 M. 245.
Snoddy v. Buchanan, 2 Miss. Dec. 637—eq. 355.
Snodgrass v. Andrews, 30 M. 472—adv. pos. 68, 69; ex. & ad. 62, 408; fraud. conv. 226, 241, 245, 254.
Snodgrass v. Butler, 54 M. 45—interpl. 9, 13, 14, 21, 25.
Snodgrass v. Matthews, 30 M. 472—fraud. conv. 172.
Snodgrass v. Nolan, 71 M. 857—app. & e. 372, 395, 626.
Snodgrass, Hendricks v.—W. 86.
Snodgrass, Nolan v.—70 M. 794.
Snodgrass, Planters' Bank v.—4 H. 573.
Snowden v. State, 62 M. 100—crim. l. 834; larc. 41, 68, 69, 77.
Snyder v. State, 78 M. 366—crim. l. 402, 785; int. liq. 233.
Snyder, Doe v.—3 H. 66.
Snyder, Owen v.—W. 326.
Snyder, Van Campen v.—3 H. 66.
Soggins v. Heard, 31 M. 426—cncts. 103; frds. st. of, 62; lim. of act. 101; trusts, 63½.
Sokoloski v. New South B. & L. Assn. 77 M. 155—b. & l. assn. 33, 45, 46.
Sokoloski v. New South B. & L. Assn. 43 So. 764—b. & l. assn. 45.
Solomon v. City Compress Co. 69 M. 319—app. & e. 1063; crim. l. 822; dism. 23; new tr. 39; trial, 249; use & o. 11.
Solomon v. Compress Co. 70 M. 822—app. 11.
Solomon v. First Nat. Bank, 72 M. 854—banks, 41; princ. & s. 129.
Solomon v. State, 71 M. 567—app. & e. 963; contin. 48; crim. l. 923, 1151; int. liq. 88; jury, 110.
Solomon, First Nat. Bank v.—71 M. 889.
Solomon, George v.—71 M. 168.
Soltzfus, Feazell v.—54 So. 444.
Somerville v. Mayes, 54 M. 31—app. & e. 1175; inj. 234; statut. 272, 276.
Somerville, Jones v.—78 M. 269.
Somerville, Moore v.—80 M. 323.
Sontheimer, Matthews v.—39 M. 174.
Soria v. Harrison County, 96 M. 109—deeds, 90, 144.
Soria v. Planters' Bank, 3 H. 46—bills & n. 462; judgm. 120; plead. 317.
Soria v. Stowe, 66 M. 615—eq. 422; quiet. t. 34, 44.
Soria, McMurran v.—4 H. 154.
Soria, Washington v.—73 M. 665.
Sorrell, Sanders v.—65 M. 288.
Sorrell, Treadwell v.—23 M. 563.
Sorsby v. Vance, 36 M. 564—wills, 435, 470, 728.
Sorsby, Liverpool &c. Ins. Co. v.—60 M. 302.
Sorsby, Taylor v.—W. 97.
Sortorius v. State, 24 M. 602—crim. l. 261.
Soule v. Shotwell, 52 M. 236—chat. m. 153, 223, 225; cncts. 54; sales, 236.
Soule, Robinson v.—56 M. 549.
Southard v. Bowles, W. 325—judgm. 195.
Southeimer, Marqueze v.—59 M. 430.
Southern Bank, Metzger v.—54 So. 241.

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Southern, Bank of Water Valley v.—71 M. 741.
Southern Brewing Co. Bush v.—69 M. 200.
Southern Columbian Climber Co. Cook v.—75 M. 121.
Southern Electric Securities Co. v. State, 91 M. 195—corp. 1, 197, 296, 370; judgm. 706; monop. 3, 9, 20, 31.
Southern Express Co. v. Brown, 67 M. 260—app. & e. 664; dam. 151; excep. 27; mast. & s. 301, 306.
Southern Express Co. v. Craft, 43 M. 508—corp. 507; judgm. 17a, 143, 409.—
Southern Express Co. v. Craft, 49 M. 480—carr. 69.
Southern Express Co. v. Fitzner, 59 M. 581—corp. 492.
Southern Express Co. v. Hunnicutt, 54 M. 566—carr. 147, 159.
Southern Express Co. v. Hunt, 54 M. 664—corp. 507; judgm. 17a, 166.
Southern Express Co. v. Marks, 87 M. 656—carr. 158, 180.
Southern Exp. Co. v. Moon, 39 M. 822—carr. 4, 39, 119, 147, 155.
Southern Express Co. v. Seide, 67 M. 609—carr. 132, 147, 158, 161.
Southern Express Co. v. Stevenson, 89 M. 233—carr. 158, 159.
Southern Exp. Co. v. Thornton, 41 M. 216—carr. 4, 181; ev. 480; trial, 194.
Southern Express Co. v. Wolfe, 41 M. 79—carr. 408; trial, 187.
Southern Express Co. Lasky v.—92 M. 268.
Southern Express Co. Swann v.—53 M. 286.
Southern Home B. & L. Assn. v. Butt, 77 M. 944—atty. & c. 166; princ. & a. 122.
Southern Home B. & L. Assn. v. Tony, 78 M. 916—b. & l. assn. 33.
Southern Ins. Co. v. Hannah, 37 So. 506—ins. 389.
Southern Ins. Co. v. Stewart, 30 So. 755—ins. 115, 389.
Southern Ins. Co. Watson v.—31 So. 904.
Southern Light &c. Co. v. Compton, 86 M. 269—carr. 375, 382; st. r. r. 70.
Southern Mutual Aid Assn. Bramlett v.—2 Miss. Dec. 477.
Southern Pac. R. Co. v. Lyon, 54 So. 728—garn. 76.
Southern Pine Co. v. Pigott, 93 M. 281—adv. pos. 43.
Southern Pine Co. Tynes v.—54 So. 885.
Southern Railroad Assn. Crawford v.—51 M. 222.
Southern R. Co. v. Cheaves, 84 M. 565—mast. & s. 182, 281.
Southern R. Co. v. Floyd, 55 So. 287—neg. 83, 136; r. r. 304, 337, 350; trial, 231.
Southern R. Co. v. Free, 95 M. 739—neg. 11.
Southern R. Co. v. Ganong, 55 So. 355—trial, 231, 296.
Southern R. Co. v. Grace, 95 M. 611—mast. & s. 86, 258; plead. 405.
Southern R. Co. v. Hays, 78 M. 319—r. r. 447; trial, 68.
Southern R. Co. v. Humphries, 79 M. 761—phys. 13.
Southern R. Co. v. Hunter, 74 M. 444; carr. 352; mast. & s. 306.
Southern R. Co. v. Isom, 92 M. 82—app. & e. 1060; dam. 132; mast. & s. 233.
Southern R. Co. v. Jackson, 38 M. 334—statut. 159; tax. 196, 231.
Southern R. Co. v. Jackson, 49 So. 138—app. & e. 170, 287.
Southern R. Co. v. Kendrick, 40 M. 374—carr. 272, 277a; dam. 91; trial, 193, 242, 243.
Southern R. Co. v. Lanning, 83 M. 161; carr. 265, 277a, 278.
Southern R. Co. v. McLellan, 80 M. 700—dam. 171; ev. 124; mast. & s. 112, 264, 270; trial, 113.
Southern R. Co. v. Miller, 30 So. 68—abate. & r. 40; death, 74.
Southern R. Co. v. Murray, 91 M. 546—r. r. 447.
Southern R. Co. v. Murrell, 78 M. 446—r. r. 112.
Southern R. Co. v. Murry, 39 So. 478—r. r. 446.
Southern R. Co. v. Pittman, 52 So. 207—r. r. 390, 400.
Southern R. Co. v. State, 95 M. 657—const. law, 241, 297.
Southern R. Co. v. Turner, 49 So. 113—dam. 131.
Southern R. Co. v. Vaughn, 86 M. 367—carr. 177; trial, 252.
Southern R. Co. v. Wiley, 88 M. 825—mast. & s. 108, 219, 235.
Southern R. Co. Bell v.—87 M. 234.
Southern R. Co. Bell v.—94 M. 440.
Southern R. Co. Blanks v.—82 M. 703.
Southern R. Co. Collins v.—89 M. 375.
Southern R. Co. Cheaves v.—82 M. 48.
Southern R. Co. Cottrell v.—80 M. 610.
Southern R. Co. Driver v.—93 M. 190.
Southern R. Co. Eidson v.—23 So. 369.
Southern R. Co. Evans v.—74 M. 230.

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Southern R. Co. Givens v.—94 M. 830.
Southern R. Co. Hamline v.—76 M. 410.
Southern R. Co. Harrison v.—93 M. 40.
Southern R. Co. Hunt v.—40 M. 391.
Southern R. Co. Hurt v.—40 M. 391.
Southern R. Co. Hyatt v.—88 M. 546.
Southern R. Co. McAfee v.—36 M. 669.
Southern R. Co. McMillian v.—75 M. 490.
Southern R. Co. Mitchell v.—77 M. 917
Southern R Co. Quinn v.—21 So. 6.
Southern R. Co. Williams v.—33 So. 972.
Southern R. Co. Yazoo &c. R. Co. v.—83 M. 746.
Southern R. Co. Young v.—52 So. 19.
Southern Tel. Co. v. Alabama &c. R. Co. 1 Miss. Dec. 489—tel. & t. 4.
Southworth v. Brownlow, 84 M. 405—hus. & w. 57; spec. perf. 106.
Southworth, Noel v.—17 So. 84.
Sovereign Camp Woodmen of the World v. Burgess, 31 So. 809—ins. 826.
Sovereign Camp Woodmen of the World v. Dismukes, 38 So. 351—ins. 724, 820.
Sovereign Camp Woodmen of the World v. Woodruff, 80 M. 546—ben. assn. 5; ins. 717, 786, 819, 828.
Sovereign Camp Woodmen of the World, Fletcher v.—81 M. 249.
Sowell v. McDonald, 58 M. 251—assa. 12, 27; ev. 152; parent & c. 7.
Spain v. State, 59 M. 19—crim. l. 1184; hom. 311; jury, 84.
Spain v. Winter, W. 152—venue, 47.
Spalding, Woolner v.—65 M. 204.
Spann v. Grant, 83 M. 19—cncts. 346.
Spann, Brooks v.—63 M. 198.
Spann, Butler v.—27 M. 234.
Spann, Grant v.—33 M. 134.
Spann, Grant v.—34 M. 294.
Spann, Myer, Neville Hardware Co. v.—35 So. 177.
Span, Wren v.—1 H. 115.
Sparkman v. Graham, 79 M. 376—app. & e. 1033; ferries, 32.
Sparkman, Patty v.—58 M. 76.
Sparkman, Smith v.—55 M. 649.
Sparks v. Hopsen, 83 M. 124—replev. 124.
Sparks v. Pittman, 51 M. 511—eq. 7, 17; subrog. 23.
Sparks, Alabama &c. R. Co. v.—71 M. 757.
Sparks, Mullins v.—43 M. 129.
Spaun v. Collins, 10 S. & M. 624—guard. & w. 10.
Spear v. King, 6 S. & M. 276—attch. 92, 242; atty. & c. 103.
Spears v. Burton, 31 M. 547—death, 2; eject. 8; ev. 285, 333, 460; marr. 40, 41; witn. 157.
Spears v. Cheatham, 44 M. 64—eq. 239, 417.
Spears v. McKay, W. 265—forc. e. & d. 5, 8; judgm. 951.
Spears v. Osyka, 92 M. 790—courts, 190.
Spears v. Robinson, 71 M. 774—chat. m. 48, 173; deeds, 140; land. & t. 271; replev. 52, 71, 91.
Spears v. State, 92 M. 613—ars. 1, 26; crim. l. 349, 533, 683.
Spears, Collins v.—W. 310.
Spears, Robinson v.—21 So. 554.
Spears, Welborn v.—32 M. 138.
Speed v. Kelly, 59 M. 47—des. & d. 2.
Speed v. McKnight, 76 M. 723—excep. 35; tax. 671.
Speed v. State, 52 M. 176—crim. l. 1088.
Speed, Finney v.—71 M. 32.
Speed, Furr v.—74 M. 423.
Speed, Ingraham v.—30 M. 410.
Speight v. Adams, Freem. Ch. 318—eq. 444; judgm. 800a.
Speight v. Brock, Freem. Ch. 389—garn. 109.
Speight, Brown v.—30 M. 45.
Speight v. Porter, 26 M. 286—bills & n. 452; ven. & pur. 268.
Speirs, Darter v.—61 M. 148.
Spell v. State, 89 M. 663—crim. l. 834.
Spellman v. McKeen, 96 M. 693—ven. & pur. 230.
Spence, Dennis v.—80 M. 396.
Spencer v. Washington County, 92 M. 230—app. & e. 1089.
Spencer, Anderson v.—51 M. 869.
Spencer, Carter v.—4 H. 42.
Spencer, Kansas City &c. R. Co. v.—72 M. 491.
Spencer, Ligon v.—58 M. 37.
Spencer, Planters' Bank v.—3 S. & M. 305.
Spengler v. O'Shea, 65 M. 75—app. & e. 902; attch. 325.
Spengler v. Stiles Tull Lumber Co. 94 M. 780—assign. 10, 58; cncts. 161, 170; mech. liens, 114.
Spengler v. Trowbridge, 62 M. 46—mun. corp. 274.
Spengler v. Williams, 67 M. 1—ev. 5; neg. 39, 120; plead. 6, 373.
Spengler, McLaughlin v.—57 M. 818.
Spengler, Sharpe v.—48 M. 360.
Spengler, State v.—74 M. 129.
Spengler, State v.—23 So. 33.
Spigener, State v.—50 So. 977.
Spikes v. State, 54 So. 1—lewd. 1.
Spight v. Waldron, 51 M. 356—partit. 18.

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Spinks v. Davis, 32 M. 152—atty. & c. 19; cncts. 108, 113; ex. & ad. 18.
Spinks, Beavers v.—77 M. 346.
Spivey v. State, 58 M. 743—crim. l. 1032, 1047, 1128, 1140, 1144.
Spivey v. State, 58 M. 858—crim. l. 91; hom. 169, 171, 174, 188, 300c.
Spivey, Darcy v.—57 M. 527.
Spottswood, Valverde v.—77 M. 912.
Spradley v. State, 80 M. 82—arr. 61; assa. 62, 73, 86, 96; crim. l. 385, 814.
Sprague, McMillan v.—4 H. 647.
Spratley v. Kitchens, 55 M. 578—action, 54; appr. 7; app. & e. 1171; dam. 197; jury, 67; parties, 21; proc. 167; replev. 34, 96, 116.
Spratley, Western Union Tel. Co. v.—84 M. 86.
Spratlin v. Colson, 80 M. 278—app. & e. 1009; ev. 333; fraud. conv. 164.
Spratt v. Baldwin, 33 M. 581—ex. & ad. 469, 495.
Spratt, Clopton v.—52 M. 251.
Sprawles v. Barnes, 1 S. & M. 629—abate. & r. 70; app. & e. 545; excep. 9; partners. 203.
Spring v. Tidwell, 31 M. 63—judgm. 296.
Springer, Lum v.—24 M. 479.
Springfield Fire &c. Ins. Co. v. Fowler, 31 So. 810—licens. 39.
Springfield Milling Co. Potter v.—75 M. 532.
Spring, Witherspoon v.—3 H. 60.
Sprott v. Baldwin, 34 M. 327—ex. & ad. 121.
Sproule v. Alabama &c. R. Co. 78 M. 88—adv. pos. 17.
Sproule v. Fredericks, 69 M. 898—const. law 3; elec. 2, 256, 270, 295.
Sproule v. Hopper, 16 So. 901—frds. st. of, 14.
Sproul, Hare v.—2 H. 772.
Spurlock, Herbert v.—26 M. 180.
Stacey, Alabama &c. R. Co. v.—68 M. 463.
Stacey, Parker v.—25 M. 471.
Stackhouse, Dabney v.—49 M. 513.
Stacks, State v.—26 So. 926.
Stacy v. Barker, Sm. & M. Ch. 112—chat. m. 229.
Stacy, Alabama &c. R. Co. v.—35 So. 137.
Stacy, Barker v.—25 M. 471.
Stadder v. Jacobs, 12 So. 444—app. & e. 880; attch. 2, 25, 256; trial, 249.
Stadeker v. Jones, 52 M. 729—chat. m. 172; eject. 25; witn. 159.
Stadeker v. Loeb, 67 M. 200—chat. m. 12.
Stadeker, Robinson v.—59 M. 3.
Stadler, Hyman v.—63 M. 362.
Stafford v. State, 44 So. 801—statut. 241.
Stafford, Humphreys v.—71 M. 135.
Stafford, Wood v.—50 M. 370.
Staggs v. Mobile &c. R. Co. 77 M. 507—r. r. 350.
Stainback v. Meridian, 79 M. 447—mun. corp. 793, 810.
Stallings, Hughes v.—52 M. 375.
Stalworth, Hatcher v.—25 M. 376.
Stam v. Kerr, 31 M. 199—bills & n. 393; paymt. 17.
Stampley v. King, 51 M. 728—guard. & w. 76, 87, 107.
Stamps v. Bracey, 1 H. 312—acct. 1; cncts. 94.
Stamps v. Brown, 2 W. 526—paymt. 39.
Stamps v. Bush, 7 H. 255—app. & e. 906, 1006; ev. 200, 231, 313; new tr. 78, 117; sales, 1, 201, 218.
Stamps v. Gilman, 43 M. 456—chat. m. 138; land. & t. 248, 263, 265.
Stamps v. Green, 33 M. 546—hus. & w. 151.
Stamps v. Newton, 3 H. 34—app. & e. 5, 23, 165.
Stamps, Archer v.—4 S. & M. 352.
Stamps, Bush v.—26 M. 463.
Stamps, Cowan v.—46 M. 435.
Stamps, Fitch v.—6 H. 487.
Stanard, Halpin v.—60 M. 822.
Standard Const. Co. v. Brantley Granite Co. 90 M. 16—cncts. 327, 346.
Standard Life &c. Ins. Co. v. Tinney, 73 M. 726—app. & e. 1055; dep. 101.
Standard Oil Co. Adams v.—53 So. 692.
Standard Oil Co. Johnston v.—71 M. 397.
Standifer v. Bush, 8 S. & M. 383—j. p. 130, 209; set-off, 25.
Standifer v. Davis, 13 S. & M. 48—cov. 86; ven. & pur. 349.
Standifer v. Welby, 26 M. 145—witn. 82.
Standifer, Allen v.—57 M. 612.
Standifer, Prewett v.—8 S. & M. 493.
Standley v. Langley, 25 M. 252—ex. & ad. 484.
Standly v. Miles, 36 M. 434—app. & e. 994; guar. 13.
Stanewall Mfg. Co. Adams v.—80 M. 94.
Stanfield, Ex parte, 53 So. 538—judgm. 345.
Stanford v. State, 76 M. 257—ind. 34.
Stanford, Box v.—13 S. & M. 93.
Stanley v. State, 82 M. 498—crim. l. 563; hom. 256.
Stanley v. State, 89 M. 63—int. liq. 223, 225.
Stanley v. State, 53 So. 497—crim. l. 636.
Stanley, Long v.—79 M. 298.
Stansberry v. State, 53 So. 783—int. liq. 236.

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Stansberry, Yazoo &c. R. Co. v.—53 So. 389.
Stansel v. Hahn, 96 M. 616—eq. 195; execution, 41.
Stansell, Johnson v.—94 M. 923.
Stansel, Smith v.—93 M. 69.
Stanton v. Green, 34 M. 576—assign. f. b. c. 134; fraud. conv. 13, 110; ven. & pur. 240; witn. 234.
Stanton v. Helm, 87 M. 287—lim. of act. 103; witn. 133.
Stanton v. Natchez Ins. Co. 5 H. 744—ins. 498.
Stanton v. Pollard, 24 M. 154—inf. 79, 80.
Stanton, Burns v.—2 S. & M. 457.
Stanton, Burns v.—24 M. 580.
Stanton, Jones v.—7 H. 601.
Stanton, Leach v.—2 H. 908.
Stanton, McNair v.—57 M. 298.
Stanton, Natchez Ins. Co. v.—4 H. 7.
Stanton, Natchez Ins. Co. v.—2 S. & M. 340.
Stanwood v. Clampitt, 23 M. 372—princ. & s. 194; subrog. 5, 10.
Staple v. Vicksburg Waterworks Co. 90 M. 848—guar. 8.
Staples v. Fox, 45 M. 667—sheriffs, 144; subrog. 1, 31.
Staples, Benjamin v.—93 M. 507.
Stapleton, Richardson v.—60 M. 97.
Star Compress &c. Co. v. Meridian Cotton Co. 87 M. 228—wareh. 11.
Stark v. Mather, W. 181—pub. lands, 114, 115, 211.
Stark v. State, 81 M. 397—crim. l. 1208; obscen. 10, 18.
Starke v. Gildart. See Doe v. Gildart.
Starke v. Gildart, 4 H. 267—execution, 5, 100, 275; judgm. 470.
Starke v. Gildart, 5 H. 606—des. & d. 125.
Starke v. Lewis, 23 M. 151—app. & e. 1179; eq. 388; inj. 199.
Starke v. Mercer, 3 H. 377—eq. 43, 442, 446; mtg. 559.
Starke, Dulaney v.—7 S. & M. 375.
Starke, Gildarts v.—1 H. 451.
Starke, Lewis v.—10 S. & M. 120.
Starke, O'Conner v.—59 M. 481.
Starke, Roberts v.—47 M. 257.
Stark, Mercer v.—W. 451.
Stark, Mercer v.—Sm. & M. Ch. 479.
Starks v. State, 6 So. 843—hom. 203.
Starling v. State, 89 M. 328—witn. 277.
Starling v. State, 90 M. 255—crim. l. 678, 1168; ind. 17, 32, 121, 126.
Starling v. Wyatt, 27 So. 526—acc. & s. 6; agric. 15; ex. & ad. 98.
Starling, Robinett v.—72 M. 652.
Starling, Sanford v.—69 M. 204.
Starling-Smith Co. Mississippi Cotton Oil Co. v.—23 So. 648.
Starling, State v.—90 M. 252.
Starling &c. Co. v. Caldwell, 18 So. 376—cncts. 275; sales, 150, 164.
Starling &c. Co. v. Flask, 16 So. 875—app. & e. 321.
State v. Abbay, 82 M. 559—elec. 126, 151.
State v. Adler, 68 M. 487—int. liq. 89, 94; tax. 309, 545, 551.
State v. Alabama &c. R. Co. 67 M. 647—r. r. 58; statut. 241.
State v. Alabama &c. R. Co. 68 M. 653—r. r. 60.
State v. Allen. See Hamilton v. State.
State v. Allen, 69 M. 508—offic. 27, 128; princ. & s. 83, 101, 116.
State v. Alley, 96 M. 720—ins. 2, 3, 4, 5, 30.
State v. Armstrong, 91 M. 513—j. p. 8.
State v. Austin, 23 So. 34—chat. m. 230; sales, 1; statut. 241.
State v. Bacon, 77 M. 366—crim. l. 1198; gr. jury, 32, 39; ind. 137.
State v. Baker, 47 M. 88—clks. of c. 72, 73; counties, 99; marr. 25; parent & c. 7; princ. & s. 79.
State v. Bank of Port Gibson. See Commercial Bank v. State.
State v. Banks, 66 M. 431—convt. 10; counties, 222; plead. 144.
State v. Bardwell, 72 M. 535—banks, 83; crim. l. 91; ind. 110.
State v. Barnett, 54 So. 313—ind. 137.
State v. Bartlett, 30 M. 624—bonds, 123; offic. 37.
State v. Basham, 77 M. 688—sheriffs, 105.
State v. Bell, 58 M. 345—crim. l. 1016.
State v. Bell, 58 M. 823—bailm. 89; plead. 214.
State v. Bertrand, 72 M. 516—crim. l. 304; int. liq. 200, 205.
State v. Bias, 65 M. 510—states, 192.
State v. Blennerhassett, W. 7—action, 18; crim. l. 936, 1159; fines, 1½; witn. 90, 101.
State v. Bollis, 73 M. 57—weap. 5.
State v. Booker, 61 M. 16—execution, 189.
State v. Booker, 84 M. 187—perj. 28.
State v. Borroum, 25 M. 203—gr. jury, 5; recogn. 11.
State v. Bowen, 45 M. 347—bonds, 123; courts, 31; ex. & ad. 241, 410, 417, 418, 537, 537h; judgm. 650, 948; plead. 217.
State v. Bramlett, 47 So. 433—ind. 137.
State v. Brennan, 72 M. 894—tax. 362.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

State v. Broughton, 71 M. 90—embez. 26; ind. 118, 125d, 147.
State v. Brown, 32 M. 275—bailm. 49; recogn. 2.
State v. Brown, 33 M. 500—quo. w. 54.
State v. Brown, 34 M. 688—dom. 7; plead. 93, 194, 346, 355, 360.
State v. Brown, 58 M. 835—counties, 101; eq. 45, 150; interpl. 14; tax. 568b, 570b.
State v. Brown, 90 M. 876—elec. 148; mand. 74.
State v. Brown, 28 So. 752—ind. 125i.
State v. Buchanan, 75 M. 349—burg. 19.
State v. Buckingham, 93 M. 846—game, 3½.
State v. Burkett, 83 M. 301—crim. l. 304; ev. 27; high. 108.
State v. Caldwell, 17 So. 372—int. liq. 200.
State v. Caston, 96 M. 183—crim. l. 197.
State v. Cavett, 78 M. 851—mun. corp. 137.
State v. Clark, 52 So. 691—ind. 125, 125a; poisons, 9.
State v. Coahoma County, 64 M. 358—app. & e. 142, 652; mand. 74; statut. 29, 254.
State v. Coahoma County, 3 So. 143—elec. 59; elect. rem. 3.
State v. Cole, 81 M. 174—const. law, 31.
State v. Commercial Bank, 6 S. & M. 218—banks, 39, 68, 102, 105, 112.
State v. Commercial Bank, 12 S. & M. 276—banks, 63; quo. w. 22.
State v. Commercial Bank, 13 S. & M. 569—banks, 73, 78; corp. 596.
State v. Commercial Bank, 24 M. 144—banks, 70.
State v. Commercial Bank, 33 M. 474—banks, 68; corp. 600; quo w. 54; plead. 64.
State v. Commissioners, W. 368—high. 96.
State v. Cooper, 53 M. 615—counties, 101; offic. 37, 60; tax. 546, 567.
State v. Cox, 62 M. 786—guard. & w. 92, 103, 175; jud. s. 21.
State v. Craft, W. 409—indians, 38.
State v. Craft, W. 537—crim. l. 1084.
State v. Crawley, 75 M. 919—int. liq. 133.
State v. Dalton, 69 M. 611—app. & e. 1045; estop. 64; jury, 78, 136; sheriffs, 100, 119.
State v. Depeder, 65 M. 26—int. liq. 86.
State v. Dickinson, 12 S. & M. 579—states, 76, 127, 135, 146.
State v. Dinkins, 77 M. 874—rewards, 5; states, 193.
State v. Dodenhoff, 88 M. 277—false pret. 25.
State v. Dunlap, 21 So. 242—crim. l. 1085.
State v. Edwards, 81 M. 399—high. 123.
State v. Edwards, 93 M. 704—const. law, 25, 37; deputy, 5.
State v. Farish, 23 M. 483—app. & e. 527, 691, 843, 926 eq. 381; ev. 202, 271; princ. & a. 190; states, 108.
State v. Felton, 59 M. 402—counties, 95.
State v. Fitzgerald, 76 M. 502—pub. lands, 11.
State v. Flower, W. 318; jury, 100.
State v. Fortinberry, 54 M. 316—attch. 129, 138, 365; atty. & c. 103; counties, 47; execution, 153.
State v. Fragiacomo, 71 M. 417—const. law, 14; int. liq. 94; statut. 189, 209, 213.
State v. Freeman, 90 M. 315—ars. 17; ind. 125b.
State v. Furlong, 60 M. 839—lim. of act. 86, 100.
State v. Gillis, 75 M. 331—embez. 2, 12.
State v. Glennen, 93 M. 836—ind. 87, 142; mun. corp. 174, 956.
State v. Govan, 70 M. 535—mun. corp. 12.
State v. Grand Gulf Bank. See Commercial Bank v. State.
State v. Hamilton, 69 M. 116—schools, 19, 23, 99.
State v. Haney, 96 M. 792—false pret. 5.
State v. Harkness, 95 M. 506—elec. 324.
State v. Harney, 57 M. 863—alt. inst. 22; bonds, 37; counties, 95; offic. 37; tax. 547, 567, 568, 568c.
State v. Harris, 52 M. 686—tax. 561.
State v. Harris, 10 So. 478—hom. 315.
State v. Harris, 18 So. 123—counties, 52, 53.
State v. Hathorn, 36 M. 491—tax. 568a, 570a.
State v. Hays, 91 M. 755—mun. corp. 149.
State v. Haywood, 21 So. 660—crim. l. 292.
State v. Hemingway, 69 M. 491—assign, f. b. c. 8; chat. m. 4, 32; dism. 4; fraud. conv. 11, 137; mtg. 4, 18, 151; offic. 127.
State v. Henry, 87 M. 125—const. law, 14, 25, 38, 48; convt. 8, 10; mand. 154; plead. 8; statut. 217.
State v. Hill, 70 M. 106—offic. 1; states, 45, 65; statut. 88; tax. 323, 545, 551.
State v. Hill, 53 So. 411—const. law, 236; game, 7.
State v. Holder, 76 M. 158—statut. 33, 34.
State v. Holmes, W. 415—app. & e. 24.
State v. Hubanks, 56 So. 163—false pret. 25.
State v. Hughes, 80 M. 609—larc. 4.
State v. Hughes, 96 M. 581—crim. l. 100.
State v. Hull, 53 M. 626—guard. & w. 15, 173, 174, 175, 177, 182e.
State v. Ireland, 89 M. 763—crim. l. 290, 399, 1024.
State v. Jackson Cotton Oil Co. 95 M. 6—corp. 38; monop. 9, 26, 31; statut. 64.

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State v. Jamison, 54 So. 843—crim. l. 213; threats, 1.
State v. Jenkins, 73 M. 523—ind. 147; prisons, 13.
State v. Johnson, W. 392—jury, 100.
State v. Johnson, 25 M. 625—statut. 146.
State v. Johnson, 72 M. 896—int. liq. 179.
State v. Joiner, 23 M. 500—lim. of act. 11; tax. 567, 569.
State v. Jolly, 73 M. 42—perj. 18.
State v. Jones, 71 M. 872—extort. 12.
State v. Kelly, 80 M. 803—app. & e. 790; elec. 305; offic. 30.
State v. Kelly, 81 M. 1—elec. 18.
State v. Kennedy, 96 M. 624—crim. l. 174.
State v. Key, 93 M. 115—bailm. 41; crim. l. 1024. 1070.
State v. Kirby, 96 M. 629—pardon, 2.
State v. Kuhn, 72 M. 276—app. & e. 151, 374.
State v. Laizer, 25 So. 153—elec. 269, 283.
State v. Lee, 72 M. 281—offic. 111; tax. 565, 568.
State v. Lewenthall, 55 M. 589—dam. 141; ev. 176; tax. 565, 570c.
State v. Lodge No. 95, B. P. O. E. 13 So. 255—int. liq. 45; statut. 271, 276.
State v. Louisville &c. R. Co. 51 So. 918—com. 61; const. law, 81, 130, 207, 210, 308; corp. 41, 636, 651; courts, 97; r. r 19.
State v. Louisville &c. R. Co. 53 So. 454—const. law, 48, 249; statut. 196, 200.
State v. Lovell, 70 M. 309—const. law, 78; j. p. 1, 8; offic. 56, 57, 59.
State v. Luckey, 51 M. 528—j. p. 44.
State v. McDaniel, 78 M. 1—false imp. 7; mun. corp. 173.
State v. McDowell, 72 M. 138—crim. l. 1024.
State v. McGinty, 41 M. 435—const. law, 180; tax. 567; war, 10.
State v. Martin, 56 M. 108—bonds, 13; offic. 37; sheriffs, 154; tax. 547, 568d.
State v. Mayes, 23 M. 516—states, 41, 65.
State v. Mayes, 28 M. 706—atty. gen. 2; states, 171.
State v. Mayes, 54 M. 417—counties, 95, 99, 101; sheriffs, 157.
State v. Mississippi Cotton Oil Co. 79 M. 203—quo. w. 28.
State v. Mississippi Levee Commissioners, 75 M. 132—tax. 174.
State v. Mitchell, 95 M. 130—ind. 133.
State v. Mitchell, 96 M. 259—banks, 84.
State v. Mitchell, 12 So. 710—jury, 138.
State v. Mobile &c. R. Co. 86 M. 172—r. r. 44, 57, 58, 60, 130, 140, 220; statut. 75, 199.
State v. Moor, W. 134—crim. l. 162.
State v. Moore, 24 So. 308—dis. c. 6; ind. 74.
State v. Morgan, 59 M. 349—judgm. 564; offic. 130; plead. 89, 342; sheriffs, 5.
State v. Morgan, 79 M. 659—crim l. 211; high, 29, 162.
State v. Morgan, 80 M. 372—quo w. 33.
State v. Morrison, 60 M. 74—judgm. 713; tax. 570.
State v. Mortimer, 82 M. 443—false pret. 25.
State v. Nichols, 39 M. 318—counties, 99; sheriffs, 124; states, 190.
State v. Oliver, 78 M. 5—convt. 11; ev. 70, 353.
State v. Order of Elks, 69 M. 895—int. liq. 94; statut. 160.
State v. Pannell, 34 So. 388—ex. & ad. 282.
State v. Peek, 95 M. 240—hom. 131; ind. 65, 137, 147.
State v. Piazza, 66 M. 426—int. liq. 94; statut. 185, 233; tax. 583.
State v. Pigott, 54 So. 257—counties, 14; mand. 74, 187.
State v. Powell, 77 M. 543—const. law, 4, 7, 9.
State v. Powers, 52 M. 198—dism. 4; ev. 460; offic. 134.
State v. Presley, 91 M. 377—ind. 110; rob. 16.
State v. Prude, 76 M. 543—hom. 1, 61, 135.
State v. Quintini, 76 M. 498—crim. l. 210, 214, 246; ind. 158.
State v. Ray, 87 M. 183—r. r. 255.
State v. Reed, 76 M. 211—carr. 14.
State v. Rees, 76 M. 435—ind. 130, 137, 140.
State v. Rhonimus, 47 M. 314—bail, 89; judgm. 870d; recogn. 11.
State v. Rials, 1 Miss. Dec. 302—trial, 5.
State v. Richardson, 86 M. 439—mast. & s. 342, 343, 345.
State v. Ricketts, 67 M. 409—bailm. 89, 93; judgm. 419, 486.
State v. Rodgers, 29 So. 73—assa. 73.
State v. Russell, 53 So. 954—embez. 44.
State v. Seymour, 78 M. 134—crim. l. 97.
State v. Shackleford, 56 M. 648; guard. & w. 174.
State v. Shanks, 88 M. 410—blasph. 3.
State v. Shrader, 72 M. 541—bailm. 49; crim. l. 1024.
State v. Silverberg, 78 M. 858—perj. 18, 21, 26.
State v. Simmons, 70 M. 485—mand. 117; statut. 245; tax. 47, 112, 198, 204, 362¼, 377, 406.
State v. Sims, 80 M. 381—assa. 56, 73, 78, 93.
State v. Smedes & Marshall, 26 M. 47—offic. 100.
State v. Smith, 68 M. 79—tax. 92.

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State v. Smith, 72 M. 420—crim. l. 532.
State v. Smith, 87 M. 551—counties, 42; ev. 44, 45; offic. 126.
State v. Smith, 47 So. 478—burg. 17.
State v. Spengler, 74 M. 129—app. & e. 546, 553, 970; excep. 6, 11, 38, 49; int. liq. 88; new tr. 126; trial, 169.
State v. Spengler, 23 So. 33—crim. l. 416, 419; ev. 123.
State v. Spigener, 50 So. 977—assa. 77.
State v. Stacks, 26 So. 962—ind. 125; int. liq. 215.
State v. Starling, 90 M. 252—forg. 25.
State v. Stewart, 36 M. 652—ev. 332; guard. & w. 174, 182e.
State v. Stone. See Warren County v. Stone.
State v. Story, 57 M. 738—acc. & s. 3.
State v. Stuart, 88 M. 406—hom. 89.
State v. Sullivan, 80 M. 596—chat. m. 232, 243.
State v. Swinney, 60 M. 39—plead. 206; tax. 568a.
State v. Tate, 77 M. 469—perj. 35.
State v. Tatum, 96 M. 430—false pret. 25.
State v. Taylor, 68 M. 730—states, 65; tax. 591.
State v. Taylor, 23 So. 34—crim. l. 186, 1111.
State v. Thibodeaux, 69 M. 92—int. liq. 94, 179; licens. 32; tax. 401, 598.
State v. Thompson, 86 M. 201—crim. l. 1024.
State v. Tonella, 70 M. 701—tax. 39, 317, 551.
State v. Tuomey, 5 H. 50—crim. l. 1006, 1018.
State v. Vandenburg, 28 So. 835—int. liq. 40.
State v. Vaughn, 77 M. 681—high. 97.
State v. Vice, 71 M. 912—counties, 122; high. 111.
State v. Vicksburg Bank, 69 M. 99—tax. 401, 551.
State v. Vicksburg &c. R. Co. 51 M. 361—colleg. 6; const. law, 70; schools, 18; states, 193.
State v. Vollm, 51 So. 275—crim. l. 595.
State v. Walker, 88 M. 592—ind. 125b.
State v. Wall, 54 So. 5—crim. l. 1134; high. 111.
State v. Washington Steam Fire Co. No. 3, 76 M. 449—corp. 592, 601; ev. 83; plead. 217; quo w. 15.
State v. Wiggins, 30 So. 712—perj. 21.
State v. Wiley, 76 M. 282—blasph. 1.
State v. Williams, 49 M. 640—const. law, 1; counties, 65; elec. 30, 38.
State v. Williams, 72 M. 992—u. s. mar. 28; weap. 3.
State v. Williams, 54 So. 951—escheat, 1, 6.
State v. Willingham, 86 M. 203—crim. l. 1024.
State v. Wilson, 51 So. 715—counties, 46.
State v. Wofford, 10 S. & M. 626—recogn. 2.
State v. Wofford, 56 So. 162—crim. l. 785.
State v. Woodruff, 81 M. 456—app. & e. 1193; lim. of act. 124.
State v. Woodruff, 83 M. 107—app. & e. 92.
State v. Woodruff, 83 M. 111—lev. 11.
State v. Yazoo &c. R. Co. 87 M. 679—r. r. 58.
State v. Yazoo-Mississippi Delta, 96 M. 677—lev. 4.
State, Abram v.—25 M. 589.
State, Adams v.—24 So. 386.
State, Adams v.—47 So. 787.
State, Ainsworth v.—5 H. 242.
State, Albrecht v.—62 M. 516.
State, Alcorn v.—57 M. 273.
State, Alcorn v.—71 M. 464.
State, Alcorn Cotton Oil Co. v.—54 So. 881.
State, Aldridge v.—59 M. 250.
State, Alexander v.—60 M. 953.
State, Alexander v.—21 So. 923.
State, Alexander v.—22 So. 871.
State, Alfred v.—37 M. 296.
State, Alfred v.—32 So. 54.
State, Algher v.—25 M. 584.
State, Allen v.—1 Miss. Dec. 126.
State, Allen v.—61 M. 627.
State, Allen v.—66 M. 385.
State, Allen v.—88 M. 159.
State, Allen v.—45 So. 833.
State, Allen v.—53 So. 498.
State, American Fire Ins. Co. v.—75 M. 24.
State, Ammons v.—80 M. 592.
State, Ammons v.—89 M. 369.
State, Anderson v.—3 S. & M. 751.
State, Anderson v.—23 M. 459.
State, Anderson v.—82 M. 784.
State, Anderson v.—91 M. 407.
State, Anderson v.—92 M. 656.
State, Anderson v.—50 So. 554.
State, Anderson v.—53 So. 393.
State, Anglin v.—96 M. 215.
State, Anthony v.—13 S. & M. 263.
State, Arbuckle v.—80 M. 15.
State, Arnold v.—77 M. 463.
State, Ashford v.—81 M. 414.
State, Ashford v.—35 So. 569.
State, Ashley v.—37 So. 960.
State, Atkins v.—32 So. 921.
State, Attlesy v.—12 So. 210.
State, Austin v.—48 So. 817.
State, Avant v.—71 M. 78.
State, Avant v.—88 M. 226.
State, Ayers v.—60 M. 709.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

State, Bacot v.—94 M. 225.
State, Bacot v.—96 M. 125.
State, Baggett v.—69 M. 625.
State, Bailey v.—56 M. 637.
State, Bailey v.—67 M. 333.
State, Bailey v.—93 M. 79.
State, Bailey v.—94 M. 863.
State, Bain v.—67 M. 557.
State, Baker v.—23 M. 243.
State, Baker v.—82 M. 84.
State, Ball v.—67 M. 358.
State, Bang v.—60 M. 571.
State, Bangs v.—61 M. 363.
State Bank, Mendenhall Lumber Co. v.—54 So. 883.
State, Bank of United States v.—12 S. & M. 456.
State, Banks v.—93 M. 700.
State, Barcus v.—49 M. 17.
State, Barkley v.—23 So. 185.
State, Barnes v.—60 M. 355.
State, Barnes v.—53 So. 956.
State, Barney v.—12 S. & M. 68.
State, Barr v.—21 So. 131.
State, Barr v.—23 So. 628.
State, Barrentine v.—51 So. 275.
State, Barton v.—94 M. 375.
State, Bateman v.—64 M. 233.
State, Bates v.—32 So. 915.
State, Beall v.—39 M. 715.
State, Beasley v.—64 M. 518.
State, Beason v.—34 M. 602.
State, Beason v.—96 M. 105.
State, Beatty v.—61 M. 18.
State, Beck v.—69 M. 217.
State, Bedell v.—50 M. 492.
State, Bell v.—39 M. 715.
State, Bell v.—66 M. 192.
State, Bell v.—72 M. 507.
State, Bell v.—89 M. 810.
State, Bell v.—90 M. 104.
State, Bell v.—38 So. 795.
State, Belote v.—36 M. 96.
State, Bennett v.—58 M. 556.
State, Bennett v.—87 M. 803.
State, Bennett v.—55 So. 482.
State, Benson v.—79 M. 538.
State, Bergen v.—58 M. 623.
State, Bernheim v.—28 So. 28.
State, Berry v.—22 So. 826.
State, Bertrand v.—73 M. 51.
State, Bethley v.—13 So. 886.
State, Bew v.—71 M. 1.
State, Bigham v.—59 M. 529.
State, Bird v.—11 So. 187.
State, Bishop v.—1 Miss. Dec. 292.
State, Bishop v.—62 M. 289.
State, Bishop v.—96 M. 846.
State, Bishop v.—52 So. 690.
State, Blackwell v.—94 M. 240.
State, Blalack v.—27 M. 642.
State, Blalack v.—79 M. 517.
State, Blakely v.—57 M. 680.
State, Blau v.—82 M. 514.
State, Blennerhasset v.—W. 7.
State, Blewett v.—34 M. 606.
State, Blocker v.—72 M. 720.
State, Bloom v.—57 M. 752.
State, Blumenberg v.—55 M. 528.
State Board of Education v. Aberdeen, 56 M. 518—const. law, 121, 127; int. liq. 95; mun. corp. 49; statut. 160.
State Board of Education v. Mobile &c. R. Co. 71 M. 500—penal. 6; plead. 204; r. r. 242.
State Board of Education v. Mobile &c. R. Co. 72 M. 236—statut. 184.
State, Bobo v.—16 So. 755.
State, Bolden v.—54 So. 241.
State, Bole v.—24 M. 445.
State, Boles v.—9 S. & M. 284.
State, Boles v.—13 S. & M. 398.
State, Boles v.—24 M. 445.
State, Bollis v.—7 So. 390.
State, Bond v.—13 S. & M. 265.
State, Bond v.—68 M. 648.
State, Bonner v.—65 M. 293.
State, Booker v.—81 M. 391.
State, Booker v.—9 So. 355.
State, Boone v.—33 So. 172.
State, Borroum v.—94 M. 88.
State, Borroum v.—22 So. 62.
State, Boswell v.—70 M. 395.
State, Botkin v.—50 M. 375.
State, Botto v.—26 M. 108.
State, Bourn v.—5 So. 626.
State, Bousquet v.—78 M. 478.
State, Bovard v.—30 M. 600.
State, Bowler v.—41 M. 570.
State, Bowles v.—14 So. 261.
State, Bowles v.—40 So. 165.
State, Box v.—34 M. 614.
State, Boyd v.—37 M. 834.
State, Boyd v.—84 M. 414.
State, Boykin v.—86 M. 481.
State, Boykin v.—89 M. 19.
State, Brabston v.—68 M. 208.
State, Bradley v.—W. 156.
State, Bradley v.—10 S. & M. 618.
State, Bracey v.—64 M. 17.
State, Bracey v.—64 M. 26.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

State, Brandon v.—75 M. 904.
State, Brantley v.—13 S. & M. 468.
State, Brazele v.—86 M. 286.
State, Breeland v.—79 M. 527.
State, Brett v.—94 M. 669.
State, Bridges v.—24 M. 153.
State, Bridges v.—86 M. 377.
State, Bright v.—28 So. 845.
State, Brister v.—86 M. 461.
State, Brock v.—92 M. 712.
State, Brooks v.—65 M. 445.
State, Brooks v.—67 M. 577.
State, Brown v.—32 M. 433.
State, Brown v.—57 M. 424.
State, Brown v.—60 M. 447.
State, Brown v.—69 M. 398.
State, Brown v.—72 M. 95.
State, Brown v.—72 M. 990.
State, Brown v.—72 M. 997.
State, Brown v.—75 M. 842.
State, Brown v.—78 M. 637.
State, Brown v.—81 M. 137.
State, Brown v.—81 M. 143.
State, Brown v.—83 M. 645.
State, Brown v.—85 M. 27.
State, Brown v.—85 M. 511.
State, Brown v.—87 M. 800.
State, Brown v.—88 M. 166.
State, Brown v.—95 M. 670.
State, Brown v.—96 M. 534.
State, Brown v.—7 So. 359.
State, Brown v.—8 So. 257.
State, Brown v.—38 So. 316.
State, Brown v.—54 So. 305.
State, Brown v.—55 So. 961.
State, Browning v.—30 M. 656.
State, Browning v.—33 M. 47.
State, Bryant v.—33 M. 225.
State, Bryant v.—65 M. 435.
State, Bryant v.—92 M. 822.
State, Buchanan v.—84 M. 332.
State, Buchanan v.—5 So. 617.
State, Buchanan v.—53 So. 399.
State, Buckley v.—62 M. 705.
State, Buckner v.—81 M. 140.
State, Bunckley v.—77 M. 540.
State, Burch v.—2 Miss. Dec. 33.
State, Burden v.—45 So. 705.
State, Buren v.—24 M. 512.
State, Burford v.—56 So. 162.
State, Burgess v.—81 M. 482.
State, Burkett v.—33 So. 221.
State, Burnett v.—72 M. 994.
State, Burnett v.—92 M. 826.
State, Burrell v.—96 M. 202.
State, Burt v.—72 M. 408.
State, Burt v.—86 M. 280.
State, Bush v.—6 So. 647.
State, Butler v.—12 S. & M. 470.
State, Butler v.—39 M. 1005.
State, Butler v.—57 M. 630.
State, Butler v.—81 M. 734.
State, Butler v.—24 So. 316.
State, Byrd v.—1 H. 163.
State, Byrd v.—1 H. 247.
State, Byrd v.—57 M. 243.
State, Byrne v.—50 M. 688.
State, Cable v.—38 So. 98.
State, Cachute v.—50 M. 165.
State, Cade v.—96 M. 434.
State, Cady v.—44 M. 332.
State, Caffey v.—78 M. 645.
State, Caffey v.—24 So. 315.
State, Cain v.—13 S. & M. 456.
State, Cain v.—81 M. 420.
State, Cain v.—86 M. 505.
State, Caldwell v.—85 M. 383.
State, Caldwell v.—87 M. 420.
State, Caleb v.—39 M. 721.
State, Calhoun v.—86 M. 553.
State, Campbell v.—1 Miss. Dec. 413.
State, Campbell v.—81 M. 417.
State, Campbell v.—17 So. 441.
State, Campbell v.—50 So. 499.
State, Cancelliere v.—23 So. 515.
State, Cannon v.—57 M. 147.
State, Canon v.—75 M. 364.
State, Canterbury v.—90 M. 279.
State, Carlisle v.—73 M. 387.
State, Carothers v.—42 M. 334.
State, Carpenter v.—4 H. 163.
State, Carroll v.—74 M. 688.
State, Carroll v.—80 M. 349.
State, Carter v.—60 M. 456.
State, Carter v.—78 M. 348.
State, Carter v.—24 So. 307.
State, Carter v.—54 So. 734.
State, Carter v.—54 So. 805.
State, Cartwright v.—71 M. 82.
State, Case v.—17 So. 379.
State, Casey v.—96 M. 427.
State, Castleman v.—94 M. 609.
State, Cavanah v.—56 M. 299.
State, Chambers v.—62 M. 108.
State, Chancellor v.—47 M. 278.
State, Charter v.—36 M. 75.
State, Chase v.—W. 384.
State, Chase v.—46 M. 683.
State, Chase v.—75 M. 502.
State, Cheatham v.—67 M. 335.
State, Chery v.—20 So. 837.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

State, Chism v.—70 M. 742.
State, Cicely v.—13 S. & M. 202.
State, Clark v.—9 So. 820.
State, Clarke v.—23 M. 261.
State, Clay v.—22 So. 62.
State, Clayton v.—2 Miss. Dec. 690.
State, Clemmens v.—92 M. 244.
State, Cloud v.—53 M. 662.
State, Clue v.—78 M. 661.
State, Cody v.—3 H. 27.
State, Cohea v.—34 M. 179.
State, Colbert v.—86 M. 769.
State, Cole v.—75 M. 142.
State, Cole v.—91 M. 628.
State, Cole v.—4 So. 577.
State, Coleman v.—59 M. 484.
State, Coleman v.—83 M. 290.
State, Coleman v.—94 M. 860.
State, Coleman v.—40 So. 230.
State, Collins v.—71 M. 691.
State, Collins v.—54 So. 665.
State, Collins v.—54 So. 666.
State, Commercial Bank v.—4 S. & M. 439.
State, Commercial Bank v.—6 S. & M. 599.
State, Conerly v.—66 M. 96.
State, Conner v.—13 So. 934.
State, Conrad v.—70 M. 733.
State, Conrad v.—80 M. 229.
State, Cook v.—49 M. 8.
State, Cook v.—57 M. 645.
State, Cook v.—72 M. 517.
State, Cook v.—77 M. 800.
State, Cook v.—81 M. 146.
State, Cook v.—85 M. 738.
State, Cook v.—90 M. 137.
State, Cook v.—23 So. 833.
State, Cook v.—38 So. 113.
State, Cookerham v.—19 So. 195.
State, Coon v.—13 S. & M. 246.
State, Cooper v.—53 M. 393.
State, Cooper v.—59 M. 267.
State, Cooper v.—80 M. 175.
State, Cooper v.—89 M. 351.
State, Cooper v.—89 M. 429.
State, Cooper v.—94 M. 480.
State, Copeland v.—23 M. 257.
State, Corbin v.—55 So. 43.
State, Corey v.—8 S. & M. 573.
State, Corley v.—56 So. 179.
State, Cornwell v.—53 M. 385.
State, Cothran v.—39 M. 541.
State, Cotton v.—31 M. 504.
State, Cotton v.—17 So. 372.
State, Coulter v.—75 M. 356.
State, Cousins v.—34 So. 323.
State, Cox v.—66 M. 14.
State, Crawford v.—73 M. 172.
State, Crum v.—64 M. 1.
State, Cryer v.—71 M. 467.
State, Cumberland Tel. &c. Co. v.—53 So. 489.
State, Cumberland Tel. &c. Co. v.—54 So. 670.
State, Cunning v.—79 M. 284.
State, Cunningham v.—49 M. 685.
State, Cunningham v.—56 M. 269.
State, Cunningham v.—87 M. 417.
State, Cunningham v.—89 M. 356.
State, Cunningham v.—94 M. 228.
State, Cunningham v.—28 So. 750.
State, Curry v.—39 M. 511.
State, Dabney v.—82 M. 252.
State, Dahmer v.—56 M. 787.
State, Dailey v.—56 M. 475.
State, Daingerfield v.—4 H. 658.
State, Dalton v.—91 M. 162.
State, Damewood v.—1 H. 262.
State, Dantzler Lumber Co. v.—53 So. 1.
State, Davis v.—6 H. 399.
State, Davis v.—50 M. 86.
State, Davis v.—75 M. 637.
State, Davis v.—80 M. 376.
State, Davis v.—81 M. 56.
State, Davis v.—85 M. 416.
State, Davis v.—87 M. 337.
State, Davis v.—89 M. 21.
State, Davis v.—89 M. 119.
State, Davis v.—90 M. 56.
State, Davis v.—16 So. 377.
State, Dawkin v.—42 M. 631.
State, Dawson v.—62 M. 241.
State, Day v.—91 M. 239.
State, Day v.—7 So. 326.
State, Deal v.—96 M. 82.
State, Dean v.—2 S. & M. 200.
State, Dean v.—78 M. 360.
State, Dean v.—85 M. 40.
State, Dee v.—68 M. 601.
State, Dees v.—78 M. 250.
State, Dees v.—89 M. 754.
State, Dees v.—7 So. 326.
State, Delk v.—64 M. 77.
State, Deloach v.—77 M. 691.
State, DeMarco v.—59 M. 355.
State, Denio v.—60 M. 949.
State, Denley v.—12 So. 698.
State, Dennis v.—91 M. 221.
State, Dennis v.—96 M. 96.
State, De Silva v.—91 M. 776.
State, De Silva v.—93 M. 635.
State, Develling v.—52 So. 484.
State, Dick v.—30 M. 593.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

State, Dick v.—30 M. 631.
State, Dick v.—53 M. 384.
State, Dickey v.—86 M. 525.
State, Diebel v.—68 M. 725.
State, Dill v.—38 So. 37.
State, Dillard v.—58 M. 368.
State, Ditto v.—30 M. 126.
State, Dixon v.—74 M. 271.
State, Dobbs v.—96 M. 786.
State, Dobson v.—67 M. 330.
State, Dodd v.—88 M. 50.
State, Dodds v.—45 So. 863.
State, Dominger v.—7 S. & M. 475.
State, Donald v.—41 So. 4.
State, Doniphan v.—50 M. 54.
State, Donnaher v.—8 S. & M. 649.
State, Donnell v.—48 M. 661.
State, Doty v.—W. 230.
State, Douglas v.—2 Miss. Dec. 220.
State, Douthit v.—30 M. 133.
State, Dowling v.—5 S. & M. 664.
State, Doxey v.—29 So. 785.
State, Drane v.—92 M. 180.
State, Draughn v.—76 M. 574.
State, Duke v.—57 M. 229.
State, Dukes v.—80 M. 353.
State, Duncan v.—49 M. 331.
State, Dunk v.—84 M. 452.
State, Dunmore v.—86 M. 788.
State, Durham v.—47 So. 545.
State, Durham v.—52 So. 627.
State, Durr v.—53 M. 425.
State, Durrah v.—44 M. 789.
State, Dyson v.—26 M. 362.
State, Earhart v.—67 M. 325.
State, Earp v.—38 So. 288.
State, Easterling v.—35 M. 210.
State, Eaton v.—80 M. 588.
State, Eaverson v.—73 M. 810.
State, Echols v.—55 So. 485.
State, Edwards v.—47 M. 581.
State, Edwards v.—8 So. 464.
State, Eldridge v.—76 M. 353.
State, Electric Securities Co. v.—91 M. 195.
State, Ellerbe v.—74 M. 522.
State, Ellerbe v.—79 M. 10.
State, Ellis v.—65 M. 44.
State, Ellzey v.—57 M. 827.
State, Elmore v.—81 M. 422.
State, Ermlick v.—28 So. 847.
State, Eubanks v.—7 So. 462.
State, Evans v.—1 Miss. Dec. 217.
State, Evans v.—44 M. 762.
State, Evans v.—61 M. 157.
State, Evans v.—87 M. 459.
State, Evans v.—92 M. 34.
State, Evans v.—4 So. 344.
State, Evans v.—54 So. 154.
State, Fahey v.—62 M. 402.
State, Fairly v.—63 M. 333.
State, Farish v.—2 H. 826.
State, Farish v.—4 H. 170.
State, Farkas v.—60 M. 847.
State, Farrow v.—91 M. 509.
State, Ferguson v.—71 M. 805.
State, Field v.—39 M. 509.
State, Field v.—57 M. 474.
State, Fikes v.—87 M. 251.
State, Files v.—50 So. 979.
State, Finch v.—53 M. 363.
State, Finch v.—64 M. 461.
State, Finklea v.—94 M. 777.
State Fire Ins. Co. v. Morrison, 48 So. 178—app. & e. 359.
State, Fire Ins. Companies v.—75 M. 24.
State, Fitzcox v.—52 M. 923.
State, Fleming v.—60 M. 434.
State, Fletcher v.—60 M. 675.
State, Flower v.—W. 318.
State, Flowers v.—85 M. 591.
State, Folkes v.—63 M. 81.
State, Fooshee v.—82 M. 509.
State, Ford v.—73 M. 734.
State, Ford v.—75 M. 101.
State, Ford v.—86 M. 123.
State, Ford v.—50 So. 497.
State, Fore v.—75 M. 727.
State, Foreman v.—95 M. 77.
State, Fortenberry v.—55 M. 403.
State, Fortenberry v.—56 M. 286.
State, Foster v.—31 M. 421.
State, Foster v.—52 M. 695.
State, Foster v.—70 M. 755.
State, Foster v.—92 M. 257.
State, Fournier v.—96 M. 417.
State, Fowler v.—95 M. 510.
State, Fox v.—7 So. 221.
State, France v.—83 M. 281.
State, Francis v.—87 M. 493.
State, Frank v.—39 M. 705.
State, Frank v.—67 M. 125.
State, Freeman v.—29 So. 75.
State, French v.—52 M. 759.
State, French v.—53 M. 651.
State, Friar v.—3 H. 422.
State, Frith v.—52 So. 786.
State, Frost v.—94 M. 104.
State, Fugate v.—82 M. 189.
State, Fugate v.—85 M. 86.
State, Fugate v.—85 M. 94.
State, Fugler v.—58 M. 829.
State, Fulcher v.—82 M. 630.

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State, Fuller v.—83 M. 30.
State, Fuller v.—85 M. 199.
State, Fullwood v.—67 M. 554.
State, Funderburk v.—75 M. 20.
State, Furlong v.—58 M. 717.
State, Gables v.—54 So. 833.
State, Gaines v.—48 So. 182.
State, Gales v.—64 M. 105.
State, Gamble v.—35 M. 222.
State, Gamblin v.—45 M. 658.
State, Gamblin v.—82 M. 73.
State, Gamblin v.—29 So. 764.
State, Gambrell v.—92 M. 728.
State, Gammon v.—85 M. 103.
State, Garman v.—66 M. 196.
State, Garner v.—76 M. 515.
State, Garner v.—93 M. 843.
State, Garrard v.—25 M. 469.
State, Garrard v.—50 M. 147.
State, Garvin v.—52 M. 207.
State, Gates v.—71 M. 874.
State, Gathings v.—44 M. 343.
State, Gavigan v.—55 M. 533.
State, Gavin v.—96 M. 377.
State, Gee v.—80 M. 285.
State, Gentry v.—92 M. 141.
State, George v.—37 M. 316.
State, George v.—39 M. 570.
State, Gerdine v.—64 M. 798.
State, Gibson v.—38 M. 313.
State, Gibson v.—59 M. 341.
State, Gibson v.—68 M. 241.
State, Gibson v.—70 M. 554.
State, Gibson v.—76 M. 136.
State, Gibson v.—7 So. 211.
State, Gibson v.—16 So. 298.
State, Gibson v.—17 So. 892.
State, Gilbert v.—78 M. 300.
State, Gillespie v.—96 M. 856.
State, Gillum v.—62 M. 547.
State, Gilmore v.—33 So. 171.
State, Gipson v.—38 M. 295.
State, Glenn v.—64 M. 724.
State, Godwin v.—73 M. 873.
State, Goforth v.—60 M. 756.
State, Golden v.—63 M. 466.
State, Golden v.—75 M. 130.
State, Golsby v.—54 So. 155.
State, Goode v.—87 M. 495.
State, Goodwynn v.—4 S. & M. 520.
State, Goolsby v.—35 So. 212.
State, Gordon v.—29 So. 529.
State, Gordon v.—95 M. 543.
State, Graham v.—71 M. 208.
State, Granberry v.—61 M. 440.
State, Grand Gulf Bank v.—10 S. & M. 428.
State, Gray v.—90 M. 235.
State, Green v.—23 M. 509.
State, Green v.—28 M. 687.
State, Green v.—53 M. 148.
State, Green v.—55 M. 454.
State, Green v.—56 M. 771.
State, Green v.—59 M. 501.
State, Green v.—67 M. 356.
State, Green v.—72 M. 522.
State, Green v.—89 M. 331.
State, Green v.—37 So. 646.
State, Green v.—46 So. 252.
State, Green v.—53 So. 415.
State, Greer v.—54 M. 378.
State, Greeson v.—5 H. 33.
State, Gregory v.—42 So. 168.
State, Grenada Lumber Co. v.—54 So. 8.
State, Griffin v.—96 M. 309.
State, Grimes v.—54 So. 839.
State, Grissom v.—62 M. 167.
State, Grogan v.—63 M. 147.
State, Guest v.—96 M. 871.
State, Guice v.—60 M. 714.
State, Guthrie v.—47 So. 639.
State, Gwynn v.—64 M. 324.
State, Hague v.—34 M. 616.
State, Hairston v.—54 M. 689.
State, Hairston v.—10 So. 479.
State, Hale v.—72 M. 140.
State, Hall v.—79 M. 38.
State, Hall v.—91 M. 216.
State, Hall v.—1 So. 351.
State, Hall v.—44 So. 810.
State, Hamilton v.—35 M. 214.
State, Hamilton v.—67 M. 217.
State, Hamilton v.—8 So. 761.
State, Hammond v.—74 M. 214.
State, Hampton v.—88 M. 257.
State, Hampton v.—54 So. 722.
State, Handy v.—63 M. 207.
State, Haney v.—38 So. 284.
State, Hannah v.—87 M. 375.
State, Hansford v.—11 So. 106.
State, Hardaway v.—54 So. 833.
State, Hardeman v.—16 So. 876.
State, Harding v.—96 M. 204.
State, Hardy v.—96 M. 844.
State, Hare v.—4 H. 187.
State, Haris v.—12 So. 904.
State, Harlan v.—41 M. 566.
State, Harkness v.—95 M. 506.
State, Harper v.—71 M. 202.
State, Harper v.—79 M. 575.
State, Harper v.—83 M. 402.
State, Harper v.—85 M. 338.

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State, Harper v.—27 So. 621.
State, Harrell v.—39 M. 702.
State, Harrington v.—54 M. 490.
State, Harris v.—47 M. 318.
State, Harris v.—55 M. 50.
State, Harris v.—61 M. 304.
State, Harris v.—71 M. 462.
State, Harris v.—72 M. 99.
State, Harris v.—72 M. 960.
State, Harris v.—96 M. 379.
State, Hart v.—87 M. 171.
State, Harvey v.—95 M. 601.
State, Harvey v.—20 So. 837.
State, Hastings v.—59 M. 541.
State, Hatten v.—95 M. 546.
State, Hatton v.—92 M. 651.
State, Hattox v.—80 M. 186.
State, Havens v.—75 M. 488.
State, Hawthorne v.—58 M. 778.
State, Hawthorne v.—61 M. 749.
State, Hayden v.—81 M. 55.
State, Hayden v.—81 M. 291.
State, Hayes v.—92 M. 831.
State, Haynes v.—32 M. 400.
State, Haynes v.—93 M. 670.
State, Haynes v.—22 So. 871.
State, Haynes v.—23 So. 182.
State, Haynes v.—27 So. 601.
State, Haynie v.—32 M. 400.
State, Hays v.—57 M. 783.
State, Hays v.—96 M. 153.
State, Haywood v.—47 M. 1.
State, Haywood v.—66 M. 402.
State, Haywood v.—90 M. 461.
State, Head v.—44 M. 731.
State, Heard v.—59 M. 545.
State, Helm v.—66 M. 537.
State, Helm v.—67 M. 562.
State, Hemingway v.—68 M. 371.
State, Hemphill v.—71 M. 877.
State, Henderson v.—8 So. 649.
State, Hendon v.—61 M. 146.
State, Hendricks v.—79 M. 368.
State, Henry v.—87 M. 1.
State, Henry v.—88 M. 843.
State, Henry v.—53 So. 397.
State, Henwood v.—41 M. 579.
State, Herman v.—75 M. 340.
State, Herring v.—87 M. 628.
State, Herrington v.—53 So. 783.
State, Hester v.—67 M. 129.
State, Heward v.—13 S. & M. 261.
State, Hibbler v.—87 M. 362.
State, Hicks v.—47 So. 524.
State, Hightower v.—58 M. 636.
State, Hill v.—64 M. 431.
State, Hill v.—72 M. 527.
State, Hill v. 89 M. 23.
State, Hill v.—94 M. 391.
State, Hill v.—52 So. 630.
State, Hinson v.—66 M. 532.
State, Hodnett v.—66 M. 26.
State, Hoff v.—83 M. 488.
State, Hogan v.—46 M. 274.
State, Hoggett v.—56 So. 172.
State, Hogsett v.—40 M. 522.
State, Holberg Mercantile Co. v.—95 M. 21.
State, Holland v.—60 M. 939.
State, Holley v.—74 M. 878.
State, Holly v.—55 M. 424.
State, Holman v.—72 M. 108.
State, Holt v.—78 M. 631.
State, Hood v.—27 So. 643.
State, Horton v.—84 M. 473.
State, Horton v.—13 So. 886.
State, Howard v.—83 M. 378.
State, Howe v.—53 M. 57.
State, Howell v.—53 So. 954.
State, Howze v.—1 Miss. Dec. 520.
State, Howze v.—59 M. 230.
State, House v.—41 M. 737.
State, House v.—94 M. 107.
State, House v.—96 M. 653.
State, Hubbard v.—64 M. 315.
State, Huddleston v.—1 Miss. Dec. 559.
State, Hudson v.—73 M. 784.
State, Huffman v.—84 M. 479.
State, Hughes v.—2 Miss. Dec. 88.
State, Hughes v.—58 M. 355.
State, Hughes v.—74 M. 368.
State, Hughes v.—79 M. 77.
State, Hughes v.—38 So. 33.
State, Hughes v.—52 So. 631.
State, Hughs v.—22 So. 827.
State, Hunt v.—61 M. 577.
State, Hunt v.—72 M. 413.
State, Hunter v.—62 M. 540.
State, Hunter v.—74 M. 515.
State, Hurt v.—25 M. 378.
State, Hyde v.—52 M. 665.
State, Hyman v.—74 M. 829.
State, Ike v.—23 M. 525.
State, Illinois Cent. R. Co. v.—71 M. 253.
State, Illinois Cent. R. Co. v.—94 M. 759.
State, Ingram v.—62 M. 142.
State, Irby v.—91 M. 542.
State, Irving v.—92 M. 662.
State, Isaacs v.—48 M. 234.
State, Isham v.—6 H. 35.
State, Ivey v.—84 M. 264.
State, Jack v.—6 S. & M. 494.
State, Jackson v.—55 M. 530.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

State, Jackson v.—56 M. 311.
State, Jackson v.—66 M. 89.
State, Jackson v.—75 M. 145.
State, Jackson v.—79 M. 42.
State, Jackson v.—94 M. 83.
State, Jackson v.—13 So. 935.
State, Jackson v.—16 So. 299.
State, Jackson Loan &c. Co. v.—54 So. 157.
State, Jacquemine v.—48 M. 280.
State, James v.—45 M. 572.
State, James v.—49 M. 420.
State, James v.—55 M. 57.
State, James v.—77 M. 370.
State, Jeff v.—37 M. 321.
State, Jeff v.—39 M. 593.
State, Jefferson v.—46 M. 270.
State, Jefferson v.—52 M. 757.
State, Jeffries v.—74 M. 675.
State, Jeffries v.—77 M. 757.
State, Jeffries v.—89 M. 643.
State, Jenkins v.—30 M. 408.
State, Jenkins v.—33 M. 382.
State, Jenkins v.—41 M. 582.
State, Jenkins v.—82 M. 500.
State, Jenkins v.—96 M. 461.
State, Jenkins v.—54 So. 158.
State, Jennings v.—7 So. 462.
State, Jesse v.—28 M. 100.
State, Jimerson v.—93 M. 685.
State, John v.—24 M. 569.
State, Johns v.—78 M. 663.
State, Johnson v.—W. 392.
State, Johnson v.—33 M. 363.
State, Johnson v.—47 M. 671.
State, Johnson v.—54 M. 430.
State, Johnson v.—59 M. 543.
State, Johnson v.—63 M. 228.
State, Johnson v.—63 M. 313.
State, Johnson v.—66 M. 189.
State, Johnson v.—75 M. 635.
State, Johnson v.—78 M. 627.
State, Johnson v.—80 M. 798.
State, Johnson v.—85 M. 572.
State, Johnson v.—87 M. 502.
State, Johnson v.—89 M. 773.
State, Johnson v.—90 M. 317.
State, Johnson v.—94 M. 91.
State, Johnson v.—16 So. 494.
State, Johnson v.—26 So. 967.
State, Johnson v.—27 So. 880.
State, Johnson v.—40 So. 324.
State, Johnson v.—42 So. 166.
State, Johnston v.—7 S. & M. 58.
State, Jolly v.—8 S. & M. 145.
State, Jolly v.—13 S. & M. 223.
State, Jones v.—W. 83.
State, Jones v.—11 S. & M. 315.
State, Jones v.—26 M. 247.
State, Jones v.—27 M. 382.
State, Jones v.—30 M. 653.
State, Jones v.—51 M. 718.
State, Jones v.—57 M. 684.
State, Jones v.—58 M. 349.
State, Jones v.—60 M. 117.
State, Jones v.—65 M. 179.
State, Jones v.—66 M. 380.
State, Jones v.—67 M. 111.
State, Jones v.—69 M. 406.
State, Jones v.—70 M. 398.
State, Jones v.—70 M. 401.
State, Jones v.—79 M. 309.
State, Jones v.—80 M. 181.
State, Jones v.—84 M. 194.
State, Jones v.—91 M. 868.
State, Jones v.—95 M. 121.
State, Jones v.—47 So. 479.
State, Jones v.—52 So. 791.
State, Jones v.—54 So. 724.
State, Jordan v.—32 M. 382.
State, Jordan v.—87 M. 170.
State, Josephine v.—39 M. 613.
State, Joslin v.—75 M. 838.
State, Kearney v.—68 M. 233.
State, Kearney v.—68 M. 239.
State, Keithler v.—10 S. & M. 192.
State, Kellogg v.—43 M. 57.
State, Kellt v.—68 M. 343.
State, Kellum v.—64 M. 226.
State, Kelly v.—3 S. & M. 518.
State, Kelly v.—79 M. 168.
State, Kemp v.—89 M. 445.
State, Kemp v.—89 M. 445.
State, Kemp v.—24 So. 695.
State, Kendrick v.—55 M. 436.
State, Keyce v.—78 M. 450.
State, Kinard v.—57 M. 132.
State, King v.—5 H. 730.
State, King v.—58 M. 737.
State, King v.—65 M. 576.
State, King v.—66 M. 502.
State, King v.—74 M. 576.
State, King v.—83 M. 375.
State, King v.—23 So. 766.
State, King v.—48 So. 228.
State, King v.—54 So. 657.
State, Kirby v.—78 M. 175.
State, Kirk v.—13 S. & M. 406.
State, Kirk v.—69 M. 215.
State, Kittrell v.—89 M. 666.
State, Knight v.—64 M. 802.
State, Knight v.—74 M. 140.
State, Klaus v.—54 M. 644.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

State, Kliffield v.—4 H. 304.
State, Kline v.—44 M. 317.
State, Klyce v.—78 M. 450.
State, Klyce v.—79 M. 652.
State, Knox v.—52 So. 695.
State, Kohlbrunner v.—67 M. 368.
State, Kohlheimer v.—39 M. 548.
State, Kramer v.—61 M. 158.
State, Lamar v.—63 M. 265.
State, Lamar v.—64 M. 428.
State, Lamar v.—64 M. 687.
State, Lamar v.—65 M. 93.
State, Lambeth v.—23 M. 322.
State, Lampton v.—11 So. 656.
State, Landrum v.—63 M. 107.
State, Lane v.—82 M. 555.
State, Lanier v.—57 M. 102.
State, Laura v.—26 M. 174.
State, Lavins v.—3 So. 78.
State, Lawson v.—62 M. 556.
State, Lawson v.—87 M. 562.
State, Layton v.—56 M. 791.
State, Lea v.—64 M. 201.
State, Lea v.—64 M. 278.
State, Lea v.—64 M. 294.
State, Leathers v.—26 M. 73.
State, Ledbetter v.—61 M. 22.
State, Lee v.—45 M. 114.
State, Lee v.—51 M. 566.
State, Lee v.—51 M. 665.
State, Lee v.—75 M. 625.
State, Lee &c. Fire Co. v.—60 M. 395.
State, Leflore County v.—70 M. 769.
State, Legori v.—8 S. & M. 697.
State, Leland v.—82 M. 132.
State, Lemly v.—69 M. 628.
State, Lemly v.—70 M. 241.
State, Lemon v.—95 M. 526.
State, Lewenthall v.—51 M. 645.
State, Lewis v.—9 S. & M. 115.
State, Lewis v.—41 M. 686.
State, Lewis v.—49 M. 354.
State, Lewis v.—65 M. 468.
State, Lewis v.—85 M. 35.
State, Lewis v.—91 M. 505.
State, Lewis v.—93 M. 697.
State, Lewis v.—2 Miss. Dec. 567.
State, Levy v.—89 M. 394.
State, Licks v.—42 M. 316.
State Life Ins. Co. Young v.—91 M. 710.
State, Lindzey v.—65 M. 542.
State, Lipscomb v.—75 M. 559.
State, Lipscomb v.—76 M. 223.
State, Litford v.—93 M. 419.
State, Little v.—87 M. 512.
State, Littlejohn v.—59 M. 273.
State, Livelar v.—53 So. 681.
State, Lloyd v.—70 M. 251.
State, Loftin v.—1 Miss. Dec. 105.
State, Loftin v.—11 S. & M. 358.
State, Lofton v.—79 M. 723.
State, Logan v.—50 M. 269.
State, Logan v.—53 M. 431.
State, Logan v.—40 So. 323.
State, Lohery v.—91 M. 853.
State, Long v.—52 M. 23.
State, Long v.—81 M. 448.
State, Long v.—94 M. 230.
State, Long v.—56 So. 185.
State, Longacre v.—2 H. 637.
State, Loper v.—3 H. 429.
State, Lott v.—83 M. 609.
State, Loughbridge v.—3 So. 667.
State, Louisville &c. R. Co. v—66 M. 662.
State, Love v.—8 So. 465.
State, Lucas v.—71 M. 471.
State, Lucker v.—14 So. 259.
State, Luckett v.—51 M. 799.
State, Lum v.—66 M. 389.
State, Lunenberger v.—74 M. 379.
State, Lusk v.—64 M. 845.
State, Lynch v.—78 M. 347.
State, Lynes v.—86 M. 617.
State, Mabry v.—71 M. 716.
State, McBeth v.—50 M. 81.
State, McBride v.—70 M. 716.
State, McCaa v.—38 So. 228.
State, McCaleb v.—96 M. 144.
State, McCall v.—29 So. 1003.
State, McCallum v.—30 So. 47.
State, McCann v.—9 S. & M. 465.
State, McCargo v.—1 So. 161.
State, McCarthy v.—56 M. 294.
State, McCarty v.—26 M. 299.
State, McCarty v.—37 M. 411.
State, McCann v.—13 S. & M. 471.
State, McCearley v.—52 So. 796.
State, McClelland v.—54 So. 251.
State, McCoy v.—91 M. 257.
State, McCrory v.—25 So. 671.
State, McCullough v.—28 So. 946.
State, McDaniel v.—8 S. & M. 401.
State, McDonald v.—68 M. 728.
State, McDonald v.—78 M. 369.
State, McDonald v.—28 So. 750.
State, McDowell v.—68 M. 348.
State, McDowell v.—74 M. 373.
State, McElmore v.—81 M. 422.
State, McEwen v.—16 So. 242.
State, McEwin v.—3 S. & M. 120.
State, McGee v.—22 So. 890.
State, McGehee v.—62 M. 772.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

State, McGraw v.—W. 208.
State, McGuire v.—13 S. & M. 257.
State, McGuire v.—35 M. 366.
State, McGuire v.—37 M. 369.
State, McGuire v.—76 M. 504.
State, McGuirk v.—64 M. 209.
State, McHenry v.—91 M. 562.
State, McInnis v.—52 So. 634.
State, McIntosh v.—2 Miss. Dec. 673.
State, McKenna v.—61 M. 589.
State, Mackguire v.—91 M. 151.
State, McLaurin v.—64 M. 529.
State, McLean v.—12 So. 905.
State, McLendon v.—96 M. 250.
State, McLeod v.—69 M. 221.
State, Mackmasters v.—81 M. 374.
State, Mackmasters v.—82 M. 459.
State, Mackmasters v.—83 M. 1.
State, McMann v.—13 S. & M. 471.
State, McMasters v.—29 So. 522.
State, McPhay v.—87 M. 456.
State, McQuillan v.—8 S. & M. 587.
State, McVay v.—26 So. 947.
State, Madden v.—65 M. 176.
State, Magee v.—92 M. 865.
State, Magee v.—21 So. 130.
State, Magee v.—54 So. 802.
State, Maiden v.—11 So. 488.
State, Majors v.—83 M. 439.
State, Malone v.—77 M. 812.
State, Mann v.—80 M. 398.
State, Marks v.—71 M. 206.
State, Marlow v.—62 M. 677.
State, Marsh v.—30 M. 637.
State, Martin v.—63 M. 505.
State, Martin v.—71 M. 87.
State, Martin v.—89 M. 633.
State, Martin v.—93 M. 764.
State, Martin v.—52 So. 258.
State, Martin v.—54 So. 148.
State, Marx v.—61 M. 478.
State, Mask v.—32 M. 405.
State, Mask v.—36 M. 77.
State, Maston v.—83 M. 647.
State, Mastronada v.—60 M. 86.
State, Mathis v.—80 M. 491.
State, Mathison v.—87 M. 739.
State v. Matthews, 57 M. 1—counties, 95; office. 37; tax. 568, 568c.
State, Matthews v.—61 M. 155.
State, Matthews v.—96 M. 169.
State, Maury v. 68 M. 605.
State, Maxwell v.—68 M. 339.
State, Maxwell v.—40 So. 615.
State, May v.—89 M. 291.
State, May v.—54 So. 70.
State, Mayes v.—64 M. 329.
State, Mayes v.—28 M. 706.
State, Merrill v.—45 M. 651.
State, Merrill v.—58 M. 65.
State, Merritt v.—5 So. 386.
State, Metts v.—68 M. 126.
State, Miazza v.—36 M. 613.
State, Michon v.—1 Miss. Dec. 529.
State, Middleton v.—80 M. 393.
State, Middleton v.—52 So. 258.
State, Miles v.—54 So. 946.
State, Miller v.—5 H. 250.
State, Miller v.—33 M. 356.
State, Miller v.—53 M. 403.
State, Miller v.—68 M. 221.
State, Miller v.—68 M. 533.
State, Miller v.—69 M. 112.
State, Miller v.—81 M. 162.
State, Miller v.—35 So. 690.
State, Miller v.—49 So. 513.
State, Minor v.—36 M. 630.
State, Miss. Cent. R. Co. v.—46 M. 157.
State, Mitchell v.—24 M. 312.
State, Mitchell v.—55 So. 354.
State, Mixon v.—55 M. 525.
State, Mobile &c. R. Co. v.—51 M. 137.
State, Mobile &c. R. Co. v.—89 M. 724.
State, Mobley v.—46 M. 501.
State, Monaghan v.—66 M. 513.
State, Monette v.—91 M. 662.
State, Monroe v.—71 M. 196.
State, Monroe County v.—63 M. 135.
State, Montgomery v.—85 M. 330.
State, Montgomery v.—52 So. 357.
State, Montgomery County v.—71 M. 153.
State, Montross v.—61 M. 429.
State, Moody v.—3 S. & M. 642.
State, Moore v.—W. 134.
State, Moore v.—13 S. & M. 259.
State, Moore v.—36 M. 137.
State, Moore v.—48 M. 147.
State, Moore v.—55 M. 432.
State, Moore v.—59 M. 25.
State, Moore v.—86 M. 160.
State, Moore v.—91 M. 250.
State, Moore v.—45 So. 866.
State, Moore v.—2 Miss. Dec. 227.
State, Morgan v.—13 S. & M. 242.
State, Morgan v.—63 M. 162.
State, Morgan v.—64 M. 511.
State, Moriarty v.—62 M. 654.
State, Morman v.—24 M. 54.
State, Morris v.—8 S. & M. 762.
State, Morris v.—8 So. 295.
State, Morrow v.—57 M. 836.
State, Morton v.—12 S. & M. 829.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

State, Moseley v.—89 M. 802.
State, Mosely v.—92 M. 250.
State, Mosely v.—11 So. 105.
State, Moses v.—65 M. 56.
State, Moss v.—6 H. 298.
State, Moss v.—1 Miss. Dec. 261.
State, Mount v.—7 S. & M. 277.
State, Mulligan v.—47 M. 304.
State, Munford v.—39 M. 558.
State, Murdin v.—82 M. 507.
State, Murphy v.—24 M. 590.
State, Murphy v.—28 M. 637.
State, Murphy v.—62 M. 97.
State, Murphy v.—66 M. 46.
State, Murphy v.—89 M. 221.
State, Murphy v.—92 M. 203.
State, Murrah v.—51 M. 675.
State, Murray v.—36 So. 451.
State, Murray v.—54 So. 72.
State, Muson v.—1 Miss. Dec. 562.
State, Myers v.—61 M. 138.
State, Myers v.—23 So. 428.
State, Myers v.—54 So. 849.
Staten v. State, 30 M. 619—crim. l. 805; hom. 122.
State, Nail v.—70 M. 32.
State Nat. Bank v. Lyons, 52 M. 181—hom. 118.
State Nat. Bank v. Merchants' Bank of Grenada, 83 M. 610—corp. 550.
State Nat. Bank, Duncan v.—85 M. 681.
State, Naul v.—12 So. 903.
State, Ned v.—33 M. 364.
State, Neely v.—54 So. 315.
State, Nelm v.—13 S. & M. 500.
State, Nelms v.—53 M. 362.
State, Nelson v.—47 M. 621.
State, Nelson v.—57 M. 286.
State, Nelson v.—61 M. 212.
State, Newcombe v.—37 M. 383.
State, Newman v.—69 M. 393.
State, Newman v.—72 M. 124.
State, New Orleans &c. R. Co. v.—52 M. 877.
State, Newton v.—12 So. 560.
State, Niblett v.—75 M. 105.
State, Nichols v.—46 M. 284.
State, Nixon v.—2 S. & M. 497.
State, Noe v.—4 H. 330.
State, Nogales Club v.—69 M. 218.
State, Noonan v.—1 S. & M. 562.
State, Norris v.—33 M. 373.
State, Norton v.—65 M. 297.
State, Norton v.—72 M. 128.
Staten, Porter v.—64 M. 421.
Staten, Sharman v.—8 So. 851.
State, Nunnery v.—87 M. 542.
State, Nutt v.—95 M. 422.
State, Nutt v.—96 M. 473.
State, Oakes v.—54 So. 79.
State, Oden v.—27 So. 992.
State, O'Flinn v.—66 M. 7.
State, O'Flynn v.—89 M. 850.
State, Ogle v.—33 M. 383.
State, Oliver v.—5 M. 14.
State, Oliver v.—39 M. 526.
State, O'Neal v.—48 So. 225.
State, Organ v.—26 M. 78.
State, Orr v.—81 M. 130.
State, Orr v.—18 So. 118.
State, Osborne v.—64 M. 318.
State, Osborne v.—55 So. 52.
State, Ott v.—78 M. 487.
State, Ouidas v.—78 M. 622.
State, Overaker v.—4 S. & M. 738.
State, Overstreet v.—3 H. 328.
State, Owens v.—59 M. 547.
State, Owens v.—63 M. 450.
State, Owens v.—80 M. 499.
State, Owens v.—82 M. 18.
State, Owens v.—82 M. 31.
State, Owens v.—96 M. 346.
State, Pace v.—25 M. 54.
State, Paddleford v.—57 M. 118.
State, Pafhausen v.—94 M. 103.
State, Pagaud v.—5 S. & M. 491.
State, Page v.—59 M. 474.
State, Page v.—54 So. 725.
State, Palmer v.—73 M. 780.
State, Parker v.—51 M. 535.
State, Parker v.—55 M. 414.
State, Parker v.—10 So. 571.
State, Patterson v.—71 M. 675.
State, Patterson v.—75 M. 670.
State, Patton v.—1 Miss. Dec. 270.
State, Payne v.—57 M. 348.
State, Payne v.—61 M. 161.
State, Peabody v.—72 M. 104.
State, Pearson v.—66 M. 510.
State, Pearson v.—53 So. 689.
State, Peden v.—61 M. 267.
State, Pederre v.—54 So. 721.
State, Peebles v.—55 M. 434.
State, Penn v.—62 M. 450.
State, Peoples v.—33 So. 289.
State, Perkins v.—23 So. 579.
State, Permenter v.—54 So. 949.
State, Perrow v.—67 M. 365.
State, Peter v.—3 H. 433.
State, Peter v.—6 H. 326.
State, Peter v.—4 S. & M. 31.
State, Petty v.—83 M. 260.
State, Phillips v.—58 M. 578.

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State, Phillips v.—91 M. 716.
State, Pickens v.—61 M. 52.
State, Pickens v.—61 M. 563.
State, Pitts v.—43 M. 472.
State, Planters' Bank v.—6 S. & M. 628.
State, Planters' Bank v.—7 S. & M. 163.
State, Polk v.—65 M. 433.
State, Pollard v.—53 M. 410.
State, Pond v.—47 M. 39.
State, Pons v.—49 M. 1.
State, Poole v.—56 So. 184.
State, Pope v.—36 M. 121.
State, Pope v.—56 M. 790.
State, Pope v.—63 M. 53.
State, Porter v.—23 M. 578.
State, Porter v.—57 M. 300.
State, Porter v.—83 M. 23.
State, Porter v.—1 Miss. Dec. 555.
State, Posey v.—86 M. 141.
State, Postal Tel. &c. Co. v.—71 M. 555.
State, Pounds v.—60 M. 925.
State, Powell v.—61 M. 319.
State, Powell v.—67 M. 119.
State, Powell v.—20 So. 4.
State, Powell v.—23 So. 266.
State, Powell v.—96 M. 608.
State, Powers v.—74 M. 777.
State, Powers v.—83 M. 691.
State, Poythress v.—56 So. 168.
State, Prescott v.—1 So. 683.
State, Preston v.—25 M. 383.
State, Prewett v.—65 M. 437.
State, Price v.—36 M. 531.
State, Price v.—38 So. 41.
State, Prince v.—93 M. 263.
State, Prine v.—73 M. 838.
State, Pryor v.—39 So. 1012.
State, Puckett v.—71 M. 192.
State, Puckett v.—71 M. 733.
State, Pulpus v.—82 M. 648
State, Pulpus v.—84 M. 49.
State, Purvis v.—71 M. 706.
State, Quin v.—65 M. 479.
State, Quin v.—82 M. 75.
State, Ragan v.—67 M. 332.
State, Raiford v.—87 M. 359.
State, Raines v.—81 M. 489.
State, Randal v.—4 S. & M. 349.
State, Ratcliffe v.—54 So. 947.
State, Ratliff v.—2 Miss. Dec. 102.
State, Rattray v.—61 M. 377.
State, Rawl v.—8 S. & M. 599.
State, Rawls v.—70 M. 730.
State, Raymond v.—54 M. 562.
State, Reabold v.—73 M. 236.
State, Reason v.—94 M. 290.
State, Reddick v.—72 M. 1008.
State, Redus v.—54 M. 712.
State, Reed v.—62 M. 405.
State, Reed v.—24 So. 312.
State, Regan v.—87 M. 422.
State, Reid v.—38 So. 320.
State, Rembert v.—56 M. 280.
State, Reno v.—88 M. 583.
State, Retail Lumber Dealers' Assn. v.—95 M. 337.
State Revenue Agent v. Johnson, 72 M. 896—attch. 2.
State, Reyfelt v.—73 M. 415.
State, Richards v.—76 M. 268.
State, Richardson v.—68 M. 349.
State, Richardson v.—79 M. 289.
State, Richardson v.—80 M. 115.
State, Richardson v.—11 So. 934.
State, Richardson v.—28 So. 817.
State, Richardson v.—33 So. 441.
State, Richburger v.—90 M. 806.
State, Riggs v.—26 M. 51.
State, Riggs v.—30 M. 635.
State, Riley v.—43 M. 397.
State, Riley v.—18 So. 117.
State, Rist v.—93 M. 841.
State, Ritcher v.—63 M. 304.
State, Roberts v.—55 M. 421.
State, Roberts v.—72 M. 110.
State, Roberts v.—72 M. 726.
State, Robertson v.—87 M. 285.
State, Robinson v.—47 M. 423.
State, Robinson v.—16 So. 201.
State, Rocco v.—37 M. 357.
State, Rockhold v.—5 H. 291.
State, Rodgers v.—21 So. 130.
State, Rogers v.—82 M. 479.
State, Rogers v.—88 M. 38.
State, Rolls v.—52 M. 391.
State, Rosemond v.—1 Miss. Dec. 122.
State, Rowland v.—83 M. 483.
State, Rucker v.—67 M. 328.
State, Rucker v.—71 M. 680.
State, Rucker v.—18 So. 121.
State, Rucker v.—24 So. 311.
State, Rule v.—22 So. 872.
State, Runnels v.—W. 146.
State, Runnels v.—96 M. 92.
State, Russell v.—53 M. 367.
State, Rylee v.—75 M. 352.
State, Rylee v.—22 So. 890.
State, Sadler v.—53 So. 783.
State, Saffold v.—60 M. 928.
State, Saffold v.—76 M. 258.
State, Saffold v.—26 So. 945.
State, Sam v.—13 S. & M. 189.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

State, Sam v.—31 M. 480.
State, Sam v.—33 M. 347.
State, Sanders v.—73 M. 444.
State, Sanders v.—74 M. 531.
State, Sanford v.—91 M. 158.
State, Sarah v.—28 M. 267.
State, Sartorious v.—24 M. 602.
State, Saucier v.—95 M. 226.
State, Scaggs v.—8 S. & M. 722.
State, Scarver v.—53 M. 407.
State, Schrader v.—84 M. 593.
State, Schullherr v.—68 M. 227.
State, Schwall v.—21 So. 660.
State, Scott v.—31 M. 473.
State, Scott v.—56 M. 287.
State, Scott v.—60 M. 268.
State, Scott v.—62 M. 781.
State, Scott v.—70 M. 247.
State, Scott v.—80 M. 197.
State, Scott v.—91 M. 156.
State, Scott v.—92 M. 833.
State, Scott v.—39 So. 1012.
State, Scott v.—42 So. 184.
State, Seal v.—13 S. & M. 286.
State, Seal v.—2 Miss. Dec. 450.
State, Self v.—90 M. 58.
State, Serpentine v.—1 H. 256.
State, Shaffer v.—1 H. 238.
State, Shanks v.—51 M. 464.
State, Sharkey v.—33 M. 353.
State, Shattuck v.—51 M. 50.
State, Shattuck v.—51 M. 575.
State, Shaw v.—79 M. 21.
State, Shaw v.—79 M. 577.
State, Shepherd v.—89 M. 147.
State, Shepprie v.—79 M. 740.
State, Sherrod v.—90 M. 856.
State, Sherrod v.—93 M. 774.
State, Short v.—82 M. 473.
State, Shows v.—92 M. 92.
State, Shrader v.—21 So. 307.
State, Shubert v.—66 M. 446.
State, Shurley v.—90 M. 415.
State, Shields v.—87 M. 429.
State, Shine v.—42 M. 331.
State, Sides v.—96 M. 638.
State, Simmons v.—61 M. 243.
State, Simon v.—36 M. 636.
State, Simon v.—37 M. 288.
State, Simpson v.—56 M. 297.
State, Sims v.—66 M. 33.
State, Sims v.—28 So. 819.
State, Sinclair v.—87 M. 330.
State, Singleton v.—71 M. 782.
State, Skates v.—64 M. 644.
State, Skeen v.—16 So. 495.
State, Skinner v.—53 M. 399.
State, Slaughter v.—16 So. 242.
State, Sloan v.—65 M. 490.
State, Sloan v.—71 M. 459.
State, Sloughton v.—13 S. & M. 255.
State, Smith v.—13 S. & M. 140.
State, Smith v.—28 M. 728.
State, Smith v.—39 M. 521.
State, Smith v.—55 M. 410.
State, Smith v.—55 M. 513.
State, Smith v.—57 M. 822.
State, Smith v.—58 M. 867.
State, Smith v.—61 M. 754.
State, Smith v.—67 M. 116.
State, Smith v.—75 M. 542.
State, Smith v.—76 M. 728.
State, Smith v.—82 M. 793.
State, Smith v.—86 M. 315.
State, Smith v.—87 M. 627.
State, Smith v.—90 M. 11.
State, Smith v.—94 M. 255.
State, Smith v.—95 M. 786.
State, Smith v.—18 So. 116.
State, Smith v.—24 So. 316.
State, Smith v.—25 So. 491.
State, Smith v.—38 So. 335.
State, Smith v.—56 So. 179.
State, Smith v.—1 Miss. Dec. 19.
State, Smithey v.—93 M. 257.
State, Snider v.—78 M. 366.
State, Snowden v.—62 M. 100.
State, Solomon v.—71 M. 567.
State, Southern Electric Securities Co. v.—91 M. 195.
State, Southern R. Co. v.—95 M. 657.
State, Spain v.—59 M. 19.
State, Spears v.—92 M. 613.
State, Speed v.—52 M. 176.
State, Spell v.—89 M. 663.
State, Spikes v.—54 So. 1.
State, Spivey v.—58 M. 743.
State, Spivey v.—58 M. 858.
State, Spradley v.—80 M. 82.
State, Stafford v.—44 So. 801.
State, Stark v.—81 M. 397.
State, Starke v.—6 So. 843.
State, Starling v.—89 M. 328.
State, Starling v.—90 M. 255.
State, Stanford v.—76 M. 257.
State, Stanley v.—82 M. 498.
State, Stanley v.—89 M. 63.
State, Stanley v.—53 So. 497.
State, Stansberry v.—53 So. 783.
State, Staten v.—30 M. 619.
State, Steele v.—76 M. 387.

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State, Stephens v.—65 M. 329.
State, Stewart v.—50 M. 587.
State, Stewart v.—64 M. 626.
State, Stewart v.—95 M. 627.
State, Stewart v.—49 So. 178.
State, Stokes v.—24 M. 621.
State, Stokes v. 58 M. 677.
State, Stokes v.—92 M. 415.
State, Stone v.—7 So. 500.
State, Story v.—68 M. 609.
State, Stovall v.—94 M. 373.
State, Strahan v.—68 M. 347.
State, Strait v.—77 M. 639.
State, Strauss v.—58 M. 53.
State, Strawhern v.—37 M. 422.
State, Street v.—43 M. 1.
State, Strickland v.—81 M. 134.
State, Stricklin v.—13 So. 898.
State, Stringer v.—38 So. 97.
State, Stringfellow v.—26 M. 157.
State, Strong v.—23 So. 392.
State, Strother v.—74 M. 447.
State, Stubbs v.—49 M. 716.
State, Stubbs v.—53 M. 437.
State, Sudduth v.—70 M. 250.
State, Sullivan v.—67 M. 346.
State, Sullivan v.—32 So. 2.
State, Sullivan v.—85 M. 148.
State, Sullivan v.—92 M. 828.
State, Sumrall v.—29 M. 202.
State, Sumpter v.—13 So. 692.
State, Surratt v.—45 M. 601.
State, Suttle v.—88 M. 177.
State, Swinney v.—8 S. & M. 576.
State, Swor v.—81 M. 453.
State, Sykes v.—89 M. 766.
State, Sykes v.—92 M. 247.
State, Tabler v.—56 So. 171.
State, Talkington v.—87 M. 510.
State, Tarkington v.—72 M. 731.
State, Tate v.—91 M. 382.
State, Tate v.—95 M. 138.
State, Taylor v.—51 M. 79.
State, Taylor v.—52 M. 84.
State, Taylor v.—74 M. 544.
State, Taylor v.—89 M. 671.
State, Taylor v.—30 So. 657.
State, Taylor v.—37 So. 498.
State, Teague v.—39 M. 516.
State, Teasdale v.—3 So. 245.
State, Teat v.—53 M. 439.
State, Tedford v.—67 M. 363.
State, Tennison v.—79 M. 708.
State, Terry v.—52 So. 483.
State, Terry v.—12 So. 544.
State, Thames v.—82 M. 667.
State, Thibodeaux v.—69 M. 683.
State, Thomas v.—5 H. 20.
State, Thomas v.—5 H. 32.
State, Thomas v.—37 M. 353.
State, Thomas v.—61 M. 60.
State, Thomas v.—62 M. 184.
State, Thomas v.—68 M. 91.
State, Thomas v.—71 M. 345.
State, Thomas v.—73 M. 46.
State, Thompson v.—37 M. 518.
State, Thompson v.—51 M. 353.
State, Thompson v.—54 M. 740.
State, Thompson v.—58 M. 62.
State, Thompson v.—73 M. 584.
State, Thompson v.—83 M. 287.
State, Thompson v.—84 M. 758.
State, Thompson v.—88 M. 223.
State, Thompson v.—91 M. 662.
State, Thompson v.—94 M. 901.
State, Thompson v.—7 So. 403.
State, Thompson v.—9 So. 298.
State, Thurmond v.—94 M. 1.
State, Tidwell v.—84 M. 475.
State, Tift v.—23 M. 567.
State, Timmons v.—56 M. 786.
State, Tipler v.—57 M. 685.
State, Tolbert v.—71 M. 179.
State, Townsend v.—12 So. 209.
State, Traube v.—56 M. 153.
State, Treen v.—92 M. 756.
State, Trim v.—33 So. 718.
State, Triplet v.—80 M. 379.
State, Trost v.—64 M. 188.
State, Tuberville v.—38 So. 333.
State, Tucker v.—55 M. 452.
State, Tucker v.—89 M. 363.
State, Turbeville v.—56 M. 793.
State, Turnage v.—1 Miss. Dec. 532.
State, Turney v.—8 S. & M. 104.
State, Turner v.—28 M. 684.
State, Turner v.—60 M. 351.
State, Turner v.—89 M. 621.
State, Turner v.—94 M. 458.
State, Turner v.—95 M. 879.
State, Tyler v.—69 M. 895.
State, Tynes v.—29 So. 91.
State, Tynes v.—93 M. 119.
State, Unger v.—42 M. 642.
State, Upchurch v.—96 M. 586.
State, Vails v.—94 M. 365.
State, Valentine v.—35 So. 170.
State, Vance v.—62 M. 137.
State, Vaughan v.—3 S. & M. 553.
State, Vicksburg &c. R. Co. v.—64 M. 5.
State, Vicksburg &c. R. Co. v.—62 M. 105.
State, Virgil v.—63 M. 317.

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State, Welch v.—68 M. 341.
State, Waddle v.—24 So. 311.
State, Wadley v.—96 M. 77.
State, Waldrop v.—54 So. 66.
State, Waldrop v.—95 M. 287.
State, Walker v.—1 Miss. Dec. 431.
State, Walker v.—53 M. 532.
State, Wall v.—51 M. 396.
State, Wallace v.—21 So. 662.
State, Waller v.—91 M. 557.
State, Walton v.—57 M. 533.
State, Walton v.—64 M. 207.
State, Walton v.—87 M. 296.
State, Ward v.—40 M. 108.
State, Ward v.—70 M. 245.
State, Ward v.—90 M. 249.
State, Warden v.—60 M. 638.
State, Ware v.—71 M. 204.
State, Warfield v.—96 M. 170.
State, Warfield v.—53 So. 397.
State, Wash v.—14 S. & M. 120.
State, Wash v.—28 M. 267.
State, Washington v.—76 M. 270.
State, Washington v.—78 M. 189.
State, Washington v.—93 M. 270.
State, Washington v.—21 So. 656.
State, Washington v.—29 So. 77.
State, Washington v.—53 So. 416.
State, Watkins v.—60 M. 323.
State, Watkins v.—11 So. 532.
State, Watson v.—36 M. 593.
State, Watson v.—81 M. 700.
State, Watson v.—96 M. 627.
State, Watts v.—90 M. 757.
State, Weathersby v.—95 M. 300.
State, Webb v.—73 M. 456.
State, Webb v.—21 So. 133.
State, Webb v.—55 So. 356.
State, Weeks v.—31 M. 490.
State, Wells v.—90 M. 516.
State, Wells v.—96 M. 500.
State, Wells v.—18 So. 117.
State, Wesley v.—37 M. 327.
State, West v.—70 M. 598.
State, West v.—80 M. 710.
State, Westbrook v.—52 M. 777.
State, Westbrooks v.—76 M. 710.
State, Wharton v.—41 M. 680.
State, Wheeler v.—64 M. 462.
State, Wheeler v.—76 M. 265.
State, Whit v.—85 M. 208.
State, Whit v.—87 M. 564.
State, White v.—2 Miss. Dec. 562.
State, White v.—1 S. & M. 149.
State, White v.—42 M. 635.
State, White v.—52 M. 216.
State, White v.—70 M. 253.
State, White v.—73 M. 50.
State, White v.—89 M. 675.
State, White v.—95 M. 75.
State, White v.—25 So. 1039.
State, White v.—45 So. 611.
State, Whitehead v.—52 So. 259.
State, Whitley v.—78 M. 255.
State, Whitlock v.—6 So. 237.
State, Whitney v.—52 M. 732.
State, Whittaker v.—45 So. 145.
State, Whitten v.—61 M. 717.
State, Whitten v.—95 M. 410.
State, Whittin v.—37 M. 379.
State, Whittington v.—62 M. 796.
State, Whittle v.—79 M. 327.
State, Wilborn v.—8 S. & M. 345.
State, Wilburn v.—73 M. 245.
State, Wilby v.—93 M. 767.
State, Wile v.—60 M. 260.
State, Wiley v.—74 M. 727.
State, Wilkerson v.—78 M. 356.
State, Wilkins v.—93 M. 695.
State, Wilkinson v.—77 M. 705.
State, Williams v.—2 Miss. Dec. 601.
State, Williams v.—12 S. & M. 58.
State, Williams v.—32 M. 389.
State, Williams v.—37 M. 407.
State, Williams v.—42 M. 328.
State, Williams v.—47 M. 609.
State, Williams v.—63 M. 58.
State, Williams v.—72 M. 117.
State, Williams v.—73 M. 820.
State, Williams v.—79 M. 555.
State, Williams v.—87 M. 373.
State, Williams v.—90 M. 319.
State, Williams v.—92 M. 70.
State, Williams v.—95 M. 671.
State, Williams v.—4 So. 550.
State, Williams v.—23 So. 547.
State, Williams v.—49 So. 513.
State, Williams v.—54 So. 857.
State, Williamson v.—59 M. 235.
State, Williamson v.—64 M. 229.
State, Willis v.—27 So. 524.
State, Wilson v.—42 M. 639.
State, Wilson v.—70 M. 595.
State, Wilson v.—71 M. 880.
State, Wilson v.—80 M. 388.
State, Wilson v.—81 M. 404.
State, Wilson v.—85 M. 687.
State, Wiltcher v.—54 So. 726.
State, Windham v.—91 M. 845.
State, Winegarden v.—87 M. 264.
State, Wingo v.—62 M. 311.
State, Wingo v.—91 M. 865.

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State, Winters v.—65 M. 238.
State, Wisconsin Lumber Co. v.—54 So. 247.
State, Wolfe v.—59 M. 338.
State, Wood v.—43 M. 364.
State, Wood v.—58 M. 741.
State, Wood v.—62 M. 220.
State, Wood v.—64 M. 761.
State, Wood v.—81 M. 408.
State, Woodruff v.—66 M. 298.
State, Woodruff v.—77 M. 68.
State, Woods v.—43 M. 364.
State, Woods v.—67 M. 575.
State, Woods v.—81 M. 164.
State, Woods v.—90 M. 245.
State, Woods v.—43 So. 289.
State, Woodsen v.—94 M. 370.
State, Woodside v.—2 H. 655.
State, Woodward v.—89 M. 348.
State, Wortham v.—59 M. 179.
State, Wortham v.—80 M. 205.
State, Wright v.—50 M. 332.
State, Wright v.—82 M. 421.
State, Wynn v.—63 M. 260.
State, Wynn v.—67 M. 312.
State, Yarbrough v.—70 M. 593.
State, Yazoo City v.—48 M. 440.
State, Yerger v.—91 M. 802.
State, Young v.—2 H. 865.
State, Young v.—24 So. 316.
Statham v. New York Life Ins. Co. 45 M. 581—attch. 66; eq. 152; ins. 147, 349; war, 10.
Statham, Grantham v.—83 M. 176.
Statham, New Orleans &c. R. Co. v.—42 M. 607.
Staton v. Alcorn, 51 M. 72—subrog. 1.
Staton v. Bryant, 55 M. 261—eject. 132, 143; estop. 52, 56, 94, 95, 118; fraud. 1; mtg. 547.
Staton v. New, 49 M. 307—hus. & w. 86, 230; spec. perf. 123.
Staton, Williams v.—5 S. & M. 347.
Stauffer v. British &c. Mortg. Co. 77 M. 127—lim. of act. 82.
Stauffer v. Garrison, 61 M. 67—abate & r. 6; parties, 81, 95; plead. 131; sequest. 20.
Staunton, Vannerson v.—W. 358.
Staunton, Wade v.—5 H. 631.
Steadman v. Butler, 95 M. 695—inj. 241.
Steadman v. Holman, 33 M. 550—app. & e. 906; hus. & w. 10, 152, 242.
Steamboat Baton Rouge, Bohr v.—7 S. & M. 715.
Steamboat Buckeye, Lum v.—24 M. 564.
Steamboat Hope, Dever v.—42 M. 715.
Steamer Genl. Worth v. Hopkins, 30 M. 703—attch. 104, 132; ship. 61, 78; witn. 94.
Steamer Magnolia v.—Marshall, 30 M. 109—nav. wat. 1, 36, 39, 41; waters, 89, 90.
Steamer Vesta, Wright v.—5 H. 152.
Stearn, Pullman Co. v.—88 M. 390.
Stebbins v. Niles, 13 S. & M. 307—app. & e. 5, 66, 75.
Stebbins v. Niles, 25 M. 267—acct. st. 4, 6; cncts. 16, 95, 97, 175; mon. lent. 1; release, 7.
Stebbins, Booth v.—47 M. 161.
Stebbins, Stewart v.—30 M. 66.
Steel, Brownlee v.—W. 179.
Steele v. Calhoun, 61 M. 556—elec. 191, 200.
Steele v. McDowall, 9 S. & M. 193—ex. & ad. 428.
Steele v. Palmer, 41 M. 88—app. & e. 496; judgm. 18.
Steele v. Shirley, 9 S. & M. 382—app. & e. 5, 802; hab. corp. 113.
Steele v. Shirley, 13 S. & M. 196—app. & e. 5, 802; execution, 156; hab. corp. 2.
Steele v. State, 76 M. 387—crim. l. 393, 405, 539, 1129, 1166½.
Steele, Cummings v.—54 M. 647.
Steele, Lyons v.—86 M. 261.
Steen v. Briggs, 3 S. & M. 326—execution, 333; sheriffs, 123, 125.
Steen v. Finley, 25 M. 535—action, 50; ex. & ad. 527.
Steen v. Hamblet, 66 M. 112—exemp. 59.
Steen v. Kirkpatrick, 84 M. 63—frds. st. of, 5, 56; witn. 157.
Steen v. Steen, 23 M. 361—ex. & ad. 37.
Steen v. Steen, 25 M. 513—ex. & ad. 464, 471, 508; guard. & w. 145; judgm. 916.
Steen, Amite County v.—72 M. 567.
Steen, Hamblet v.—65 M. 474.
Steen, Virginia-Carolina Chemical Co. v.—55 So. 47.
Stegall v. Coney, 49 M. 761—partners. 141, 144, 154; trusts, 103.
Stegall, Bank of Newberry v.—41 M. 142.
Steger v. Bush, Sm. & M. Ch. 172—ex. & ad. 363, 364, 368; pigs. 30.
Stein v. Adams, 23 So. 269—int. liq. 180, 188.
Stein v. Brunswick, 69 M. 277—alt. inst. 26; ev. 116.
Stein v. Hyman-Lewis Co. 95 M. 293—land. & t. 109.
Stein v. Stein, 25 M. 513—ex. & ad. 533.
Steinberger v. Western Union Tel. Co. 52 So. 691—tel. & t. 69.
Stein, Georgia Home Ins. Co. v.—72 M. 943.
Stein, Miss. Fire Assn. v.—88 M. 499.
Stein, Supreme Lodge v.—15 M. 107.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Steitenroth v. Jackson, 54 So. 955—mun. corp. 57; waters, 277.
Stelle, Metcalf v.—42 M. 511.
Stephen v. Eiseman, 54 M. 535—courts, 119; replev. 17.
Stephen, Rubon v.—25 M. 253.
Stephens v. Commercial &c. Bank, 31 M. 438—plead. 258.
Stephens v. Hood, 9 S. & M. 75—app. & e. 372, 784.
Stephens v. Railway &c. Assn. 75 M. 84—ins. 464.
Stephens v. Roby, 27 M. 744—execution, 100; judgm. 360, 906, 912, 914, 937.
Stephens v. State, 65 M. 329—anim. 96.
Stephens, Denton v.—32 M. 194.
Stephens, Howard v.—52 M. 239.
Stephenson v. Miller, 57 M. 48—eject. 33; hus. & w. 171.
Stephenson v. Osborne, 41 M. 119—const. law, 180; hus. & w. 111, 279.
Stephenson v. Sloan, 65 M. 407—attch. 34.
Stephenson v. Smith, 23 M. 507—excep. 56.
Stephenson, Dean v.—61 M. 175.
Stephenson, Frank v.—21 So. 778.
Stephenson, Saunders v.—94 M. 676.
Stephenson, Whitley v.—38 M. 113.
Steppacher v. Reneau, 25 M. 114—new tr. 76.
Stern v. Hampton, 73 M. 555—subrog. 23; trusts, 209; wills, 629.
Stern v. Hampton, 19 So. 300—fraud. conv. 58; trusts, 46.
Stevens v. Brown, 49 M. 597—bankr. 20, 417.
Stevens v. Durrett, 49 M. 411—eject. 8; ex. & ad. 319.
Stevens v. Magee, '81 M. 644—app. & e. 1009; judgm. 788.
Stevens v. Mangum, 27 M. 481—app. & e. 934; judgm. 766, 778, 780; j. p. 135.
Stevens v. Moore, 1 Miss. Dec. 537—land. & t. 229b.
Stevens v. Ruher, 1 H. 522—appr. 24; execution, 102.
Stevens v. West, 1 H. 308—bills & n. 142, 283.
Stevens v. Wilbourn, 88 M. 514—home. 65, 141; partit. 12.
Stevens v. Yazoo &c. R. Co. 81 M. 195—r. r. 391, 400.
Stevens, Blalack v.—81 M. 711.
Stevens, Bloodworth v.—51 M. 475.
Stevens, Dandridge v.—12 S. & M. 723.
Stevens, Jones v.—12 So. 446.
Stevens Lumber Co. v. Hughes, 38 So. 769—adv. pos. 23; eject. 82.
Stevens, McGuire v.—42 M. 724.
Stevens, Martin v.—30 M. 159.
Stevens, Miss. Home Ins. Co. v.—93 M. 439.
Stevens, Moore v.—60 M. 809.
Stevens, Netterville v.—2 H. 642.
Stevenson v. McReary, 12 S. & M. 9—estop. 12; ev. 69; ex. & ad. 351, 358, 388, 388c, 397; lim. of act. 76, 176; marr. 40; propty. 9; trial, 194, 248.
Stevenson v. Morris, 69 M. 232—cncts. 301; dam. 122.
Stevenson v. Reed, 90 M. 341—tax. 671, 810.
Stevenson v. Renardet, 83 M. 392—hus. & w. 31a, 31d, 33.
Stevenson v. Walton, 2 S. & M. 262—abate. & r. 27.
Stevenson, Adams Lumber Co. v.—89 M. 678.
Stevenson, Southern Express Co. v.—89 M. 233.
Stevens, Russell v.—70 M. 685.
Stevens, Wheeler v.—13 S. & M. 623.
Stewart v. Belt, 19 So. 957—inj. 163.
Stewart v. Brooks, 62 M. 492—eq. 66; judgm. 419, 449, 460; new tr. 146.
Stewart v. Buck, 2 Miss. Dec. 440—ex. & ad. 510; frds. st. of, 18.
Stewart v. Burkholter, 28 M. 396—ex. & ad. 44; partners. 245.
Stewart v. Cage, 59 M. 558—deeds, 38.
Stewart v. Davidson, 10 S. & M. 351—const. law, 191; ex. & ad. 419; statut. 263, 267.
Stewart v. Flowers, 44 M. 513—atty. & c. 182; liens, 7.
Stewart v. Forman, 90 M. 85—lim. of act. 148.
Stewart v. Foxworth, 52 So. 354—adv. pos. 106.
Stewart v. Fuqua, W. 175—execution, 154b.
Stewart v. Gates, 30 M. 100—ven. & pur. 96.
Stewart v. Graham, 93 M. 251—app. & e. 1031; replev. 70.
Stewart v. Hinds County, 25 M. 479—high. 53; judgm. 17a.
Stewart v. Hollins, 47 M. 708—agric. 10; land. & t. 240; plead. 229.
Stewart v. Ives, 1 S. & M. 197—ven. & pur. 254b, 257, 262.
Stewart v. Lee Mut. Fire Ins. Assn. 64 M. 499—corp. 310, 312; ins. 54, 56, 61, 733.
Stewart v. Lumpkin, 51 So. 801—adv. pos. 57.
Stewart v. Matheny, 66 M. 21—estop. 93; life est. 10, 17; ten. in c. 20; ven. & pur. 230.
Stewart v. Morrison, 38 M. 417—guard. & w. 8, 9½, 10, 17, 144.
Stewart v. Pettit, 94 M. 769—j. p. 70.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Stewart v. Potts, 49 M. 749—atty. & c. 28.
Stewart v. Raymond R. Co. 7 S. & M. 568—em. dom. 2, 154, 272, 318, 320; spec. perf. 97.
Stewart v. Richardson, 32 M. 313—ex. & ad. 444, 450, 454, 502.
Stewart v. Ross, 50 M. 776—curt. 11.
Stewart v. State, 50 M. 587—crim. l. 598, 1150; jury, 138; trial, 222.
Stewart v. State, 64 M. 626—crim. l. 622, 723; forn. 8, 9, 10; lewd, 7, 11a.
Stewart v. State, 95 M. 627—banks, 84; crim. l. 1; statut. 241.
Stewart v. State, 49 So. 178—rape, 50.
Stewart v. Stebbins, 30 M. 66—app. & e. 1097; assign. f. b. c. 177; judgm. 650, 713; partners. 333.
Stewart v. Swanzy, 12 S. & M. 684—app. & e. 1178; wills, 240, 245.
Stewart v. Swanzy, 23 M. 502—app. & e. 1178; ev. 35, 340, 348; wills, 240.
Stewart, Barnett v.—1 Miss. Dec. 342.
Stewart, Benson v.—30 M. 49.
Stewart, Currie v.—26 M. 646.
Stewart, Feld v.—78 M. 187.
Stewart, Freeman v.—41 M. 138.
Stewart, Garland v.—31 M. 314.
Stewart, Gilleylen v.—72 M. 262.
Stewart, Goodall v.—65 M. 157.
Stewart, Ladnier v.—38 So. 748.
Stewart, Louisville &c. R. Co. v.—78 M. 600.
Stewart, Lucas v.—3 S. & M. 231.
Stewart, Madison County v.—74 M. 160.
Stewart, Magruder v.—4 H. 204.
Stewart, Marshall v.—67 M. 494.
Stewart, Marshall v.—68 M. 180.
Stewart, Menter v.—2 H. 698.
Stewart, Minor v.—2 H. 912.
Stewart, Orrick v.—12 So. 824.
Stewart, Partee v.—50 M. 717.
Stewart, Roberts v.—31 M. 664.
Stewart, Southern Ins. Co. v.—30 So. 755.
Stewart, State v.—36 M. 652.
Stewart, Vasser v.—68 M. 180.
Stewart, Williams v.—12 S. & M. 533.
Stewart, Williams v.—79 M. 46.
Stidger, Dabney v.—4 S. & M. 749.
Stiegleman, Hicks v.—49 M. 377.
Stier v. Surget, 10 S. & M. 154—app. & e. 197; j. p. 67, 100, 141, 176; land. & t. 63, 185, 222, 230; plead. 430.
Stigler v. Anderson, 12 So. 831—bills & n. 538; trial, 190.
Stigler v. Jaap, 83 M. 351—ven. & pur. 18.
Stigler v. Porter, 42 M. 449—ex. & ad. 322, 325.
Stiles v. Inman, 55 M. 469—bills & n. 420, 535; parties, 80, 81; plead. 193; trial, 150, 154.
Stiles v. Weir, 26 M. 187—tax. 657.
Stiles, Tell City Furniture Co. v.—60 M. 849.
Stiles-Tull Lumber Co. Spengler v.—94 M. 780.
Still v. Anderson, 63 M. 545—app. & e. 881.
Still v. Davidson, 51 M. 153—ex. & ad. 480.
Still v. Woodville, 38 M. 646—dom. 4; wills, 252.
Still, Henderson v.—61 M. 391.
Still, International Harvester Co. v.—53 So. 394.
Stillman v. Hamer, 7 H. 421—fixt. 1, 24; trover. 2.
Still, Porter v.—63 M. 357.
Stillwell &c. Co. v. Biloxi Canning Co. 78 M. 779—sales, 168½, 281, 428, 438, 442.
Stillwell &c. Co. Biloxi Canning Co. v.—25 So. 366.
Stilwell, Sims v.—3 H. 176.
Stingily, Goforth v.—79 M. 398.
Stinson v. Lee, 68 M. 113—bills & n. 402.
Stinson, Bynum v.—81 M. 25.
Stinson, Kyle v.—13 S. & M. 301.
Stinson, Mobile &c. R. Co. v.—74 M. 453.
Stites, Tucker v.—39 M. 196.
Stith v. Parham, 57 M. 289—judgm. 870b; lim. of act. 38.
Stith, Parham v.—56 M. 465.
Stith, Parham v.—61 M. 199.
Stix, Langstaff v.—64 M. 171.
Stockard v. Eckford, 2 Miss. Dec. 490—land. & t. 231, 272.
Stockard, Coggins v.—64 M. 301.
Stockett v. Nicholson, W. 75—courts, 40, 48; high. 22; tresp. 12, 22.
Stockett, Harris v.—58 M. 825.
Stockett, Mandeville v.—28 M. 398.
Stockett, Nicholson v.—W. 67.
Stockett, West Feliciana &c. R. Co. v.—13 S. & M. 395.
Stockett, West Feliciana &c. R. Co. v.—27 M. 739.
Stockman, Planters' Bank v.—Freem. Ch. 502.
Stockner v. Wilczinski, 71 M. 340—estop. 88.
Stockton v. Caldwell, 86 M. 477—anim. 47.
Stockton v. George, 7 H. 172—cov. 26.
Stokes v. Kennedy, 58 M. 614—wills, 690.
Stokes v. Lemon, 96 M. 868—ex. & ad. 226.
Stokes v. Shannon, 55 M. 583—app. & e. 14; hus. & w. 84, 85; judgm. 273.
Stokes v. State, 24 M. 621—gr. jury, 5, 8; tax. 311.

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Stokes v. State, 58 M. 677—larc. 40, 41, 77.
Stokes v. State, 92 M. 415—crim. l. 44; hom. 25.
Stokes v. Stokes, 65 M. 456—ex. & ad. 138.
Stokes v. Terrell, 23 So. 371—trusts, 231, 232.
Stokes v. Winslow, 31 M. 518—bills & n. 352.
Stokes, Bates v.—40 M. 56.
Stokes, Binns v.—27 M. 239.
Stokes, Dismukes v.—41 M. 430.
Stokes Evans Co. v. Clay County Cotton Oil Co. 33 So. 283—cncts. 332.
Stokes, Tucker v.—3 S. & M. 124.
Stone v. Heggie, 82 M. 410—assa. 43.
Stone v. Brooks, 6 H. 373—abate. & r. 85.
Stone v. Buckner, 12 S. & M. 73—cov. 96; mtg. 415; set-off. 24; spec. perf. 52, 63, 106; trusts, 63¾; ven. & pur. 19, 31, 145, 228.
Stone v. Cannon, 9 S. & M. 595—dep. 60.
Stone v. Caspar, 2 So. 74—tax. 316.
Stone v. Heggie, 82 M. 410—assa. 41.
Stone v. Montgomery, 35 M. 83—ack. 55, 62; hus. & w. 168, 171, 193; offic. 119.
Stone v. Morgan, 65 M. 247—estop. 68; ex. & ad. 473, 504, 509.
Stone v. Natchez &c. R. Co. 62 M. 646—carr. 12.
Stone v. State, 7 So. 500—int. liq. 221, 223, 241.
Stone v. Threefoot Bros. 54 So. 595—judgm. 767.
Stone v. Yazoo &c. R. Co. 62 M. 607—carr. 1, 10, 12; const. law, 129.
Stone, Brougher v.—72 M. 647.
Stone, Elzy v.—5 S. & M. 21.
Stone, Gwin v.—Sm. & M. Ch. 124.
Stone, Heggie v.—70 M. 39.
Stone, Johnson v.—69 M. 826.
Stone, Johnston v.—71 M. 593.
Stone, Josselyn v.—28 M. 753.
Stone, Kretschmar v.—90 M. 375.
Stone, Love v.—56 M. 449.
Stone, McCulloch v.—64 M. 378.
Stone, Payne v.—7 S. & M. 367.
Stone, Porter v.—70 M. 291.
Stone, Regan v.—4 S. & M. 691.
Stone, Regan v.—7 S. & M. 104.
Stoner, Marks v.—11 So. 186.
Stone, Taylor v.—13 S. & M. 652.
Stone, Tufts v.—70 M. 54.
Stonewall Cotton Mills, Adams v.—89 M. 865.
Stonewall Mfg. Co. v. Peek, 63 M. 342—frds. st. of, 90; princ. & a. 143.
Stone, Warren v.—69 M. 375.
Stone, Warren County v.—69 M. 383.
Stone, Wynn v.—69 M. 80.
Storm v. Green, 51 M. 103—app. & e. 280, 1063; chat. m. 12; dam. 91, 136, 215; land. & t. 248; tresp. 56.
Storm v. Smith, 43 M. 497—ex. & ad. 388b; guard. & w. 108; sales, 269, 346.
Storms, Crawford v.—41 M. 540.
Story v. State, 68 M. 609—crim. l. 390, 594, 1144; hom. 142, 169, 338a; jury, 131.
Story v. Ware, 35 M. 399—plead. 86; proc. 134.
Story, State v.—57 M. 738.
Stoughton v. State, 13 S. & M. 255—crim. l. 112, 1088.
Stovall v. Connor, 58 M. 138—tax. 301, 362½, 431.
Stovall v. Farmers' &c. Bank, 8 S. & M. 305—app. & e. 994; ev. 269; fraud. conv. 29a, 140, 183, 285.
Stovall v. Judah, 74 M. 747, 21 So. 614—lost inst. 2; mtg. 171; ven. & pur. 225, 231, 232.
Stovall v. Northern Bank, 5 S. & M. 17—eq. 10, 215; judgm. 428.
Stovall v. State, 94 M. 373—hom. 250, 340.
Stovall v. Tabb, 8 So. 644—anim. 47.
Stovall, Armstrong v.—26 M. 275.
Stovall, Burch v.—27 M. 725.
Stovall, Cayce v.—50 M. 396.
Stovall, Parker v.—31 M. 446.
Stovall, Payne v.—67 M. 514.
Stovall, Pollard v.—60 M. 266.
Stowers v. Telegraph Co. 68 M. 559—em. dom. 117; tel. & t. 10.
Stowers, Harrison v.—W. 165.
Stowers, Powell v.—47 M. 577.
Stowe, Soria v.—66 M. 615.
Straas, Brennan v.—85 M. 341.
Strahan v. Attala County, 91 M. 529—high. 42, 57.
Strahan v. State, 68 M. 347—crim. l. 21; weap. 7.
Strait v. State, 77 M. 693—crim. l. 79.
Strange, Hafter v.—65 M. 323.
Stratakos, Gulfport v.—90 M. 469.
Stratton v. Gold, 40 M. 778—ven. & pur. 261, 301.
Stratton v. Taylor, 32 M. 201—parties, 54.
Stratton, Marshall v.—96 M. 465.
Stratton, Marshall v.—51 So. 132.
Stratton, Williams v.—10 S. & M. 418.
Strauss v. McAllister, 5 So. 625—tax. 764.
Strauss v. Baley, 58 M. 131—agric. 11; chat. m. 173; land. & t. 248, 249.
Strauss v. National Parlor Furniture Co. 76 M. 343—app. & e. 1201; sales, 132, 161, 164, 168, 182; trial, 139.

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Strauss v. State, 58 M. 53—crim. l. 600, 602 917.
Strauss, First Nat. Bank v.—66 M. 479.
Strauss, Illinois Cent. R. Co. v.—75 M. 367.
Strauss, Peacher v.—47 M. 353.
Straw v. Illinois Cent. R. Co. 73 M. 446—judgm. 570.
Strawhern v. State, 37 M. 422—crim. l. 508; gaming, 94; ind. 124, 130, 133, 176; witn. 89.
Street v. Columbus, 75 M. 822—const. law, 50; mun. corp. 980; pub. lands, 51; tax. 2, 173, 175.
Street v. Smith, 85 M. 359—judgm. 794, 800.
Street v. State, 43 M. 1—bailm. 41, 46, 49; consp. 44; crim. l. 427.
Strenby, Merchants' &c. Packet Co. v.—91 M. 211.
Stribling, Oglesby v.—67 M. 666.
Stribling, Presley v.—24 M. 527.
Stribling, Shaw v.—2 Miss. Dec. 280.
Strickler v. Leathers, 68 M. 803—ship. 113.
Strickland v. Hudson, 55 M. 235—app. & e. 299, 701, 867, 928; mon. recd. 1; princ. & a. 164, 176.
Strickland v. Kirk, 51 M. 795—mtg. 26; ven. & pur. 27, 232.
Strickland v. State, 81 M. 134—hom. 308, 309.
Strickland, Hudson v.—49 M. 591.
Strickland, Hudson v.—58 M. 186.
Strickland, Milam v.—45 M. 721.
Strickland, Thompson v.—52 M. 574.
Strickland, Wilkinson v.—53 So. 177.
Stricklin v. Cooper, 55 M. 624—interest, 22; ven. & pur. 285.
Stricklin v. State, 13 So. 898—hom. 244, 276; jury, 97.
Stricklin, Heirmann v.—60 M. 234.
Stringer v. State, 38 So. 97—crim. l. 761, 815.
Stringer Grand Lodge v. First Nat. Bank, 55 So. 408—banks, 147; lim. of act. 39, 66, 104.
Stringfellow v. State, 26 M. 157—crim. l. 533, 563; hom. 144; witn. 239.
Stritze, Quitman v.—69 M. 460.
Stritze, Quitman County v.—70 M. 320.
Stritz, Williams v.—17 So. 227.
Strong v. Cannon, 1 Miss. Dec. 11—trusts, 172, 322.
Strong v. Canton, 3 So. 465—r. r. 234, 390.
Strong v. Harrison, 62 M. 61—app. & e. 712, 906, 909, 920; inj. 129.
Strong v. Hines, 35 M. 201—execution, 180; fraud, 51; fraud. conv. 289; partners. 184.
Strong v. Krebs, 63 M. 338—agric. 11; fact. 47; liens, 7; logs, 22.
Strong v. Paret, 1 Miss. Dec. 283—fraud. conv. 107, 261.
Strong v. Runnels, 2 H. 667—ev. 340.
Strong v. State, 23 So. 392—ars. 37.
Strong, Burnett v.—26 M. 116.
Strong, Conway v.—24 M. 665.
Strong, Cudabac v.—67 M. 705.
Strong, Hurst v.—1 H. 123.
Strong, Maxey v.—53 M. 280.
Strong, Monroe County v.—78 M. 565.
Strong, Taylor v.—10 S. & M. 63.
Strother v. State, 74 M. 447—crim. l. 561; weap. 13, 17b.
Stroud v. Weems, 2 Miss. Dec. 267—eject. 8.
Stroud, Mobile &c. R. Co. v.—64 M. 784.
Strouse v. Lanctot, 27 So. 606—sunday, 19.
Stuart v. Robinson, 80 M. 290—wills, 819, 820.
Stuart v. Swanzy, 12 S. & M. 684—remaind. 17.
Stuart, State v.—88 M. 406.
Stubblefield v. McRaven, 5 S. & M. 130—ex. & ad. 120a, 473, 512; inj. 116.
Stubbs v. State, 49 M. 716—crim. l. 636.
Stubbs v. State, 53 M. 437—ev. 44; offic. 66.
Studebaker, Citizens' Bank v.—71 M. 544.
Studebaker, Weissinger v.—73 M. 480.
Studivant, Perkins v.—4 So. 555.
Stuhlmuller v. Ewing, 39 M. 447—witn. 51, 65.
Sturdevant v. Neill, 27 M. 157—ex. & ad. 39; wills, 70, 249, 434.
Sturdevant, Woods v.—38 M. 68.
Sturdivant, Barry v.—53 M 490.
Sturges v. Jackson, 88 M. 508—exemp. 93; garn. 20; inj. 27.
Sturges v. Meridian, 95 M. 35—mun. corp. 713.
Sturges v. Radford, 2 Miss. Dec. 379—trusts, 374.
Sturges v. Swift, 32 M. 239—partners. 102, 112.
Sturges, King v.—56 M. 606.
Sturges, Thomas v.—32 M. 261.
Styles, Lee v.—95 M. 623.
Sublett v. Bedwell, 47 M. 266—elec. 269, 270, 275, 300, 305; offic. 30, 32, 55; quo. w. 1.
Success Brick Machinery Co. Johnson v.—93 M. 169.
Suddeth, Bell v.—2 S. & M. 532.
Suddoth, Louisville &c. R. Co. v.—70 M. 265.
Suddoth, Yazoo Delta Invest. Co. v.—70 M. 416.
Sudduth v. State, 70 M. 250—weap. 13.

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Sudduth v. Sudduth, 60 M. 366—est. 5; est. tail, 1.
Sugg v. Thrasher, 30 M. 135—inj. 223; judgm. 854; lim. of act. 111.
Sugg, Dancey v.—46 M. 606.
Sugg, Johnson v.—13 S. & M. 346.
Sullivan v. Ammons, 95 M. 196—const. law, 105.
Sullivan v. Blackwell, 28 M. 737—guard. & w. 145, 164, 165.
Sullivan v. Building &c. Assn, 70 M. 94—b. & l. assn. 31, 32, 33.
Sullivan v. Grand Lodge, K. P. 52 So. 360—div. 174; marr. 40.
Sullivan v. Lafayette County, 58 M. 790—em. dom. 138; fer. 9, 21; high. 55.
Sullivan v. Lafayette County, 61 M. 271—app. & e. 1175; counties, 47; em. dom. 144, 237, 238; ev. 90.
Sullivan v. State, 67 M. 346—ind. 110; prize f. 3.
Sullivan v. State, 85 M. 149—crim. l. 814; hom. 300, 305.
Sullivan v. State, 92 M. 828—crim. l. 1172; hom. 285.
Sullivan v. State, 32 So. 2—crim. l. 364; hom. 288.
Sullivan v. Walker, 12 So. 250—atty. & c. 125.
Sullivan v. Yazoo &c. R. Co. 85 M. 649—em. dom. 172, 243; judgm. 654; mand. 27.
Sullivan, Barr v.—75 M. 536.
Sullivan, Berryman v.—13 S. & M. 65.
Sullivan, May v.—37 M. 541.
Sullivan, Orne v.—3 H. 161.
Sullivan, Pettis v.—21 So. 607.
Sullivan, State v.—80 M. 596.
Sullivan, Western Union Tel. Co. v.—70 M. 447.
Sulphine v. Dunbar, 55 M. 255—estop. 94, 95, 118; land. & t. 64.
Sultan v. Western Union Tel. Co. 92 M. 785—tel. & t. 67.
Summerfield, Phœnix Ins. Co. v.—70 M. 827.
Summers v. Brady, 56 M. 10—eject. 76, 105; ex. & ad. 380; lim. of act. 4, 70, 171.
Summers v. Foote, 28 M. 671—offic. 134; plead. 253.
Summers v. Roos, 42 M. 749—chat. m. 188; execution, 194; fraud. conv. 17, 142, 207; mtg. 16, 78.
Summers, Alabama &c. R. Co. v.—68 M. 566.
Summers, Jennings v.—7 H. 453.
Summers, Shannon v.—86 M. 619.
Summers, Shannon v.—50 So. 693.
Summers, Sivley v.—57 M. 712.
Summers, Wilkerson v.—15 So. 130.
Summey, Knowles v.—52 M. 377.
Sumner, Burnham v.—50 M. 517.
Sumner County, Chickasaw County v.—58 M. 619.
Sumner, Foster v.—3 S. & M. 606.
Sumner, Oliver Finnie Grocery Co. v.—73 M. 248.
Sumner, Temple v.—51 M. 13.
Sumpter v. Geron, 4 H. 263—bills & n. 475, 517; ev. 601.
Sumpter v. State, 13 So. 692—mast. & s. 345.
Sumrall v. State, 29 M. 202—gr. jury, 5.
Sumrall v. Sumrall, 24 M. 258—ex. & ad. 241.
Sumrall, Illinois Cent. R. Co. v.—96 M. 860.
Sumrall Lumber Co. Perry v.—95 M. 691.
Sunflower County, Jones v.—84 M. 98.
Sunflower &c. Co. v. Watts, 77 M. 56—tax. 731.
Sun Mutual Ins. Co. v. Searles, 73 M. 62—ins. 335, 561; licens. 39.
Sun Mutual Ins. Co. Nichols v.—71 M. 326.
Sun Mutual Ins. Co. Vicksburg v.—72 M. 67.
Supreme Conclave Knights of Damon v. Sayler, 32 So. 50—ins. 668.
Supreme Lodge v. Fletcher, 78 M. 377—death, 61; ins. 659, 815, 816, 818, 823.
Supreme Lodge of K. of H. Aaron v.—15 So. 115.
Supreme Lodge Knights of Pythias, Dornes v.—75 M. 466.
Supreme Lodge v. Stein, 75 M. 107—ins. 693, 716.
Supreme Lodge K. P. v. Quinn, 78 M. 525—ins. 755.
Surget v. Arighi, 11 S. & M. 87—cov. 97, 102, 113.
Surget v. Boyd, 57 M. 485—eq. 373; fraud. conv. 122, 171, 242.
Surget v. Little, 5 S. & M. 319—bound. 36; eject. 89.
Surget v. Little, 24 M. 118—eject. 87, 106; ev. 274, 342; hus. & w. 15; pub. lands, 115, 214.
Surget, Drake v.—36 M. 458.
Surget, Ford v.—46 M. 130.
Surget, Stier v.—10 S. & M. 154.
Surget, Young v.—34 So. 322.
Surratt v. State, 45 M. 601—int. liq. 221.
Sutcliff, Hooker v.—71 M. 792.
Suter v. Suter, 72 M. 345—div. 37; hus. & w. 3.
Sutherland v. Federal Ins. Co. 52 So. 689—ins. 79, 375, 381.
Sutherland, Bartlett v.—24 M. 395.

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Suttle v. Mechanics' Aid &c. Assn. 29 So. 758—app. & e. 982, 1010.
Suttle v. State, 88 M. 177—hom. 288.
Sutton v. Archer, 93 M. 603—courts, 3; state, 11.
Sutton v. Carroll County, 41 M. 236—counties, 144, 208; mun. corp. 744, 745.
Sutton v. Graham, 80 M. 636—land. & t. 197.
Sutton v. Nevin, 2 Miss. Dec. 409—tax. 619, 800.
Sutton, Englehard v.—7 H. 99.
Sutton, Herring v.—86 M. 283.
Sutton, Johnson v.—94 M. 544.
Suzett v. Buckels, 7 H. 663—ev. 587.
Swafford v. Garmon, 51 M. 348—clks. of c. 73.
Swaim, Slack v.—8 So. 545.
Swain v. Alcorn, 50 M. 320—sheriffs, 89, 99, 126, 130.
Swain v. Gilder, 61 M. 667—judgm. 245, 524; j. p. 89, 118, 125.
Swain, Conner v.—32 M. 245.
Swain, Minter v.—52 M. 174.
Swalm, Illinois Cent. R. Co. v.—83 M. 631.
Swalm, McRee v.—81 M. 679.
Swan v. Gray, 44 M. 393—mand. 51, 70, 72, 164, 179.
Swan v. Liverpool &c. Ins. Co. 52 M. 704—app. & e. 1178; ins. 77, 560, 668; trial, 169.
Swan v. New England Mortgage &c. Co. 75 M. 907—deeds, 113.
Swan v. Smith, 57 M. 548—fraud. conv. 183, 206, 311; judgm. 700; partners. 312.
Swan v. Smith, 58 M. 875—app. & e. 1097; jud. s. 15.
Swan, Barksdale v.—69 M. 907.
Swan, Feltus v.—62 M. 415.
Swan, Hopton v.—50 M. 545.
Swank, Perkins v.—43 M. 349.
Swann v. Buck, 40 M. 268—const. law, 70, 142; ev. 33; mand. 1, 71, 102, 141, 158; offic. 100; statut. 2, 22, 40, 99, 158, 160, 206, 225, 229, 248, 285.
Swann v. Horne, 54 M. 337—app. & e. 383, 384, 460, 462.
Swann v. Josselyn, 14 S. & M. 106—states, 64.
Swann v. Southern Express Co. 53 M. 286—ev. 408.
Swann v. Turner, 23 M. 565—judges, 22; offic. 93; states, 171.
Swann v. West, 41 M. 104—ev. 357; sales, 332, 346; trial, 269.
Swann v. Wilson, 24 M. 471—states, 167.
Swann v. Work, 24 M. 439—mand. 164, 179.
Swanson v. Griffin, 68 M. 319—bills & n. 91, 94, 106.
Swanson, Illinois Cent. R. Co. v.—92 M. 485.
Swanzy v. Kolb, 46 So. 549—wills, 113, 116.
Swanzy, Stewart v.—12 S. & M. 684.
Swanzy, Stewart v.—23 M. 502.
Swanzy, Stuart v.—12 S. & M. 684.
Swayze v. McCrossin, 13 S. & M. 317—attch. 201, 217; deeds, 38; eject. 86; fraud. conv. 54, 206; proc. 138.
Swayze, Lusk v.—35 M. 155.
Swayze, McCearly v.—65 M. 351.
Swayzie, Vaughan v.—56 M. 704.
Sweatman v. Dean, 86 M. 641—judgm. 490, 497; partit. 73, 95, 108; proc. 36.
Sweatman v. Parker, 49 M. 19—frds. st. of, 14, 23; witn. 133.
Sweatt v. Corcoran, 37 M. 513—pub. lands, 32, 114, 115.
Sweet, McKinney v.—28 So. 939.
Sweetzer v. First Nat. Bank, 73 M. 96—banks, 87; bills & n. 330, 338; corp. 41.
Swett v. Dodge, 4 S. & M. 667—ev. 35.
Swett v. Penrice, 24 M. 416—hus. & w. 164, 218.
Swift, Sturges v.—32 M. 239.
Swing v. Brister, 87 M. 516—const. law, 304; ins. 16, 125; lim. of act. 43, 46.
Swing, Boyd v.—38 M. 182.
Swinney v. Cockrell, 86 M. 318—cov. 99.
Swinney v. Cockrell, 38 So. 360—ex. & ad. 473.
Swinney v. State, 8 S. & M. 576—crim. l. 878, 882; larc. 87; ind. 20, 31, 168, 189.
Swinney, Hill v.—72 M. 248.
Swinney, State v.—60 M. 39.
Swisher v. Fitch, 1 S. & M. 541—assign. 52; fraud. conv. 114; garn. 122.
Switzer v. Benny, 94 M. 209—app. & e. 65; courts, 22.
Swofford v. Garmon, 51 M. 348—clks. of c. 70; jud. s. 4, 31, 39; partit. 39, 106.
Swofford, Martin v.—59 M. 328.
Swoope v. Moody, 73 M. 82—counties, 68.
Swope, Daily v.—47 M. 367.
Swor v. State, 81 M. 453—crim. l. 636, 874.
Sykes v. Columbus, 55 M. 115—mun. corp. 58, 59, 935, 940.
Sykes v. State, 89 M. 766—crim. l. 723.
Sykes v. State, 92 M. 247—crim. l. 888; hom. 234.
Sykes v. Sykes, 49 M. 190—dower, 17, 44.
Sykes, Aberdeen v.—59 M. 236.
Sykes, Barnard v.—72 M. 297.
Sykes, Clopton v.—2 Miss. Dec. 515.
Sykes, Fears v.—35 M. 633.

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Sykes, Hatch v.—64 M. 307.
Sykes, Holder v.—77 M. 64.
Sykes, Landau v.—54 So. 3.
Sykes, Paine v.—72 M. 351.
Sykes, Perry-Mason Shoe Co. v.—72 M. 390.
Sykes, Pollock v.—74 M. 700.
Sykes, Wilson v.—67 M. 617.
Sykes, Word v.—61 M. 649.
Sylverstein v. Atkinson, 45 M. 81—partners. 128, 145, 146, 147, 217; plead. 304.

T

Tabb, Byers v.—76 M. 843.
Tabb, Stovall v.—8 So. 644.
Tabler v. Bryant, 62 M. 350—partners. 204.
Tabler v. Mitchell, 62 M. 437—app. & e. 880; attch. 217; partners. 208, 213.
Tabor v. State, 56 So. 171—hom. 338, 340c.
Tagert v. Baker, 57 M. 303—app. & e. 110, 1176, 1184; new tr. 11, 182.
Taggert v. Muse, 60 M. 870—hus. & w. 242, 243; j. p. 129.
Talbert v. Melton, 9 S. & M. 9—bankr. 20, 418; execution, 154b, 339, 341; judgm. 784, 789, 853.
Talbert, Henderson v.—5 S. & M. 109.
Talbert, King v.—36 M. 367.
Talbot v. Norage, 23 M. 572—slaves, 17.
Talbot, Hunter v.—3 S. & M. 754.
Talbot, Sims v.—27 M. 487.
Talby, Sellers v.—33 M. 582.
Taliaferro, Chaffe v.—58 M. 544.
Taliaferro, Hoy v.—8 S. & M. 727.
Taliaferro, Kirk v.—8 S. & M. 754.
Taliaferro, Shotwell v.—25 M. 105.
Talkington v. State, 87 M. 510—crim. l. 419, 1169.
Tallahatchie County v. Harrison, 75 M. 744—paup. 48.
Tallahatchie County v. Little, 93 M. 88—tax. 699.
Tallahatchie County, Forsdick v.—76 M. 622.
Tallahatchie County, Roach v.—78 M. 303.
Tallahatchie Drainage Commission, James v.—52 So. 453.
Taltavall v. Marigny, 91 M. 873—judgm. 570.
Tanner v. Hicks, 4 S. & M. 294—app. & e. 958; eq. 43; mtg. 234, 559; spec. perf. 66, 106; ven. & pur. 27, 261, 275, 279.
Tanner, Finch v.—2 Miss. Dec. 209.
Tanning v. Farmers' &c. Bank, 8 S. & M. 139—bills & n. 60.
Tant v. Smith, 1 Miss. Dec. 305—trial, 68.
Tapley, Harper v.—35 M. 506.
Tapp v. Bonds, 57 M. 281—sheriffs, 123.
Tappan, Benwood Iron-Works Co. v.—56 M. 659.
Tappan, Farmers' &c. Bank v.—55 M. 112.
Tappan, Thomas v.—Freem. Ch. 472.
Tarball, Lehr v.—2 H. 905.
Tarkington v. State, 72 M. 731—crim. l. 924.
Tarleton v. Cox, 45 M. 430—abate. & r. 75; judgm. 471, 486.
Tarleton, Bank of England v.—23 M. 173.
Tarpley v. Hamer, 9 S. & M. 310—const. law, 161; judgm. 755, 800.
Tarpley v. Wilson, 33 M. 467—cncts. 298; eq. 189, 368; trusts, 219.
Tarpley, Anderson v.—6 S. & M. 507.
Tarpley, Phipps v.—24 M. 597.
Tarpley, Phipps v.—31 M. 433.
Tart, Savings B. & L. Assn. v.—81 M. 276.
Tart, Savings &c. Assn. v.—30 So. 693.
Tartt, Horne v.—76 M. 304.
Tarver, Martin v.—43 M. 517.
Tate v. Blackburne, 48 M. 1—fixt. 13, 21, 30.
Tate v. Board of Levee Commissioners, 84 M. 388—lev. 21.
Tate v. Bush, 62 M. 145—guard. & w. 108; jud. s. 24; partit. 39, 104, 108, 113.
Tate v. State, 91 M. 382—int. liq. 148.
Tate v. State, 95 M. 138—crim. l. 422; hom. 340.
Tate v. Townsend, 61 M. 316—wills, 497.
Tate v. Weir, 24 M. 465—eject. 113, 123.
Tate v. Yazoo &c. R. Co. 78 M. 842—carr. 41.
Tate, Allen v.—58 M. 585.
Tate County v. Bourland, 42 So. 379—app. & e. 69.
Tate County v. De Soto County, 51 M. 588—counties, 16; eq. 51.
Tate County v. Moore, 87 M. 245—rewards, 14.
Tate, Louisville &c. R. Co. v.—70 M. 348.
Tate, Millsaps v.—75 M. 150.
Tate, Pierce v.—27 M. 283.
Tate, State v.—77 M. 469.
Tate, Tatum v.—77 M. 684.
Tate, Tunica County v.—78 M. 294.
Tatum v. Bonner, 27 M. 760—bills & n. 402; cncts. 153; guar. 4.
Tatum v. Caston, 65 M. 488—eject. 25.
Tatum v. McLellan, 50 M. 1—ex. & ad. 115; life est. 3; wills, 12, 490, 616.
Tatum v. McLellan, 56 M. 352—estop. 68; life est. 15; judgm. 534; trusts, 231, 310; wills, 826.
Tatum v. Preston, 53 M. 654—jury, 81, 85, 138.

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Tatum v. Tate, 77 M. 684—execution, 172; judgm. 460.
Tatum, State v.—96 M. 430.
Tatum, Taylor v.—30 M. 701.
Tatum, Whitfield v.—83 M. 153.
Taylor v. Alliance Trust Co. 71 M. 694—corp. 656; judgm. 899; mtg. 335.
Taylor v. Arthur, 9 S. & M. 183—counties, 65; offic. 134.
Taylor v. Barbour, 90 M. 888—brok. 56, 73.
Taylor v. Blackman, 12 So. 458—brok. 7; comp. 19; eq. 12.
Taylor v. Bradford, 83 M. 157—mast. & s. 258.
Taylor v. Chickasaw County, 70 M. 87—counties, 170; eq. 71, 87; lim. of act. 39; mand. 109, 143, 154.
Taylor v. Chickasaw County, 74 M. 23—counties, 163, 170; ev. 183; statut. 144.
Taylor v. Chickasaw County, 16 So. 907—counties, 170.
Taylor v. Conner, 41 M. 722—paymt. 15; princ. & a. 7, 14, 148, 166.
Taylor v. Davis, 38 M. 493—app. & e. 154; princ. & s. 126.
Taylor v. Eckford, 11 S. & M. 21—estop. 44; execution, 250, 265; fraud. conv. 24, 108; land. & t. 64; ven. & pur. 190.
Taylor v. Frost, 39 M. 328—fraud, 49; sales, 437.
Taylor v. Hart, 73 M. 22—land. & t. 192.
Taylor v. Lowenstein, 50 M. 278—execution, 263; judgm. 682; ven. & pur. 232.
Taylor v. McNairy, 42 M. 276—bills & n. 476, 486; cncts, 341; judgm. 107.
Taylor v. Manley, 6 S. & M. 305—trial, 182, 312.
Taylor v. Marion County, 51 M. 731—app. & e. 3; counties, 205.
Taylor v. Mitchell, 1 H. 596—disc. 19, 22.
Taylor v. Morton, 61 M. 24—replev. 74, 80.
Taylor v. Mosely, 57 M. 544—mtg. 151, 161, 166, 182; ven. & pur. 232.
Taylor v. Nelson, 54 M. 524—land. & t. 229b, 248, 250.
Taylor v. Orlansky, 92 M. 761—forc. e. & d. 9.
Taylor v. Reese, 44 M. 89—assign. 35; bills & n. 455; eq. 43.
Taylor v. Smith, 54 M. 50—curt. 12; eq. 150; execution, 41, 54; home. 118a, 142, 160, 208; hus. & w. 121; life est. 3.
Taylor v. Sorsby, W. 97—new tr. 13, 44; trial, 307.
Taylor v. State, 51 M. 79—judgm. 198; offic. 37; tax. 568c.
Taylor v. State, 52 M. 84—big. 11, 12, 16; crim. l. 789, 857, 1172, 1174.
Taylor v. State, 74 M. 544—crim. l. 970; hom. 129, 135; ind. 73.
Taylor v. State, 89 M. 671—crim. l. 789; hom. 297.
Taylor v. State, 30 So. 657—crim. l. 665, 855; jury, 70.
Taylor v. State, 37 So. 498—burg. 29.
Taylor v. Stone, 13 S. & M. 652—hus. & w. 14, 15, 119; sales, 148.
Taylor v. Strong, 10 S. & M. 63—fraud. conv. 294; judgm. 785; trusts, 44; ven. & pur. 92, 260.
Taylor v. Tatum, 30 M. 701—ex. & ad. 86.
Taylor v. Watkins, 13 So. 811—assign. f. b. c. 88, 95, 98, 161; trusts, 160.
Taylor v. Webb, 54 M. 36—app. & e. 1178; ev. 269; fraud. conv. 212, 254, 269; witn. 52.
Taylor v. Webb, 56 M. 631—ex. & ad. 456.
Taylor v. Wright, 54 M. 722—app. & e. 1201; eq. 375; refer. 55.
Taylor, Applegate v.—56 M. 685.
Taylor, Ayres v.—25 M. 200.
Taylor, Bank of Lexington v.—2 S. & M. 27.
Taylor, Bass v.—34 M. 342.
Taylor, Bradford v.—85 M. 409.
Taylor, Bullitt v.—34 M. 708.
Taylor, Byrne v.—46 M. 95.
Taylor, Byrne v.—46 M. 553.
Taylor, Carter v.—6 S. & M. 367.
Taylor, Deason v.—53 M. 697.
Taylor, Denver Commission Co. v.—73 M. 702.
Taylor, Ex parte, 58 M. 478—licens. 5½, 8; mun. corp. 621.
Taylor, Franklin Fire Ins. Co. v.—52 M. 441.
Taylor, Haley v.—77 M. 867.
Taylor, Hart v.—70 M. 655.
Taylor, Heidelberg v.—25 So. 166.
Taylor, Iowa City State Bank v.—51 So. 1.
Taylor, Johnson v.—3 S. & M. 92.
Taylor, Louisville &c. R. Co. v.—68 M. 361.
Taylor, Love v.—26 M. 567.
Taylor Mfg. Co. Wilkinson v.—67 M. 231.
Taylor Mfg. Co. Yale v.—63 M. 598.
Taylor, Marion County v.—55 M. 184.
Taylor, May v.—62 M. 500.
Taylor, Newman v.—69 M. 670.
Taylor, Pate v.—66 M. 97.
Taylor, Pulliam v.—50 M. 251.
Taylor, Pulliam v.—50 M. 551.
Taylor, Rucks v.—49 M. 552.
Taylor, Rule v.—4 S. & M. 577.
Taylor, Shields v.—13 S. & M. 127.

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Taylor, Shields v.—25 M. 13.
Taylor, State v.—68 M. 730.
Taylor, State v.—23 So. 34.
Taylor, Stratton v.—32 M. 201.
Taylor, Thomas v.—42 M. 651.
Taylor, Underwood Typewriter Co. v.—94 M. 584.
T. B. Bonner Co. v. New Orleans &c. R. Co. 40 So. 65—r. r. 484.
Teague v. Attala County, 56 M. 29—high. 153.
Teague v. State, 39 M. 516—crim. l. 15; int. liq. 196; statut. 276.
Teague v. Weeks, 89 M. 360—exemp. 92.
Teague, Little v.—60 M. 115.
Teams, Illinois Cent. R. Co. v.—75 M. 147.
Team, Smith v.—16 So. 492.
Teasdale v. State, 3 So. 245—int. liq. 131, 149.
Teat v. State, 53 M. 439—consp. 28; crim. l. 173, 181, 200, 970; ind. 130, 200.
Tebo v. Betancourt, 73 M. 868—attch. 367.
Tedford v. State, 67 M. 363—bailm. 74.
Tegarden v. Carpenter, 36 M. 404—adv. pos. 43, 44; app. & e. 976; eject. 22, 68, 84; plead. 266.
Tegarden v. Carpenter, 38 M. 401—adv. pos. 43, 99.
Tegarden v. McBean, 33 M. 283—high. 6; priv. roads, 1.
Tegarden, Fornuquet v.—24 M. 96.
Telegraph Co. Alexander v.—66 M. 161.
Telegraph Co. Louisville &c. R. Co. v.—68 M. 806.
Telegraph Co. Meridian v.—72 M. 910.
Telegraph Co. Stowers v.—68 M. 559.
Telford, Power v.—60 M. 195.
Telheard v. Bay St. Louis, 87 M. 580—crim. l. 1032; ind. 56; mun. corp. 639, 642.
Tell City Furniture Co. v. Stiles, 60 M. 849—ex. & ad. 275, 320, 363, 416, 475, 509.
Temple v. Hammock, 52 M. 360—app. & e. 214; estop. 98; guard. & w. 76, 87; partit. 32; wills, 111.
Temple v. McComb &c. Power Co. 89 M. 1—electr. 12.
Temple v. Sumner, 51 M. 13—hawk. & p. 4.
Temple, Coleman v.—25 So. 1036.
Temples v. Cain, 60 M. 478—eject. 5; ex. & ad. 8, 383.
Templeton v. Planters' Bank, 5 H. 169—judgm. 105; plead. 97, 194.
Templeton v. Tompkins, 45 M. 424—lim. of act. 36; wills, 826.
Tennent v. Barksdale, 3 So. 80—plead. 189.
Tennent-Stribling Shoe Co. v. Davie, 75 M. 447—fraud. conv. 164.
Tennessee Brewing Co. v. Hendricks, 77 M. 491—acct. st. 1; lim. of act. 148.
Tennessee, Cutrer v.—54 So. 434.
Tennison v. Silverberg, 77 M. 750—app. & e. 671.
Tennison v. State, 79 M. 708—crim. l. 126.
Terrall v. Adams, 23 M. 570—gaming, 26, 64.
Terral v. McRae, 6 S. & M. 136—execution, 222.
Terral, McRae v.—6 S. & M. 136.
Terrel v. Ligon, W. 170—land. & t. 274.
Terrell v. Farrar, W. 417—spec. perf. 63.
Terrall, Collins v.—2 S. & M. 383.
Terrell, Curphey v.—39 So. 477.
Terrell, Curphy v.—89 M. 624.
Terrell, Eureka Lumber Co. 48 So. 628.
Terrell, Mardis v.—W. 327.
Terrell, Munday v.—87 M. 282.
Terrell, Noble v.—64 M. 830.
Terrell, Stokes v.—23 So. 371.
Terrill, Martin v.—12 S. & M. 571.
Terry v. Carter, 25 M. 168—partners. 102.
Terry v. Curd &c. Mfg. Co. 66 M. 394—app. & e. 154, 865, 1173, 1234; attch. 211, 217.
Terry v. Groves, 71 M. 539—agric. 11.
Terry v. Jones, 44 M. 540—eq. 152.
Terry v. Robins, 5 S. & M. 291—app. & e. 66, 110; excep. 13; fixt. 1, 3.
Terry v. State, 12 So. 544—app. & e. 999; trial, 140.
Terry v. State, 52 So. 483—seduct. 37, 46.
Terry v. Woods, 6 S. & M. 139—marshaling, 7; mtg. 234, 246, 579; partners. 241.
Terry, Dismukes v.—W. 180.
Terry, Hamberlin v.—7 H. 143.
Terry, Hamberlin v.—Sm. & M. Ch. 589.
Terry, Hinds v.—W. 80.
Terry, Hitt v.—92 M. 671.
Terry, Jenks v.—88 M. 364.
Terry, King v.—6 H. 513.
Terry, Saffarans v.—12 S. & M. 690.
Terry, Scott v.—37 M. 65.
Tewksbury v. Tewksbury, 4 H. 109—div. 26, 250.
Texada v. Camp, W. 150—sales, 393; trover, 46.
Texas Express Co. Kirkland v.—57 M. 316.
Thames v. Duvic, 89 M. 9—quiet. t. 34.
Thames v. Mangum, 87 M. 575—lim. of act. 176; partit. 45.
Thames v. Sharbrough, 27 So. 834—attch. 47.
Thames v. State, 82 M. 667—hom. 292.
Thames, McInnes v.—80 M. 617.
Tharpe v. Marsh, 40 M. 158—eq. 15; partners. 20.

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Tharpe, Clow v.—3 S. & M. 64.
Thatcher, Bullitt v.—5 H. 689.
Thayer v. Hartman, 78 M. 590—tax. 655, 674.
Thayer, Timberlake v.—71 M. 279.
Thayer, Timberlake v.—76 M. 76.
The Blacksmith, Edwards v.—33 M. 190.
The Governor, Carmichael v.—3 H. 236.
The Governor, Montgomery v.—7 H. 68.
The Jacobs, Auter v.—34 M. 269.
Theobald v. Deslonde, 93 M. 208—guard. & w. 87, 94; judgm. 486.
Theobald v. Louisville &c. R. Co. 66 M. 279—em. dom. 69, 106, 117.
Therrell v. Ellis, 83 M. 494—princ. & a. 122; tresp. 46.
Therrell, Enochs v.—61 M. 178.
Thibodeaux v. State, 69 M. 683—int. liq. 89, 94; tax. 309, 317.
Thibodeaux, State v.—69 M. 92.
Thighen, Candiff v.—30 M. 180.
Thigpen v. Mississippi Cent. R. Co. 32 M. 347—corp. 75, 79, 90; ev. 422; jury, 10; plead. 1, 24, 128, 289, 291, 342.
Thigpen, Boswell v.—75 M. 308.
Thigpen, Casper v.—48 M. 635.
Third Nat. Bank v. Vicksburg Bank, 61 M. 112—banks, 172.
Thistle, Glenn v.—23 M. 42.
Thomas v. Burrus, 23 M. 550—estop. 13; guard. & w. 8, 15, 17, 182.
Thomas v. Calhoun, 58 M. 80—nuis. 19, 22.
Thomas v. Estes, 2 S. & M. 439—app. & e. 1175; det. 20; execution, 198, 201.
Thomas v. Grand Gulf Bank, 9 S. & M. 201—ev. 180; slaves, 7, 148.
Thomas v. Hinds County, 69 M. 665—sheriffs, 33.
Thomas v. Holmes County, 67 M. 754—ev. 462; mtg. 37, 38; tax. 47.
Thomas v. Jennings, 5 S. & M. 627—bills & n. 240, 515.
Thomas v. Jennings, 5 S. & M. 627—bills & n. 240.
Thomas v. Lee County, 53 So. 585—counties, 178; high. 99.
Thomas v. Miller, W. 324—bills & n. 454.
Thomas v. Phillips, 4 S. & M. 358—judgm. 408, 414, 431; new tr. 10.
Thomas v. Romano, 82 M. 256—estop. 54; tax. 828.
Thomas v. Shell, 76 M. 556—execution, 179.
Thomas v. State, 5 H. 20—burg. 8; crim. l. 85, 267, 880; ind. 20; judges, 47; jury, 116.
Thomas v. State, 5 H. 32—larc. 81.
Thomas v. State, 37 M. 353—int. liq. 146, 164, 223, 224; sales, 1, 209.
Thomas v. State, 61 M. 60—crim. l. 554, 598, 602, 758, 763b, 1172, 1174; duel. 1; hom. 19, 300c; hus. & w. 340d; new tr. 41.
Thomas v. State, 62 M. 184—sci. fa. 9.
Thomas v. State, 68 M. 91—crim. l. 260b.
Thomas v. State, 71 M. 345—crim. l. 47.
Thomas v. State, 73 M. 46—crim. l. 1024, 1184; ind. 191.
Thomas v. Sturges, 32 M. 261—garn. 159.
Thomas v. Tappan, Freem. Ch. 472—eq. 3; execution, 153d.
Thomas v. Taylor, 42 M. 651—int. law, 3; states, 18, 18b, 145.
Thomas v. Thomas, 62 M. 531—trusts, 63½, 78.
Thomas v. Thomas, 69 M. 564—eject. 138, 142; land. & t. 279.
Thomas v. Thomas, 53 So. 630—est. tail, 2; perp. 1; trusts, 314; wills, 497, 548, 604, 625, 634, 672, 684.
Thomas v. Wyatt, 9 S. & M. 308—app. & e. 321.
Thomas v. Yazoo City, 95 M. 395—crim. l. 369, 1169, 1213; int. liq. 9, 223; mun. corp. 639.
Thomas, Adams Mach. Co. v.—87 M. 391.
Thomas, Advance Gin &c. Co. v.—81 M. 486.
Thomas, Alabama &c. R. Co. v.—86 M. 27.
Thomas, Alexander v.—70 M. 517.
Thomas, Atwood v.—60 M. 162.
Thomas, Brown v.—26 M. 335.
Thomas, Buffington v.—84 M. 157.
Thomas, Burrus v.—13 S. & M. 459.
Thomas, Dickerson v.—67 M. 777.
Thomas, Ex parte, 59 M. 522—clks. of c. 10.
Thomas, Gaillard v.—61 M. 166.
Thomas, Gray v.—12 S. & M. 111.
Thomas, Hardy v.—23 M. 544.
Thomas, Hughes v.—29 So. 74.
Thomas, Illinois Cent. R. Co. v.—75 M. 54.
Thomas, Jennings v.—13 S. & M. 617.
Thomas, Jordan v.—31 M. 557.
Thomas, Jordan v.—34 M. 72.
Thomas, Louisville &c. R. Co. v.—87 M. 600.
Thomas, Louisville &c. R. Co. v.—1 Miss. Dec. 317.
Thomas, Lumbley v.—65 M. 97.
Thomas, Memphis &c. R. Co. v.—51 M. 637.
Thomas, Moores v.—95 M. 644.
Thomas, Murphy v.—41 M. 429.
Thomas, Pleas v.—75 M. 495.
Thomas, Pollard v.—61 M. 150.
Thomas, Roberts v.—94 M. 219.

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Thomas, Rootes v.—85 M. 493.
Thomas, Shields v.—71 M. 260.
Thomas, Simmons v.—43 M. 31.
Thomas, Thompson v.—30 M. 152.
Thomas, Tittle v.—30 M. 122.
Thomas, Turner v.—77 M. 864.
Thomas, Whatley v.—2 Miss. Dec. 590.
Thomas, White v.—52 M. 49.
Thomas, W. T. Adams Mach. Co. v.—87 M. 391.
Thomas, Yazoo &c. R. Co. v.—65 M. 553.
Thomason v. Neeley, 50 M. 310—eq. 195, 203; fraud. conv. 1.
Thomason v. Wadlington, 53 M. 560—attch. 34; replev. 96.
Thomasson v. Agnew, 24 M. 93—neg. 6; wharves, 22.
Thomasson, Wiggle v.—1 S. & M. 452.
Thoma, Weathersby v.—57 M. 296.
Thompson v. Adams, Freem. Ch. 225—princ. & s. 174, 193; release, 38.
Thompson v. Bryant, 75 M. 12—ev. 400.
Thompson v. Chambers, 12 S. & M. 488—attch. 110.
Thompson v. First Nat. Bank, 84 M. 54—app. & e. 854; bankr. 55, 277, 287, 290, 302.
Thompson v. First Nat. Bank, 85 M. 261—app. & e. 856; bankr. 302; plead. 36, 300.
Thompson v. Furr, 57 M. 478—fraud. conv. 110, 159.
Thompson v. Grand Gulf &c. R. Co. 3 H. 240—const. law, 11, 36; em. dom. 1, 12, 73.
Thompson v. Gwyn, 46 M. 522—princ. & a. 61; wareh. 24.
Thompson v. Houze, 48 M. 444—mtg. 411.
Thompson v. McGill, Freem. Ch. 401—execution, 40.
Thompson v. Matthews, 56 M. 368—acct. st. 6; interest, 18.
Thompson v. Means, 11 S. & M. 604—bonds, 125; cncts. 117; plead. 114.
Thompson v. Munson, 43 M. 176—app. & e. 166.
Thompson v. Natchez Water Co. 68 M. 423—corp. 298; rec. 15.
Thompson v. New Orleans &c. R. Co. 50 M. 315—carr. 277, 294.
Thompson v. Norwood, 56 M. 487—mtg. 41, 408.
Thompson v. Planters' Bank, 2 S. & M. 476—bills & n. 460.
Thompson v. Preston, 73 M. 587—assign. f. b. c. 31, 84, 147.
Thompson v. Ross, 26 M. 198—abate. & r. 68; exemption, 118, 151b; ex. & ad. 454.
Thompson v. Shelby, 3 S. & M. 296—garn. 144.
Thompson v. State, 37 M. 518—offic. 131.
Thompson v. State, 51 M. 353—anim. 43; crim. l. 1085; ind. 165; mal. mis. 3.
Thompson v. State, 54 M. 740—const. law, 106; crim. l. 146, 288, 824; ind. 111, 133, 288; lim. of act. 7; mast. & s. 345a; states, 272.
Thompson v. State, 58 M. 62—jury, 81, 137.
Thompson v. State, 73 M. 584—crim. l. 763, 807.
Thompson v. State, 83 M. 287—crim. l. 305, 549, 778, 789.
Thompson v. State, 84 M. 758—hom. 157; witn. 277.
Thompson v. State, 88 M. 223—crim. l. 888, 1036.
Thompson v. State, 91 M. 662—mun. corp. 179; statut. 90.
Thompson v. State, 94 M. 901—crim. l. 939.
Thompson v. State, 7 So. 403—app. & e. 1025; bail, 93.
Thompson v. State, 9 So. 198—hom. 300c, 300e.
Thompson v. Strickland, 52 M. 574—estop. 95; guard. & w. 70; inf. 30, 31.
Thompson v. Thomas, 30 M. 152—des. & d. 20; ex. & ad. 307.
Thompson v. Thompson, 2 H. 737—gifts, 17.
Thompson v. Tillotson, 56 M. 36—home. 162.
Thompson v. Toomer, 50 M. 394—app. & e. 359, 375.
Thompson v. Wheatley, 5 S. & M. 499—eject. 13, 22; execution, 40; trusts, 63¾.
Thompson v. Williams, 7 S. & M. 276—app. & e. 925; new tr. 91, 95, 100.
Thompson v. Williams, 10 S. & M. 173—eq. 23; ven. & pur. 254a.
Thompson v. Winona, 96 M. 591—em. dom. 271; mun. corp. 843; plead. 204.
Thompson v. Yazoo &c. R. Co. 72 M. 715—r. r. 273½, 282, 282b.
Thompson v. Young, 30 M. 17—slaves, 9.
Thompson, Briscoe v.—Freem. Ch. 155.
Thompson, Chism v.—73 M. 410.
Thompson, Commercial Bank v.—7 S. & M. 443.
Thompson, Fairly v.—34 M. 101.
Thompson, Hall v.—1 S. & M. 443.
Thompson, Hargroves v.—31 M. 211.
Thompson, Harmon v.—2 H. 808.
Thompson, Haynes v.—34 M. 17.
Thompson-Houston Electric Co. Mulholland v.—66 M. 339.
Thompson, Jack v.—41 M. 49.

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Thompson, Jamison v.—65 M. 516.
Thompson Land &c. Co. Batson v.—92 M. 199.
Thompson, Laughman v.—6 S. & M. 259.
Thompson, Louisville &c. R. Co. v.—64 M. 584.
Thompson, Lynch v.—61 M. 354.
Thompson, McLain v.—52 M. 418.
Thompson, Meade v.—W. 450.
Thompson, Mitchell v.—2 Miss. Dec. 214.
Thompson, Moss Point Lumber Co. v.—83 M. 499.
Thompson, Peck v.—23 M. 367.
Thompson, Probate Judge v.—2 H. 808.
Thompson, Ratliff v.—61 M. 71.
Thompson, Redd v.—56 M. 230.
Thompson, Robinson v.—Sm. & M. Ch. 454.
Thompson, Robinson Mercantile Co. v.—74 M. 847.
Thompson, Rollins v.—13 S. & M. 522.
Thompson, Romanski v.—11 So. 828.
Thompson, Shaw v.—Sm. & M. Ch. 628.
Thompson, Shelton v.—53 So. 538.
Thompson, Smith v.—2 Miss. Dec. 70.
Thompson, State v.—86 M. 201.
Thompson, Wade v.—52 M. 367.
Thompson, Wilcher v.—12 So. 828.
Thompson, Whitfield v.—85 M. 749.
Thompson, Yarborough v.—3 S. & M. 291.
Thompson, Young v.—3 S. & M. 129.
Thoms v. Thoms, 45 M. 263—bankr. 420; eq. 148; home. 118a, 134, 213; hus. & w. 228.
Thomson v. Hester, 55 M. 656—fraud. conv. 95, 206, 212; hus. & w. 144; mtg. 307; nova. 4.
Thomson, Hester v.—58 M. 108.
Thornhill v. Gilmer, 4 S. & M. 153—chat. m. 162; execution, 194, 268; judgm. 780.
Thornhill v. Gilmer, 4 S. & M. 153—execution, 36, 37.
Thornton v. Alliston, 12 S. & M. 124—bills & n. 475, 485; ex. & ad. 442.
Thornton v. Boyd, 25 M. 598—execution, 305; sheriffs, 5.
Thornton v. Crisp, 14 S. & M. 52—lim. of act. 150.
Thornton v. Dabney, 23 M. 559—witn. 97.
Thornton v. Demoss, 5 S. & M. 609—app. & e. 105, 154; hab. corp. 3; slaves, 11, 21.
Thornton v. Fitzhugh, 10 S. & M. 438—plead. 86; proc. 63; trial, 5.
Thornton v. Glover, 25 M. 132—ex. & ad. 533.
Thornton v. Holland, 87 M. 470—inf. 58.
Thornton v. Lucas, 29 So. 400—trial, 326, 330.
Thornton v. McNeill, 23 M. 369—partners. 102, 348.
Thornton v. Natchez, 88 M. 1—deeds, 155; eq. 24, 43, 87; judgm. 829; lim. of act. 86, 98.
Thornton v. West Feliciana &c. R. Co. 29 M. 143—app. & e. 549, 671; new tr. 11, 182; trial, 25.
Thornton, Boyd v.—13 S. & M. 338.
Thornton, Buckley v.—1 Miss. Dec. 220.
Thornton, Graham v.—9 So. 292.
Thornton, Henderson v.—37 M. 448.
Thornton, Hutto v.—44 M. 166.
Thornton, New Orleans &c. R. Co. v.—65 M. 256.
Thornton, Provine v.—92 M. 395.
Thornton, Southern Express Co. v.—41 M. 216.
Thornton, Triplet v.—1 Miss. Dec. 98.
Thorn, Wheatly v.—23 M. 62.
Thrasher v. Buckingham, 40 M. 67—garn. 57, 122, 138, 141, 145.
Thrasher v. Ely, 2 S. & M. 139—bills & n. 489; guar. 1, 4, 7, 46, 83; plead. 375.
Thrasher v. Gillespie, 52 M. 840—land. & t. 229b; 229k; trial, 143, 194.
Thrasher, Sugg v.—30 M. 135.
Thrasher, Wade v.—10 S. & M. 358.
Thrasher, Weeks v.—52 M. 142.
Thread Co. Wise v.—84 M. 200.
Threefoot v. New Orleans &c. R. Co. 89 M. 192; carr. 177.
Threefoot v. Nuckols, 68 M. 116—mal. pros. 16, 40, 72.
Threefoot v. Whittle, 15 So. 120—garn. 174.
Threefoot, Stone v.—54 So. 595.
Threefoot, Harris v.—12 So. 335.
Threefoot, Liverpool &c. Ins. Co. v.—71 M. 392.
Threefoot, Preston v.—24 So. 703.
Three Ins. Companies, Tisdale v.—84 M. 709.
Thurlkill, Whitesides v.—12 S. & M. 599.
Thurman v. Adams, 82 M. 204—int. liq. 170.
Thurman v. Pointer, 67 M. 297—spec. perf. 11; ven. & pur. 49, 345.
Thurman, Elmslie v.—87 M. 537.
Thurman, Hunter v.—25 M. 463.
Thurmond v. Carter, 59 M. 127—convt. 10, 12; princ. & a. 130, 170.
Thurmond v. State, 94 M. 1—ind. 160.
Thurmond, Falkner v.—23 So. 584.
Thurmond, Falkner v.—23 So. 877.
Thweatt, Hughes v.—57 M. 376.
Tibbs, McLarty v.—69 M. 357.
Tice, Troup v.—55 M. 278.
Tichenor v. Woodburn &c. Wheel Co. 54 M. 589—acct. acti. on, 13.
Tidmore, Marshall County v.—74 M. 317.

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Tidwell v. State, 84 M. 475—crim. l. 763, 763c, 814; hom. 237, 294.
Tidwell, Coleman v.—5 H. 12.
Tidwell, Spring v.—31 M. 63.
Tiernan v. Commercial Bank, 7 H. 648—banks, 172; bills & n. 400.
Tiernan, Davis v.—2 H. 786.
Tiernan, Webster v.—4 H. 352.
Tierney v. Brown, 65 M. 563—deeds, 37, 38; tax. 625, 764.
Tierney v. Brown, 67 M. 109—tax. 431.
Tierney v. Duffy, 59 M. 364—acct. acti. on, 6; app. & e. 154, 191; new tr. 85, 86.
Tierney v. Klien, 67 M. 173—app. & e. 837, 1071, 1170; eq. 276, 350, 427; liens, 17; partners. 184.
Tiffany v. Johnson, 27 M. 227—eq. 7; sheriffs, 122.
Tiffany, Wilkinson v.—5 H. 411.
Tifft v. Verden, 11 S. & M. 153—land. & t. 265, 270.
Tifft v. Virden, 7 S. & M. 91—land. & t. 273; trial, 5.
Tift v. State, 23 M. 567—slaves, 10.
Tigner v. McGehee, 60 M. 185—ev. 183; wills, 820.
Tigner v. McGehee, 60 M. 242—costs, 233.
Tiliver, Richardson v.—71 M. 966.
Till v. Redus, 79 M. 125—phys. 13; trial, 324.
Tillery, Baldwin v.—62 M. 378.
Tillman v. Ailles, 5 S. & M. 373—app. & e. 516; bills & n. 208, 274, 280; jury, 32; plead. 291.
Tillman v. Cowand, 12 S. & M. 262—chat. m. 83; ven. & pur. 231.
Tillman v. Heard, 95 M. 238—inj. 148.
Tillman, Martin v.—70 M. 614.
Tillman, Newman v.—71 M. 26.
Tillotson, Montgomery v.—1 H. 215.
Tillotson, Thompson v.—56 M. 36.
Tilman, Whitworth v.—40 M. 76.
Timberlake v. Shippers' Compress Co. 72 M. 323—corp. 124, 154; trial, 143.
Timberlake v. Thayer, 71 M. 279—cncts. 324; mast. & s. 29; princ. & s. 128.
Timberlake v. Thayer, 76 M. 76—bills & n. 422, frds. st. of, 158; trial, 41.
Timmons v. State, 56 M. 786—larc. 81.
Tims, Clark v.—2 Miss. Dec. 360.
Tindall v. Tindall, 3 So. 581—partit. 51, 63.
Tindall, Anderson v.—26 M. 332.
Tindall, Carlisle v.—49 M. 229.
Tindall, Caffey v.—56 So. 177.
Tindall, Fuqua v.—11 S. & M. 465.
Tinnen, Garrett v.—7 H. 465.
Tinney, Standard Life &c. Ins. Co. v.—73 M. 726.
Tinnin v. Brown, 53 So. 780—eject. 142; estop. 49; partners. 138; ven. & pur. 229, 236.
Tinnin v. Garrett, 4 S. & M. 207—bonds, 131; ev. 469; witn. 224.
Tinnin v. Price, 27 M. 619—hus. & w. 11, 115, 133.
Tinnin v. Price, 31 M. 422—ev. 374, 511.
Tinsley, Champenois v.—90 M. 38.
Tinsley, Dogget v.—2 Miss. Dec. 573.
Tipler v. State, 57 M. 685—weap. 11, 17.
Tippah County, Green v.—58 M. 337.
Tippah County, McCarley v.—58 M. 483.
Tippah County, Vernon v.—47 M. 181.
Tippett, Connor v.—57 M. 594.
Tippin v. Coleman, 59 M. 641—estop. 98; hus. & w. 221; inf. 81; life est. 21; lim. of act. 72; wills, 634.
Tippin v. Coleman, 61 M. 516—lim. of act. 70a, 76.
Tirelli, Alabama &c. R. Co. v.—93 M. 797.
Tironi, Lowenberg v.—62 M. 19.
Tisdale v. Three Ins. Companies, 84 M. 709—inj. 26.
Tishamingo Co. Carroll v.—28 M. 38.
Tish-ho-mah, Coleman v.—4 S. & M. 40.
Tishimingo Sav. Inst. v. Buchanan, 60 M. 496—banks, 93, 181; interest, 4, 39, 50; lim. of act. 111; mtg. 300; tender, 19.
Tishomingo County, Dickerson v.—92 M. 223.
Tishomingo Sav. Inst. v. Allen, 76 M. 114—assign. f. b. c. 4, 355; plead. 245.
Tishomingo Sav. Inst. v. Carr, 1 Miss. Dec. 364—ex. & ad. 263, 264, 318; mtg. 355.
Tishomingo Sav. Inst. v. Duke, 1 So. 165—mtg. 372.
Tishomingo Sav. Inst. v. Young, 87 M. 473—exemp. 44, 126.
Tishomingo Sav. Inst. Bank of Mobile v.—62 M. 250.
Tishomingo Sav. Inst. Mitchell v.—53 M. 613.
Tishomingo Sav. Inst. Mitchell v.—56 M. 444.
Tishomingo Sav. Inst. Williams v.—57 M. 633.
Tittle v. Bonner, 53 M. 578—app. & e. 917, 1040; bills & n. 476, 477; cncts. 341; judgm. 156; plead. 87, 204, 221, 223; usury, 99.
Tittle v. Thomas, 30 M. 122—bills & n. 32.
Titus, Hancock v.—39 M. 224.
Tobin v. Allen, 53 M. 563—attch. 180; estop. 52.
Todd, British &c. Mortg. Co. v.—84 M. 522.

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Todd, Gross v.—94 M. 168.
Todd, Gulfport v.—92 M. 428.
Todd, Simmons Hardware Co. v.—79 M. 163.
Tolbert v. State, 71 M. 179—crim. l. 923, 1166½; hom. 20; jury, 78, 110.
Toler v. Yazoo &c. R. Co. 31 So. 788—carr. 320.
Tombes, Hurd v.—7 H. 229.
Tombigbee R. Co. v. Bell, 4 S. & M. 685—app. & e. 326, 372, 859. 905.
Tombigbee, Bell v.—4 S. & M. 549.
Tombigbee Mills, Adams v.—78 M. 676.
Tombigby R. Co. v. Bell, 7 H. 216—assign. 80; eq. 10; judgm. 839, 841.
Tomicich, Howard v.—81 M. 703.
Tomilson v. Hoyt, 1 S. & M. 515—app. & e. 510, 915; assum. 20; judgm. 105; proc. 135.
Tomlin v. Combs, 21 So. 782—eq. 427; home. 115; judgm. 247; mtg. 462.
Tomkins, Templeton v.—45 M. 424.
Tonella, State v.—70 M. 701.
Toney, McCroy v.—66 M. 233.
Tony, Southern Home B. & L. Assn. v.—78 M. 916.
Toof v. Brewer, 3 So. 571—hus. & w. 203½.
Toof v. Duncan, 45 M. 48—j. adv. 1, 2; partners. 153.
Toof v. Miller, 73 M. 756—fraud. conv. 56; insolv. 6.
Tooley v. Culbertson, 5 H. 267—land. & t. 229k.
Tooley v. Gridley, 3 S. & M. 493—courts, 204; eq. 148; jud. s. 31; mtg. 420, 494, 501, 519, 526, 528.
Tooley v. Kane, Sm. & M. Ch. 518—jud. s. 34; mtg. 420, 499, 525.
Toomer, Edwards v.—14 S. & M. 75.
Toomer, Thompson v.—50 M. 394.
Tootle, Jackson Naval Stores Co. v.—96 M. 486.
Topp v. Pollard, 24 M. 682—app. & e. 1043; atty. & c. 128; estop. 2.
Topp, Elliott v.—63 M. 138.
Torrance v. Betsy, 30 M. 129—app. & e. 520; eject. 8, 13.
Torrance v. Hurst, W. 403—ev. 471; libel, 1, 50; witn. 239.
Torrance, Betsey v.—34 M. 132.
Torre v. Jeanin, 76 M. 898—aliens, 2; app. & e. 1047; pub. lands, 114.
Torrence v. Carbry, 27 M. 697—dower, 11, 70.
Torrence v. Kerr, 27 M. 786—ex. & ad. 315.
Torrey v. Cook, 3 S. & M. 60—forc. e. & d. 28, 29.
Torrey v. Fisk, 10 S. & M. 590—app. & e. 854; bills & n. 60; trial, 46, 47, 60; witn. 91.
Torrey v. Grant, 10 S. & M. 89—bills & n. 106, 331; cncts. 106; estop. 55; usury, 32, 66, 128.
Torrey v. Jordan, 4 H. 401—judgm. 17; princ. & s. 153; sheriffs, 159, 169.
Torrey v. Minor, Sm. & M. Ch. 489—cov. 53; dower, 54, 75.
Torry v. Robertson, 24 M. 192—abate. & r. 39; app. & e. 718.
Torry, Adams v.—26 M. 499.
Torry, Anketel v.—7 S. & M. 467.
Torry, McKey v.—28 M. 78.
Torsch, Pass Canning Co. v.—87 M. 694.
Totten, Houston v.—1 Miss. Dec. 244.
Totten, Mattheny v.—2 S. & M. 52.
Toulme v. Clark, 64 M. 471—eq. 341, 345.
Toulme, Keller v.—7 So. 508.
Toulme, New Orleans &c. R. Co. v.—59 M. 284.
Toulmin v. Heidelberg, 32 M. 268—ack. 35; hus. & w. 190, 194; quiet. t. 9.
Toumbs, Cook v.—36 M. 685.
Tourney v. Sinclair, 3 H. 324—hus. & w. 45, 49½, 279.
Townes, New England Mortgage Security Co. v.—1 So. 242.
Town of Batesville, Patterson v.—37 M. 560.
Town of, see title of particular town.
Towns v. Boarman, 23 M. 186—land. & t. 263, 274.
Townsend v. Blewett, 5 H. 503—app. & e. 548, 689, 926; fran. 4, 5; trial, 46, 56.
Townsend v. Henry, 26 M. 203—execution, 326.
Townsend v. Hurst, 37 M. 679—fraud, 28; g. will. 4.
Townsend v. Kennard, 1 Miss. Dec. 222—witn. 133, 140.
Townsend v. Odam, W. 356—disc. 19.
Townsend v. State, 12 So. 209—crim. l. 786.
Townsend, Tate v.—61 M. 316.
Traders' Ins. Co. v. E. D. Edwards Post No. 22, G. A. R. 86 M. 135—ev. 453, 454, 461.
Traders' Ins. Co. Hennessey v.—87 M. 259.
Trager v. Jenkins, 75 M. 676—tax. 529, 806, 810.
Trager v. Shepherd, 18 So. 122—eject. 86; trial, 252.
Trager, Cage v.—60 M. 563.
Trahern v. Shackelford, 3 H. 73—app. & e. 398.
Trahern, Gamble v.—3 H. 32.
Trail, Illinois Cent. R. Co. v.—25 So. 863.
Trainer, Overstreet v.—24 M. 484.

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Traube v. State, 56 M. 153—crim. l. 880; hom. 315; trial, 338.
Travis v. Willis, 55 M. 557—hus. & w. 18, 61, 78, 221, 237; judgm. 36; witn. 53.
Traweek v. Kelly, 60 M. 652—lim. of act. 70a, 114.
Treadwell v. Herndon, 41 M. 38—app. & e. 492; execution, 18; ex. & ad. 454, 471.
Treadwell v. Sorrell, 23 M. 563—ex. & ad. 314g, 473.
Treadwell, Wells v.—28 M. 717.
Treen v. State, 92 M. 756—counties, 102.
Trewalla, Fletcher v.—60 M. 963.
Trezevant v. McQueen, 12 S. & M. 575—ex. & ad. 415c, 419.
Trezevant v. McQueen, 13 S. & M. 311—ex. & ad. 415e.
Tribette v. Illinois Cent. R. Co. 70 M. 182—app. & e. 1167; eq. 2, 51, 150; inj. 26.
Tribette v. Illinois Cent. R. Co. 71 M. 212—carr. 115; ev. 471; neg. 133; r. r. 453, 456, 471, 481, 482, 485; trial, 143, 194.
Trible v. Bank of Grenada, 2 S. & M. 523—bills & n. 455.
Trible, Lazarus v.—1 S. & M. 575.
Trice v. Jones, 52 M. 138—afft. 12; j. p. 157.
Trice v. Lagrone, 57 M. 839—execution, 169; waters, 58, 59.
Trice v. Walker, 71 M. 968—execution, 180, 184, 187, 192; sales, 202.
Trice, Lagrone v.—57 M. 227.
Trice, Okolona Sav. Inst. v.—60 M. 262.
Trice, Walker v.—71 M. 968.
Trigg, Lanier v.—6 S. & M. 641.
Trigg, Musson v.—51 M. 172.
Trim v. State, 33 So. 718—crim. l. 596, 1085, 1115; witn. 40.
Trimble v. Durham, 70 M. 295—land. & t. 245, 254.
Trimble v. Turner, 13 S. & M. 348—fraud. conv. 29a, 29b, 140, 207, 321.
Trimble, Natchez v.—W. 376.
Triplet v. State, 80 M. 379—crim. l. 260c; mast. & s. 343, 345a.
Triplet v. Thornton, 1 Miss. Dec. 98—lim. of act. 111; lis pens. 23; mtg. 582; tax. 679.
Triplett, Campbell v.—74 M. 365.
Tronstine, Illinois Cent. R. Co. v.—64 M. 834.
Trost v. State, 64 M. 188—int. liq. 45, 221.
Trotter v. Dobbs, 38 M. 198—citiz. 10; exemp. 17, 25.
Trotter v. Erwin, 27 M. 772—lim. of act. 85, 167; venue, 28.
Trotter v. McCall, 26 M. 410—bailm. 22, 31.
Trotter v. Parker, 38 M. 473—app. & e. 1175; execution, 129, 338; ex. & ad. 411, 416; sheriffs, 137.
Trotter v. Trotter, 40 M. 704—ex. & ad. 473, 477, 478, 479, 481, 508; guard. & w. 53; lim. of act. 143; states, 18, 18c.
Trotter v. White, 10 S. & M. 607—bills & n. 455; ex. & ad. 524; frds. st. of, 24; garn. 118.
Trotter v. White, 26 M. 88—app. & e. 1016; det. 19; eq. 268; execution, 153e; fraud, 183; inj. 234; mtg. 530; trover, 6.
Trotter, Chicago &c. R. Co. v.—60 M. 442.
Trotter, Chicago &c. R. Co. v.—61 M. 417.
Trotter, Memphis Grocery Co. v.—7 So. 550.
Trotter, Mobile &c. R. Co. v.—36 M. 416.
Trotter, Pointer v.—10 S. & M. 537.
Trotter, White v.—14 S. & M. 30.
Troup v. Rice, 49 M. 248—app. & e. 69, 102; courts, 200¼; ex. & ad. 468, 473.
Troup v. Rice, 55 M. 278—des. & d. 104; ex. & ad. 104, 438, 473, 475; trusts, 350; witn. 159.
Troup, Brown v.—33 M. 35.
Troup, Dowd v.—57 M. 204.
Troupe, Harvey v.—23 M. 538.
Troup, Rice v.—62 M. 186.
Troutman v. Louisville &c. R. Co. 95 M. 183—carr. 320.
Trowbridge v. Schmidt, 82 M. 475—lim. of act. 12; mun. corp. 871.
Trowbridge, Reid v.—78 M. 542.
Trowbridge, Spengler v.—62 M. 46.
Trueheart v. Craddock, 23 So. 549—assign. f. b. c. 147, 157, 321.
Trueland, Acker v.—56 M. 30.
Truly v. Lane, 7 S. & M. 325—app. & e. 958; eq. 378; lost inst. 13, 18, 24.
Truly v. North Lumber Co. 83 M. 430—mast. & s. 219, 245, 265.
Truly, Dick v.—Sm. & M. 557.
Trussel, McClusky v.—90 M. 544.
Trussel, Marx v.—50 M. 498.
Trussell, Meridian v.—52 M. 711.
Trustees of School Lands, Carmichael v.—3 H. 84.
Tuberville v. State, 38 So. 333—assa. 83, 96, 789, 829, 942, 949; witn. 274.
Tucker v. Byers, 46 M. 549—attch. 319, 322; judgm. 17d, 144.
Tucker v. Cocke, 32 M. 184—cncts. 4; eq. 427; princ. & a. 5; trusts, 219.
Tucker v. Dean, 2 Miss. Dec. 660—ten. in c. 30.
Tucker v. Donald, 60 M. 460—app. & e. 243; ev. 360; witn. 381, 398.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Tucker v. Field, 51 M. 191—deeds, 38; dower, 15.
Tucker v. Gordon, 7 H. 306—arb. 12, 82; excep. 35.
Tucker v. Hadley, 52 M. 414—estop. 68; judgm. 682; ven. & pur. 260, 285.
Tucker v. Hart, 23 M. 548—offic. 134; prisons, 5; plead. 217.
Tucker v. State, 55 M. 452—recogn. 11.
Tucker v. State, 89 M. 363—schools, 53.
Tucker v. Stites, 39 M. 196—wills, 456, 546.
Tucker v. Stokes, 3 S. & M. 124—offic. 129; tax. 324.
Tucker v. Tucker, 74 M. 93—hus. & w. 323, 333; trial, 242; witn. 344, 360.
Tucker v. Whitehead, 58 M. 762—land. & t. 68, 203, 229b; wills, 421, 728.
Tucker v. Whitehead, 59 M. 594—witn. 91, 140; wills, 171, 204, 433.
Tucker v. Wilson, 68 M. 693—abate. & r. 45, 65, 75; inf. 88; judgm. 570; lim. of act. 106; lis pens. 26.
Tucker v. Zollicoffer, 12 S. & M. 591—dism. 80; plead. 88, 194, 433, 434; supersed. 6.
Tucker, Blackburn v.—72 M. 735.
Tucker, Colored Knights of Pythias v.—92 M. 501.
Tucker, Day v.—94 M. 222.
Tucker, Dean v.—58 M. 487.
Tucker, Graves v.—10 S. & M. 9.
Tucker, Grindley v.—Freem. Ch. 209.
Tucker, Hutcheson v.—15 So. 132.
Tucker, Illinois Cent. R. Co. v.—31 So. 792.
Tucker, Parisot v.—65 M. 439.
Tucker, White v.—52 M. 145.
Tucker, Williams v.—47 M. 678.
Tufts v. Greenwall, 66 M. 360—cncts. 143; ev. 449, 463.
Tufts v. Stone, 70 M. 54—princ. & a. 145; sales, 203, 242, 304, 316, 471.
Tufts, Burnley v.—66 M. 48.
Tufts, Gayden v.—68 M. 691.
Tuggle, Johnson v.—27 M. 836.
Tuler, Dunbar v.—44 M. 1.
Tullis, Lowry v.—32 M. 147.
Tullos, Rogers v.—51 M. 685.
Tully v. Herrin, 44 M. 626—assign. 2; attch. 211; insolv. 6; motions, 2.
Tunica County v. Rhodes, 85 M. 500—schools, 95.
Tunica County v. Tate, 78 M. 294—tax. 352, 362, 412, 495.
Tunica County, Polk v.—52 M. 422.
Tunica County, Miller v.—67 M. 651.
Tunica County, Turner v.—2 Miss. Dec. 136.
Tunstall v. Walker, 2 S. & M. 638—abate. & r. 71; app. & e. 828, 1003, 1184; bills & n. 393, 400, 421.
Tunstall, Green v.—5 H. 638.
Tunstall, Walker v.—3 H. 259.
Tuomey, State v.—5 H. 50.
Tupelo v. Beard, 56 M. 532—int. liq. 45; licens. 34; mun. corp. 957.
Tupelo, Clayton v.—29 So. 994.
Tupelo Furniture Mfg. Co. Mobile &c. R. Co. v.—67 M. 35.
Tupper v. Cassell, 45 M. 352—abate. & r. 76; attch. 316; garn. 191.
Tupper, Doe v.—4 S. & M. 261.
Tupper, Scott v.—8 S. & M. 280.
Turberville v. Simpson, 94 M. 154—chat. m. 225, 266.
Turbeville v. State, 56 M. 793—crim. l. 634; forg. 10; trial, 19.
Turley v. Ingram, 1 Miss. Dec. 542—lim. of act. 170; new tr. 65.
Turley, Columbus Buggy Co. v.—73 M. 529.
Turnage v. State, 1 Miss. Dec. 532—crim. l. 814, 1172.
Turnage, Cooper v.—52 M. 431.
Turnage, Miss. Cent. R. Co. v.—95 M. 854.
Turnbull v. Endicott, 3 S. & M. 302—courts, 202c; judgm. 342.
Turnbull v. Middleton, W. 413—slaves, 7c.
Turnbull v. Witherspoon, W. 351—plead. 193.
Turnbull, Alabama &c. R. Co. v.—71 M. 1029.
Turner v. Acker, 2 Miss. Dec. 736—cncts. 151.
Turner v. Bird, 44 M. 449—app. & e. 1006; new tr. 11.
Turner v. Brown, 3 S. & M. 425—assign. 99; bills & n. 352; cncts. 70; ex. & ad. 95, 99.
Turner v. Chambers, 10 S. & M. 308—execution, 130; ex. & ad. 318, 454.
Turner v. Cochran, 89 M. 206—tax. 44.
Turner v. Ellis, 24 M. 173—ex. & ad. 324, 338, 437.
Turner v. Fish, 28 M. 306—indians, 14.
Turner v. Forrest County—see Turner v. Hattiesburg.
Turner v. Hattiesburg, 53 So. 681—const. law, 30, 70; mun. corp. 861, 907; statut. 21, 80, 96; tax. 44.
Turner v. Herron, 34 M. 460—slaves, 5.
Turner v. Leflore County, 93 M. 188—counties, 176.
Turner v. Lilly, 56 M. 576—j. p. 40; replev. 19.
Turner v. McAdory, 58 M. 27—judgm. 883; set-off, 35.

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Turner v. Morris, 27 M. 733—dower, 76, 107; hus. & w. 237.
Turner v. Planters' Lumber Co.—92 M. 767—frds. st. of, 72.
Turner v. Simmons, 54 So. 658—app. & e. 338, 387.
Turner v. State, 28 M. 684—ind. 175.
Turner v. State, 60 M. 351—witn. 61.
Turner v. State, 89 M. 621—hom. 319.
Turner v. State, 94 M. 458—crim. l. 1171.
Turner v. State, 95 M. 879—crim. l. 785b.
Turner v. Thomas, 77 M. 864—ev. 178, 334.
Turner v. Tunica County, 2 Miss. Dec. 136—counties, 211.
Turner v. Turner, 30 M. 428—ex. & ad. 173; exemp. 30.
Turner v. Turner, 57 M. 775—ex. & ad. 138; wills, 732, 821.
Turner v. Turner, 93 M. 167—parent. & c. 2.
Turner v. Yazoo &c. R. Co. 33 So. 283—r. r. 376, 398.
Turner, Alabama &c. R. Co. v.—52 So. 261.
Turner, Caston v.—95 M. 303.
Turner, Coleman v.—14 S. & M. 118.
Turner, Frelick v.—26 M. 393.
Turner, Halsell v.—84 M. 432.
Turner, Helm &c. Co. v.—89 M. 334.
Turner, Illinois Cent. R. Co. v.—71 M. 402.
Turner, Laurel v.—80 M. 530.
Turner, Laurel v.—96 M. 631.
Turner, Magee v.—92 M. 438.
Turner, McAdroy v.—56 M. 666.
Turner, McComb v.—14 S. & M. 119.
Turner, Pease v.—3 H. 375.
Turner, Poindexter v.—W. 349.
Turner, Quitman Lumber Co. v.—48 So. 819.
Turner, Southern R. Co. v.—49 So. 113.
Turner, Swann v.—23 M. 565.
Turner, Trimble v.—13 S. & M. 348.
Turney v. State, 8 S. & M. 104—bast. 62; crim. l. 1093; rape, 40, 44; witn. 239.
Turnipseed v. Hudson, 50 M. 429—estop. 97; offic. 63.
Tush-Ho-Yo-Tubby v. Barr, 41 M. 52—adv. pos. 110.
Tush-Ho-Yo-Tubby v. Barr, 45 M. 189—app. & e. 1063; eject. 86; lim. of act. 86; new tr. 41.
Tusten, Walton v.—49 M. 569.
Tuteur v. Brown, 74 M. 774—can. of l. 35; mtg. 596; quiet. t. 30.
Tuteur v. Chase, 66 M. 476—fraud. conv. 164, 309; sales, 235.
Tutt v. Fulgham, 5 H. 621—execution, 99, 348.
Tutt v. Jackson, 87 M. 207—ins. 768.
Tutt v. McLeod, 3 H. 223—action, 26; cncts. 346; sales, 440.
Tuttle v. Everett, 51 M. 27—tax. 536, 562.
Tuttle, Johnson v.—65 M. 492.
Tutt, McLeod v.—1 H. 288.
Twichell, Pearce v.—41 M. 344.
Tyer v. Lilly, 81 M. 606—deeds, 136.
Tyler v. Bay St. Louis, 34 So. 215—mun. corp. 845.
Tyler v. Davis, 63 M. 345—replev. 118.
Tyler v. Fant, 3 So. 374—mun. corp. 137.
Tyler v. Herring, 67 M. 169—eject. 110; ev. 70; mtg. 339, 346, 369a.
Tyler v. Illinois Cent. R. Co. 61 M. 445—r. r. 411, 419, 447.
Tyler v. McCardle, 9 S. & M. 230—bills & n. 91; cncts. 211; inj. 185; spec. perf. 93.
Tyler v. State, 69 M. 395—crim. l. 260c; int. liq. 219, 223.
Tyler v. Wheeler, 1 Miss. Dec. 251—fraud. conv. 106.
Tynes v. Southern Pine Co. 54 So. 885—pub. lands, 61.
Tynes v. State, 93 M. 119—lewd. 4, 7, 11.
Tynes v. State, 29 So. 91—rape, 53.
Tyson v. Gaston, 14 So. 458—bills & n. 515.
Tyson, Anderson v.—6 S. & M. 244.
Tyson, New Orleans &c. R. Co. v.—46 M. 729.

U

Udell Woodenware Co. Snider v.—74 M. 353.
Uhler v. Adams, 73 M. 332—eject. 132.
Ulmer, Blumer v.—44 So. 161.
Ullman, Commercial Bank v.—10 S. & M. 411.
Underwood v. Ainsworth, 72 M. 328—hus. & W. 47, 151; new tr. 104.
Underwood Typewriter Co. v. Taylor, 94 M. 584—j. p. 159.
Unger v. State, 42 M. 642—crim. l. 70, 1184; ind. 158; larc. 32, 41, 81, 85.
Unger, Donald v.—75 M. 294.
Unger & Co. v. Abbott, 92 M. 563—sales, 234.
Union Bank v. Govan, 10 S. & M. 333—atty. & c. 94, 101; bills & n. 223, 265, 415, 422; execution, 174.
Union Bank v. Graves, 12 S. & M. 130—bills & n. 527; trial, 76.
Union Bank, Brown v.—62 M. 754.
Union Bank, Johnston v.—37 M. 526.
Union Bank, Smith v.—13 S. & M. 240.
Union Casualty &c. Co. Pervanger v.—81 M. 32.
Union Cent. Life Ins. Co. Mills v.—77 M. 327.
Union Investment Co. v. Harrison County, 67 M. 614—tax. 348, 470.

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Union Inv. Co. McGuire v.—76 M. 868.
Union Mortgage &c. Co. v. Peters, 72 M. 1058—estop. 82, 98; lim. of act. 171; subrog. 1, 23.
Union Nat. Bank v. Fraser, 63 M. 231—usury, 52, 74, 99, 100, 102, 146.
Union Nat. Bank, Lexington v.—75 M. 1.
Union Naval Stores Co. Gates v.—92 M. 227.
Union Planters' Bank v. Edgell, 33 So. 409—mtg. 339.
Union &c. Bank v. Allen, 77 M. 442—app. & e. 835, 1099; assign. f. b. c. 10, 28, 50, 98, 152; judgm. 649.
Union &c. Bank v. Duncan, 84 M. 467—assign. f. b. c. 312.
Union &c. Bank, Allen v.—72 M. 549.
Union &c. Co. Pervanger v.—85 M. 31.
United States, American Surety Co. v.—76 M. 289.
United States Bank, Long v.—Freem. Ch. 375.
United States Fidelity &c. Co. v. Williams, 96 M. 10—ins. 145.
Universal Life Ins. Co. v. Whitehead, 58 M. 226—ins. 239, 363.
Upchurch v. State, 96 M. 586—hom. 333; witn. 372.
Upshaw v. Gibson, 53 M. 341—estop. 95; inf. 8, 29, 58.
Upshaw v. Hargrove, 6 S. & M. 286—arb. & a. 32; bills & n. 327; eq. 417; ven. & pur. 220, 254b, 262, 266a.
Usher v. Moss, 50 M. 208—j. p. 142, 166; land. & t. 114, 279.

V

Vaccaro v. Asher, 11 So. 531—usury, 2.
Vaccaro, Richards v.—67 M. 516.
Vaiden v. Hawkins, 59 M. 406—wills, 449, 586, 752, 820.
Vaiden v. Hawkins, 6 So. 227—lim. of act. 43; partners. 20, 81; wills, 867.
Vail, Bush v.—2 Miss. Dec. 519.
Vails v. State, 94 M. 365—crim. l. 785b, 823.
Valentine v. McGrath, 52 M. 112—app. & e. 1011; execution, 172; inj. 200.
Valentine v. Planters' Bank, Freem. Ch. 727—execution, 37.
Valentine v. State, 35 So. 170—fish, 15.
Valentine, Person v.—13 S. & M. 551.
Vallandingham, Knox v.—13 S. & M. 526.
Valley Dry Goods Co. Buster Brown Co. v.—94 M. 856.
Valley Land Co. Memphis Grocery Co. v.—17 So. 232.
Valley Land Co. Paxton v.—67 M. 96.
Valley Land Co. Paxton v.—68 M. 739.
Valverde v. Spottswood, 77 M. 912—mar. liens, 29.
Vanarsdale, Davis v.—59 M. 367.
Van Buren v. State, 24 M. 512—const. law, 55; crim. l. 531, 537; excep. 32; slaves, 18c.
Van Campen v. Snyder, 3 H. 66—witn. 92.
Van Campen, Abbey v.—Freem. Ch. 273.
Vance v. Connell, W. 254—sheriffs, 125.
Vance v. Isbel, 13 S. & M. 371—app. & e. 1040; plead. 218.
Vance v. State, 62 M. 137—app. & e. 1063; crim. l. 1172; new tr. 41.
Vance v. State, 62 M. 137—perj. 1, 34, 40.
Vance, Bias v.—32 M. 198.
Vance, Burroughs v.—75 M. 696.
Vance, Eakin v.—10 S. & M. 549.
Vance, Isbel v.—13 S. & M. 371.
Vance, Merritt v.—6 H. 498.
Vance, Sorsby v.—36 M. 564.
Vandenburg, State v.—28 So. 835.
Vanderburg v. Campbell, 64 M. 89—new tr. 6, 104, 149.
Vanderburg v. Williamson, 52 M. 233—guard. & w. 15, 92; quiet. t. 48.
Vandergrift, Acme Lumber Co. v.—70 M. 91.
Vanderpool, Dougherty v.—35 M. 190.
Vandervelde, Natchez v.—31 M. 706.
Van Diver v. Buckley, 1 So. 633—attch. 211, 217; hus. & w. 19.
Van Diver, Buckley v.—70 M. 622.
Van Dorn, Eastin v.—W. 214.
Van Duzer v. Zimmerman Lumber Co. 43 So. 177—partners. 9, 17, 20.
Van Eaton v. Hamlin, 16 So. 594—spec. perf. 126.
Van Eaton v. Napier, 63 M. 220—lim. of act. 165, 167; nova. 7.
Van Eaton, Louisville &c. R. Co. v.—11 So. 111.
Van Eaton, Louisville &c. R. Co. v.—14 So. 267.
Vanghan, Blewitt v.—5 H. 418.
Vanhouten v. Reiley, 6 S. & M. 440—action, 21; assign. 72, 80; execution, 130; ex. & ad. 454; judgm. 836, 844; parties, 4.
Vanhouten, Riley v.—4 H. 428.
Vanmeter Lumber Co. Sims v.—96 M. 449.
Vannerson v. Cord, Sm. & M. Ch. 345—jud. s. 7, 12; mtg. 515.
Vannerson v. Culbertson, 10 S. & M. 150—wills, 435, 440, 613.
Vannerson v. Pendleton, 8 S. & M. 452—new tr. 85, 146.

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Vannerson v. Staunton, W. 358—j. p. 6; land. & t. 273.
Vannerson, Dunn v.—7 H. 579.
Vanos, Liverpool &c. Ins. Co. v.—63 M. 431.
Van Range Co. v. Allen, 7 So. 499—fixt. 1, 9; sales, 471.
Van Vacter v. Brewster, 1 S. & M. 400—atty. & c. 80; new tr. 41.
Van Vacter v. Flack, 1 S. & M. 393—bills & n. 17, 428.
Van Vacter v. McWillie, 31 M. 563—ex. & ad. 314b.
Van Vacter, McWillie v.—35 M. 428.
Van Winkle v. Smith, 26 M. 491—fraud. conv. 235.
Vanzant v. Shelton, 40 M. 332—paymt. 60; plead. 180.
Varando, Atkinson &c. Co. v.—91 M. 825.
Varnadore, Illinois Cent. R. Co. v.—15 So. 933.
Vardeman v. Byrne, 7 H. 365—new tr. 704.
Varner v. Gregg, 26 M. 590—des. & d. 57; hus. & w. 10.
Vasser v. George, 47 M. 713—lev. 21, 28a, 28c, 28d, 28e; tax. 42, 44, 655.
Vasser v. Henderson, 40 M. 519—cred. s. 16; fraud. conv. 237.
Vasser v. Stewart, 68 M. 180—tresp. 5.
Vasser v. Vasser, 23 M. 378—chat. m. 34, 35.
Vasser, Buck v.—47 M. 551.
Vaughan v. Bunch, 53 M. 513—wills, 474.
Vaughan v. Commercial Bank, 18 So. 270—app. & e. 1011.
Vaughan v. Cutrer, 49 M. 782—eq. 446, 447, 457.
Vaughan v. State, 3 S. & M. 553—crim. l. 1144, 1159; hom. 86, 142; ind. 165.
Vaughan v. Swayzie, 56 M. 704—tax. 296, 573, 679, 679a, 688, 764, 787.
Vaughan, Blundell v.—12 S. & M. 625.
Vaughan, Wilson v.—61 M. 472.
Vaughn v. Cox, 27 M. 701—abate. & r. 24.
Vaughn v. Hudson, 59 M. 421—app. & e. 719; ex. & ad. 509; inf. 115.
Vaughn v. Powell, 65 M. 401—home. 117; hus. & w. 6; mtg. 346.
Vaughn v. Ruff, 54 So. 837—replev. 10.
Vaughn, Higdon v.—58 M. 572.
Vaughn, Southern R. Co. v.—86 M. 367.
Vaughn, State v.—77 M. 681.
Vaughn, Vicksburg Mfg. Co. v.—27 So. 599.
Vause v. Woods, 46 M. 120—cred. s. 33; rec. 35, 39.
Vauzandt, Foote v.—34 M. 40.
Velie v. Breen, 28 So. 25—eq. 47.
Ventress, Bacon v.—32 M. 158.
Verden, Tifft v.—11 S. & M. 153.
Verhallen v. Laveochia, 79 M. 370—ev. 348.
Verner v. Verner, 62 M. 260—eq. 15; hus. & w. 283, 285.
Verner v. Verner, 64 M. 184—div. 227; fraud. conv. 273; hus. & w. 282.
Verner v. Verner, 64 M. 321—libel, 35.
Vernon v. Tippah County, 47 M. 181—schools, 16; trusts, 172.
Verona, Sample v.—94 M. 264.
Vertner v. Griffith, W. 414—eq. 273.
Vertner v. Humphreys, 14 S. & M. 130—fraud. conv. 68, 207; hus. & w. 2, 28.
Vertner v. McMurran, Freem. Ch. 136—courts, 200¼; ex. & ad. 471, 508a.
Vertner v. Martin, 10 S. & M. 103—cmpt. 25, 55, 58; execution, 15.
Vertner, Griffith v.—5 H. 736.
Vertner, Humphreys v.—Freem. Ch. 251.
Vice v. Holley, 88 M. 572—false imp. 7.
Vice, State v.—71 M. 912.
Vick v. Ayres, 56 M. 670—frds. st. of, 57; land. & t. 5, 229b; ven. & pur. 19.
Vick v. Chewning, 31 M. 201—judgm. 870b.
Vick v. House, 2 H. 617—ex. & ad. 449, 450, 453a.
Vick v. Lane, 56 M. 681—corp. 265, 274.
Vick v. LaRochelle, 57 M. 602—corp. 247.
Vick v. McDaniel, 3 H. 337—ins. p. 4; wills, 586.
Vick v. Maulding, 1 H. 217—app. & e. 166.
Vick v. Peck, 4 H. 407—ev. 342; trial, 267.
Vick v. Percy, 7 S. & M. 256—ven. & pur. 35, 112, 115.
Vick v. Vicksburg, 1 H. 379—ded. 13, 16, 17, 18, 30; ex. & ad. 21; partit. 51.
Vick, Chambless v.—34 M. 109.
Vickery v. Rester, 4 H. 293—app. & e. 707; bills & n. 301; dism. 23; judgm. 105.
Vick, Manlove v.—55 M. 567.
Vick, Moore v.—2 H. 746.
Vick, Offit v.—W. 99.
Vick, Queen v.—28 M. 662.
Vicksburg v. Armour Packing Co. 24 So. 224—tax. 260, 265.
Vicksburg v. Butler, 56 M. 72—tax. 536.
Vicksburg v. Groome, 24 So. 306—offic. 33, 95.
Vicksburg v. Hennessey, 52 M. 178—crim. l. 1184; new tr. 156.
Vicksburg v. Hennessy, 54 M. 391—mun. corp. 763, 805, 817.
Vicksburg v. Herman, 72 M. 211—em. dom. 75, 93, 101; mun. corp. 381, 395.
Vicksburg v. Lombard, 51 M. 111—counties,

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47; mun. corp. 46, 918, 922, 931, 936, 938, 945; offic. 13.
Vicksburg v. McLain, 67 M. 4—death, 94, 97, 99; mun. corp. 747, 767, 802; neg. 33, 42, 85, 115; r. r. 359.
Vicksburg v. Marshall, 59 M. 563—adv. pos. 4, 8; ded. 29, 39; mun. corp. 654.
Vicksburg v. Rainwater, 47 M. 547—mand. 28, 72.
Vicksburg v. Rainwater, 52 M. 718—mun. corp. 183.
Vicksburg v. Record, 1 Miss. Dec. 407—app. & e. 934.
Vicksburg v. Richardson, 90 M. 1—mun. corp. 736.
Vicksburg v. Sun Mutual Ins. Co. 72 M. 67—statut. 167, 225½, 231, 246.
Vicksburg, Alexander v.—68 M. 564.
Vicksburg Bank v. Adams, 74 M. 179—banks, 12; licens. 36; tax. 125, 411, 446, 495.
Vicksburg Bank v. Little, 67 M. 159—attch. 339; sheriffs, 126.
Vicksburg Bank v. Moss, 63 M. 74—app. & e. 1002; new tr. 47; trial, 314.
Vicksburg Bank v. Worrell, 67 M. 47—banks, 12; counties, 192; licens. 2, 19; tax. 39, 41, 42, 113, 125, 192, 196.
Vicksburg Bank, Adams v.—10 So. 102.
Vicksburg Bank, Carson v.—75 M. 167, 22 So. 1.
Vicksburg Bank, Third Nat. Bank v.—61 M. 112.
Vicksburg Bank, State v.—69 M. 99.
Vicksburg, Butler v.—17 So. 605.
Vicksburg, Craig v.—31 M. 216.
Vicksburg, Crumpler v.—89 M. 214.
Vicksburg, Donovan v.—29 M. 247.
Vicksburg Grocery Co. v. Brennan, 20 So. 845—courts, 48; execution, 5; judgm. 470, 667.
Vicksburg, Harrison v.—3 S. & M. 581.
Vicksburg Liquor Co. v. Express Co. 68 M. 149—carr. 61.
Vicksburg, Lum v.—72 M. 950.
Vicksburg, Mackey v.—64 M. 777.
Vicksburg, Methodist &c. Church v.—50 M. 601.
Vicksburg Mfg. Co. v. Vaughn, 27 So. 599—mast. & s. 239.
Vicksburg Mfg. &c. Co. v. Jaffray Const. Co. 94 M. 282—app. & e. 170; frds. st. of, 26; mech. liens, 117.
Vicksburg, Overton v.—70 M. 558.
Vicksburg, Pitts v.—72 M. 181.
Vicksburg, Robinson v.—54 So. 858.
Vicksburg R. &c. Co. v. Cameron, 88 M. 412—new tr. 81.
Vicksburg R. &c. Co. v. Miles, 88 M. 204—electr. 19.
Vicksburg R. &c. Co. v. Marlett, 78 M. 872—dam. 91.
Vicksburg, Semple v.—62 M. 63.
Vicksburg, Smith v.—54 M. 615.
Vicksburg, Smith v.—86 M. 577.
Vicksburg Traction Co. Austin v.—95 M. 867.
Vicksburg, Vicks v.—1 H. 379.
Vicksburg, Vicksburg Waterworks Co. v.—54 So. 852.
Vicksburg, Vicksburg Waterworks Co. v.—79 M. 510.
Vicksburg, Walker v.—71 M. 899.
Vicksburg Water Supply Co. v. Gorman, 70 M. 360—cncts. 314, 321, 322, 351; dam. 124; mast. & s. 302.
Vicksburg Water Supply Co. Vicksburg Waterworks Co. v.—80 M. 68.
Vicksburg Waterworks Co. v. Dutton, 53 So. 537—dam. 140, 208.
Vicksburg Waterworks Co. v. Ford, 52 So. 208—j. p. 44.
Vicksburg Waterworks Co. v. J. M. Guffy Petroleum Co. 86 M. 60—cncts. 202; estop. 78.
Vicksburg Waterworks Co. v. Vicksburg, 79 M. 510—app. & e. 67; rem. of c. 89.
Vicksburg Waterworks Co. v. Vicksburg, 54 So. 852—inj. 244, 252; mun. corp. 148.
Vicksburg Waterworks Co. v. Vicksburg Water Supply Co. 80 M. 68—tax. 78; ven. & pur. 198.
Vicksburg Waterworks Co. v. Yazoo &c. R. Co. 96 M. 807—mun. corp. 686; waters, 201.
Vicksburg Waterworks Co. Adams v.—94 M. 601.
Vicksburg Waterworks Co. Griffith v.—88 M. 371.
Vicksburg Waterworks Co. J. M. Guffey Petroleum Co. v.—89 M. 238.
Vicksburg Waterworks Co. Staple v.—90 M. 848.
Vicksburg Waterworks &c. Co. v. Washington, 1 S. & M. 536—corp. 514; plead. 222, 236.
Vicksburg &c. Packet Co. Crescent Ins. Co. v.—69 M. 208.
Vicksburg &c. R. Co. v. Alexander, 62 M. 496—neg. 65, 136; r. r. 305, 324, 446.
Vicksburg &c. R. Co. v. Bradley, 66 M. 518—tax. 231.
Vicksburg &c. R. Co. v. Barrett, 67 M. 579—adv. pos. 109; r. r. 68.

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Vicksburg &c. R. Co. v. Barmore, 87 M. 273—r. r. 391.
Vicksburg &c. R. Co. v. Dixon, 61 M. 119—r. r. 103.
Vicksburg &c. R. Co. v. Hamilton, 62 M. 503—neg. 122; r. r. 441.
Vicksburg &c. R. Co. v. Hart, 61 M. 468—r. r. 418.
Vicksburg &c. R. Co. v. Hedrick, 62 M. 28—witn. 317.
Vicksburg &c. R. Co. v. Howe, 52 M. 202—carr. 302.
Vicksburg &c. R. Co. v. Lawrence, 78 M. 86—new tr. 76.
Vicksburg &c. R. Co. v. Lewis, 68 M. 29—eject. 128; tax. 231, 251.
Vicksburg &c. R. Co. v. Ligon, 1 Miss. Dec. 507—r. r. 453, 483.
Vicksburg &c. R. Co. v. Lowry, 61 M. 102—mand. 71; states, 41.
Vicksburg &c. R. Co. v. McCutchen, 52 M. 645—corp. 266, 506, 507, 523; execution, 37, 38; jud. s. 3; r. r. 176.
Vicksburg &c. R. Co. v. McGowan, 62 M. 682—ev. 123, 243; neg. 65, 97, 136; r. r. 234, 359, 381, 382, 397; witn. 362.
Vicksburg &c. R. Co. v. Marlett, 78 M. 872—carr. 382.
Vicksburg &c. R. Co. v. Patton, 31 M. 156—anim. 47; com. l. 10; dam. 92; mast. & s. 330; neg. 82; r. r. 222, 267, 405, 411, 444.
Vicksburg &c. R. Co. v. Phillips, 64 M. 108—garn. 45.
Vicksburg &c. R. Co. v. Phillips, 64 M. 693—carr. 361; death, 31; mast. & s. 302d; neg. 137; r. r. 251, 276, 393.
Vicksburg &c. R. Co. v. Ragsdale, 46 M. 458—carr. 95; cncts. 314; dam. 24, 62, 117, 142.
Vicksburg &c. R. Co. v. Ragsdale, 51 M. 447—excep. 11, 35.
Vicksburg &c. R. Co. v. Ragsdale, 54 M. 200—estop. 70, 90; forfeit. 5; frds. st. of, 56; quiet. t. 4, 7; r. r. 72; ven. & pur. 299.
Vicksburg &c. R. Co. v. Scanlan, 63 M. 413—carr. 276, 294, 303, 319; dam. 91.
Vicksburg &c. R. Co. v. Sharkey, 1 Miss. Dec. 158—carr. 214.
Vicksburg &c. R. Co. v. State, 62 M. 105—licens. 8, 15; statut. 245.
Vicksburg &c. R. Co. v. State, 64 M. 5—high. 162.
Vicksburg &c. R. Co. v. White, 82 M. 468—ev. 364.
Vicksburg &c. R. Co. v. Wilkins, 47 M. 404—mast. & s. 85, 167, 233, 264.
Vicksburg &c. R. Co. Barmore v.—85 M. 426.
Vicksburg &c. R. Co. Butts v.—63 M. 462.
Vicksburg &c. R. Co. Dowell v.—61 M. 519.
Vicksburg &c. R. Co. Dyche v.—79 M. 361.
Vicksburg &c. R. Co. Hemingway v.—52 M. 16.
Vicksburg &c. R. Co. Kiestler v.—1 Miss. Dec. 329.
Vicksburg &c. R. Co. King v.—88 M. 456.
Vicksburg &c. R. Co. Lewis v.—67 M. 82.
Vicksburg &c. R. Co. Mulverhill v.—88 M. 689.
Vicksburg &c. R. Co. Musgrove v.—50 M. 677.
Vicksburg &c. R. Co. Newman v.—64 M. 115.
Vicksburg &c. R. Co. Ragsdale v.—62 M. 480.
Vicksburg &c. R. Co. Romano v.—39 So. 781.
Vicksburg &c. R. Co. Sevier v.—61 M. 8.
Vicksburg &c. R. Co. State v.—51 M. 361.
Vicksburg &c. R. Co. Waldauer v.—88 M. 200.
Vicksburg &c. R. Co. White v.—31 So. 709.
Vicksburg &c. Tel. Co. v. Citizens' Tel. Co. 79 M. 341—corp. 590; eq. 17.
Viener, Davis v.—27 So. 877.
Vignand v. Dean, 77 M. 860—home. 24, 25.
Villere, Bradley v.—66 M. 399.
Vincent v. Corbitt, 94 M. 46—fraud, 11, 13, 45.
Vinegar Bend Lumber Co. v. Oak Grove &c. R. Co. 89 M. 84—em. dom. 65, 262.
Vinegar Bend Lumber Co. v. Oak Grove &c. R. Co. 89 M. 117—em. dom. 65, 262.
Vining v. Hall, 40 M. 83—wills, 167, 178, 231.
Vinson, McDonald v.—56 M. 497.
Violett v. Mangold, 27 So. 875—gaming, 31.
Virden v. Bowers, 55 M. 1—ev. 85; statut. 61; tax. 614, 624, 657, 726, 745, 771, 787.
Virden v. Dwyer, 78 M. 763—fraud. conv. 270, 294; witn. 52.
Virden v. Murphey, 78 M. 515—gaming, 19, 34.
Virden v. Robinson, 59 M. 28—judgm. 785.
Virden, Bowers v.—56 M. 595.
Virden, Tifft v.—7 S. & M. 91.
Virginia-Carolina Chemical Co. v. Steen, 55 So. 47—bills & n. 427.
Virgil v. State, 63 M. 317—hom. 348.
Viser v. Scruggs, 49 M. 705—hus. & w. 84, 85, 89, 155, 171.
Vogh, Cox v.—33 M. 187.
Volking v. Huckaby, 67 M. 206—sales, 102.
Vollm, State v.—51 So. 275.
Volunteer Carriage Co. Brunson v.—93 M. 793.

W

Wack, Smokey v.—57 M. 832.

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Waddell v. De Jet, 76 M. 104—cncts. 147; land. & t. 152, 154.
Waddell v. Latham, 71 M. 351—estop. 24; ven. & pur. 307, 308a, 314, 315.
Waddell v. Magee, 53 M. 687—app. & e. 923; crim. l. 1144; replev. 91.
Waddell, Hall v.—78 M. 16.
Waddell, Owens v.—87 M. 310.
Waddle v. State, 24 So. 311—int. liq. 146, 225.
Wade v. American Col. Society, 4 S. & M. 670—app. & e. 101, 374, 458, 459, 462.
Wade v. American Col. Society, 7 S. & M. 663—char. 37, 43; corp. 381, 385; eq. 19; slaves, 13, 23; trusts, 29, 45, 55; wills, 73, 675.
Wade v. Barlow, 54 So. 662—cov. 130; lim. of act. 143.
Wade v. Bridewell, 38 M. 420—guard. & w. 28.
Wade v. Grimes, 7 H. 425—hus. & w. 10, 11, 117; wills, 720.
Wade v. Staunton, 5 H. 631—ev. 208; plead. 127, 291; princ. & s. 109, 124; witn. 82.
Wade v. Thompson, 52 M. 367—adv. pos. 59, 63; eject. 15; estop. 29; mtg. 369.
Wade v. Thrasher, 10 S. & M. 358—bills & n. 223, 265, 440.
Wade v. Watt, 41 M. 248—execution, 69, 99, 351.
Wade, American Colonization Society v.—8 S. & M. 610.
Wade, Barrow v.—7 S. & M. 49.
Wade, Hoggatt v.—10 S. & M. 143.
Wadley v. State, 96 M. 77—crim. l. 291, 292.
Wadlington v. Covert, 51 M. 631—bills & n. 17, 388; paymt. 19.
Wadlington v. Gary, 7 S. & M. 522—excep. 9; ex. & ad. 87; princ. & s. 108.
Wadlington v. Hill, 10 S. & M. 560—cncts. 147; cov. 21, 26, 107.
Wadlington, Cox v.—3 H. 57.
Wadlington, Thomason v.—53 M. 560.
Waggoner, Work &c. Co. v.—82 M. 591.
Wagner v. Ellis, 85 M. 422—app. & e. 204, 1140; land. & t. 19; trial, 82.
Wagner v. Gibbs, 80 M. 53—abate. & r. 54; assa. 25, 39; dam. 92.
Wagner, Kelly v.—61 M. 299.
Wagner, Saxony Mills v.—94 M. 233.
Waide, White v.—W. 263.
Wailes v. Cooper, 24 M. 208—judgm. 407; princ. & s. 167; ven. & pur. 220, 227, 230, 260, 261, 308, 308a.
Wailes v. Johnson, 25 M. 421—app. & e. 1201, 1221.
Walcot, Bohannon v.—1 H. 336.
Waldauer v. Vicksburg R. &c. Co. 88 M. 200—carr. 350, 381.
Walden, Sims v.—3 So. 457.
Waldron, Parkinson v.—7 So. 189.
Waldron, Spight v.—51 M. 356.
Waldrop v. State, 95 M. 287—hom. 169.
Waldrop v. State, 54 So. 66—crim. l. 785a, 829; hom. 115.
Walker v. Brown, 45 M. 615—eq. 273, 276, 297.
Walker v. Brungard, 13 S. & M. 723—frds. st. of, 62; fraud. conv. 29; mtg. 361; plgs. 52; princ. & s. 175, 190½; trusts, 63½, 70, 71, 199, 227, 349, 372.
Walker v. Commissioners of Sinking Fund, 1 S. & M. 372—det. 20; execution, 198; replev. 96; trial, 338.
Walker v. Fuqua, 24 M. 640—ex. & ad. 364, 368.
Walker v. Georgia &c. R. Co. 1 Miss. Dec. 1—em. dom. 168, 243.
Walker v. Gilbert, Freem. Ch. 85—deeds, 77; judgm. 417, 785, 788; ven. & pur. 231, 232.
Walker v. Gilbert, 7 S. & M. 456—courts, 85; eq. 79, 296; judgm. 780, 788; ven. & pur. 112, 123a, 232.
Walker v. Gilbert, 13 S. & M. 693—execution, 144, 158; princ. & s. 168.
Walker v. Hall, 66 M. 390—action, 50; app. & e. 1036; bills & n. 443, 450, 455, 460; parties, 80, 81; set-off. 41.
Walker v. Harrison, 75 M. 665—land. & t. 67, 149; mun. corp. 1; tax. 536.
Walker v. Hasser, 41 M. 90—app. & e. 840; new tr. 85.
Walker v. Ivey, 2 Miss. Dec. 59—partners. 81, 92.
Walker v. Jeffries, 45 M. 160—war. 15.
Walker v. Jones, 44 M. 623—app. & e. 281.
Walker v. King, 1 H. 17—estop. 2.
Walker v. McDowell, 4 S. & M. 118—execution, 153a, 174, 185, 204, 351; judgm. 784.
Walker v. Marseilles, 70 M. 283—ev. 272, 273; hus. & w. 36½, 37, 122.
Walker v. Meek, 12 S. & M. 495—bills & n. 91; usury, 19.
Walker v. Mobile &c. R. Co. 34 M. 245—corp. 74, 79, 80; fraud, 11, 28; plead. 24.
Walker v. Nelson, 87 M. 268—ex. & ad. 227.
Walker v. Pigott, 1 Miss. Dec. 190—deeds, 54.
Walker v. Ross, 65 M. 523—hus. & w. 198.
Walker v. Saunders, 1 Miss. Dec. 50—app. & e. 197; fraud. conv. 173.

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Walker v. Shotwell, 13 S. & M. 544—execution, 153b, 153c; princ. & s. 40.
Walker v. Smith, 19 So. 102—costs, 127; j. p. 166; libel. 7.
Walker v. State, 53 M. 532—eq. 22; ex. & ad. 527, 537d.
Walker v. State, 1 Miss. Dec. 431—crim. l. 1162.
Walker v. Trice, 71 M. 968—app. & e. 1046.
Walker v. Tunstall, 3 H. 259—bills & n. 421; proc. 34.
Walker v. Vicksburg, 71 M. 899—mun. corp. 764; neg. 65.
Walker v. Walker, 6 H. 500—abate. & r. 31; app. & e. 517, 1040; judgm. 195; plead. 409.
Walker v. Walker, 67 M. 529—app. & e. 1009, 1011, 1108; wills, 111.
Walker v. Williams, 30 M. 165—eject. 25; eq. 32, 437; ven. & pur. 190, 261.
Walker v. Williams, 84 M. 392—partit. 86, 87, 114.
Walker, Anderson v.—31 M. 642.
Walker, Brown v.—11 So. 724.
Walker, Buckingham v.—48 M. 609.
Walker, Buckingham v.—51 M. 491.
Walker, Caldwell v.—76 M. 879, 35 So. 929, 71 Am. St. 545.
Walker, Commissioners of Sinking Fund v.—6 H. 143.
Walker, Davis v.—51 M. 659.
Walker, Ex parte, 53 M. 366—app. & e. 154; hab. corp. 8.
Walker, Foster v.—34 M. 365.
Walker, General Accident &c. Co. v.—55 So. 51.
Walker, Georgia Pac. R. Co. v.—61 M. 481.
Walker, Hamilton-Brown v.—67 M. 197.
Walker, Herron v.—69 M. 707.
Walker, Hunt v.—40 M. 590.
Walker, Illinois Cent. R. Co. v.—63 M. 13.
Walker, Ivy v.—58 M. 253.
Walker, Johnson v.—86 M. 757.
Walker, McCrea v.—4 H. 455.
Walker, McNulty v.—64 M. 198.
Walker, McRea v.—4 H. 455.
Walker, Matthews v.—57 M. 337.
Walker, Morton v.—7 H. 554.
Walker, Planters' Bank v.—3 S. & M. 409.
Walker, Reynolds v.—29 M. 250.
Walker, Sitler v.—Freem. Ch. 77.
Walker, Smith v.—Sm. & M. Ch. 432.
Walker, Smith v.—8 S. & M. 131.
Walker, Smith v.—10 S. & M. 584.
Walker, State v.—88 M. 592.
Walker, Sullivan v.—12 So. 250.
Walker, Trice v.—71 M. 968.
Walker, Tunstall v.—2 S. & M. 638.
Walker, Westmoreland v.—25 M. 76.
Walker, Young v.—70 M. 813.
Wall v. Boisgerard, 11 S. & M. 574—assn. 20; mtg. 394.
Wall v. Dickens, 66 M. 655—des. & d. 64; wills, 782.
Wall v. Harris, 90 M. 671—inj. 26.
Wall v. State, 51 M. 396—crim. l. 1152, 1184.
Wall v. Wall, 28 M. 409—judgm. 16, 500, 635; wills, 88.
Wall v. Wall, 30 M. 91—deeds, 4, 24, 55, 63, 129; wills, 88; 222, 315, 424.
Wallace v. Bobbitt, 79 M. 402—app. & e. 92.
Wallace v. Fouche, 27 M. 266—usury, 87, 146.
Wallace v. Latham, 52 M. 291—ex. & ad. 318; inf. 30.
Wallace v. Lucas, 42 So. 607; eq. 31.
Wallace v. Lyle, 37 So. 460—tax. 787.
Wallace v. Savings Institution, 49 M. 616—app. & e. 154; plead. 212.
Wallace v. Seales, 36 M. 53—attch. 2, 160; mar. liens, 73; plead. 136; slaves, 8; trover, 10.
Wallace v. State, 21 So. 662—assa. 47, 64.
Wallace v. Wallace, 93 M. 278—hab. corp. 99.
Wallace v. Wingate, 6 S. & M. 151—courts, 202, 488; wills, 387.
Wallace v. Wortham, 25 M. 119—frds. st. of, 26.
Wallace, Andrews v.—72 M. 291.
Wallace, Carraway v.—17 So. 930.
Wallace, Davidson v.—53 M. 475.
Wallace, Delta &c. Land Co. v.—83 M. 656.
Wallace, Fox v.—31 M. 660.
Wallace, Gabbert v.—66 M. 618.
Wallace, Ireys v.—76 M. 277.
Wallace, Johnston v.—53 M. 331.
Wallace, Langstaff Hardware Co. v.—28 So. 871.
Wallace, Laud v.—31 M. 630.
Wallace, New Orleans &c. R. Co. v.—50 M. 244.
Wallace, Wallis v.—6 H. 254.
Wallace, Wilson v.—64 M. 13.
Wallace, Yazoo &c. R. Co. v.—90 M. 609.
Wallace, Yazoo &c. R. Co. v.—91 M. 492.
Wall, Boisgerard v.—Sm. & M. 404.
Waller v. Shannon, 53 M. 500—afft. 2; eq. 148, 319, 345; fraud. conv. 258.
Waller v. State, 91 M. 557—hom. 300c.
Waller, Ogden v.—24 M. 190.
Wall, Ex parte, 84 M. 783—extrad. 37; hab. corp. 113.
Wall, Felder v.—26 M. 595.

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Wallin, Piedmont &c. Life Ins. Co. v.—58 M. 1.
Wallis v. Smith, 2 S. & M. 220—dower, 56; eject. 52.
Wallis v. Wallace, 6 H. 254—attch. 110, 112, 129; partners. 147.
Wallis v. Wilson, 34 M. 357—eq. 437; mtg. 28.
Wallis, McGee v.—57 M. 638.
Wallis, Penrice v.—37 M. 172.
Wallis, Wingate v.—5 S. & M. 249.
Wall, Mosby v.—23 M. 81.
Wall, Redditt v.—55 So. 45.
Wall, State v.—54 So. 5.
Wally v. Wally, 41 M. 657—ex. & ad. 183; exemp. 30.
Walsh, Smith v.—63 M. 584.
Walter, Boggan v.—12 S. & M. 666.
Walter Pratt Co. Folkes v.—86 M. 254.
Walters, Howard v.—2 Miss. Dec. 187.
Walter, Stevenson v.—2 S. & M. 262.
Walton v. Forsdick, 25 So. 668—ev. 183, 178.
Walton v. Hargroves, 42 M. 18—execution, 169; judgm. 785; ven. & pur. 188, 213, 220, 257, 260, 262.
Walton v. Hollis, 16 So. 260—cncts. 303; liens, 16.
Walton v. Lowrey, 74 M. 484—frds. st. of, 61, 72; licens. 44; logs, 4; tresp. 25.
Walton v. Olive, 29 M. 270—des. & d. 59; hus. & w. 10, 111.
Walton v. State, 57 M. 533—hom. 311.
Walton v. State, 64 M. 207—blasph. 3; dis. c. 6.
Walton v. State, 87 M. 296—crim. l. 600, 761, 1124; ex. & ad. 214; witn. 268.
Walton v. Tusten, 49 M. 569—can. of i. 26; eq. 65; fraud. conv. 172, 173; partners. 161; quiet. t. 44.
Walton v. Walton, 76 M. 662—home. 118b.
Walton v. Wilson, 30 M. 576—cncts. 211; cov. 107; ven. & pur. 96, 186.
Walton, Anderson v.—Freem. Ch. 347.
Walton, Heard v.—39 M. 388.
Walton, Olive v.—33 M. 103.
Walton, Wright v.—56 M. 1.
Wanita Woolen Mills v. Rollins, 75 M. 253—bills & n. 485.
Wanzer v. Barker, 4 H. 363—execution, 153, 154b; names, 16; seals, 3.
Wanzer, Anderson v.—5 H. 587.
Wanzer, Barker v.—5 H. 290.
Wanzer, Franks v.—25 M. 121.
Warbington v. Norris, 3 H. 227—bills & n. 540; judgm. 106; plead. 236.
Ward v. Cooper, 69 M. 789—wills, 497.
Ward v. David & Jonathan Lodge No. 1976, G. U. O. O. F. in America, 90 M. 116—ben. assn. 5, 12; considered in Independent Order of Sons and Daughters of Jacob v. Wilkes, 53 So. 493, on question of recourse to courts of member of fraternal insurance association.
Ward v. Dulaney, 23 M. 410—lim. of act. 74; marr. 18, 37, 56.
Ward v. Harrington, 29 M. 238—ex. & ad. 95.
Ward v. Pennsylvania Fire Ins. Co. 82 M. 124—ins. 620; lim. of act. 111.
Ward v. Scott, 57 M. 826—app. & E. 55, 65.
Ward v. State, 40 M. 108—ex. & ad. 26.
Ward v. State, 70 M. 245—mast. & s. 342, 345a.
Ward v. State, 90 M. 249—ind. 125d.
Ward v. Whitfield, 64 M. 754—app. & e. 67, 790, 792, 1034; eq. 273, 290; inj. 116, 121.
Ward v. Yazoo &c. R. Co. 79 M. 145—app. & e. 1055; ev. 120.
Ward, Ellis v.—7 S. & M. 651.
Warden v. State, 60 M. 638—larc. 3; trial, 267.
Warden, McLin v.—55 So. 358.
Wardlaw, Ross v.—3 So. 74.
Ward, O'Conner v.—60 M. 1025.
Ward, Robertson v.—12 S. & M. 490.
Ware v. Allen, 64 M. 545—frds. st. of, 17.
Ware v. Collins, 35 M. 223—debt, act. of, 1; tresp. 20; woods, 11.
Ware v. Houghton, 41 M. 370—ex. & ad. 293, 389; sales, 122, 346.
Ware v. McQuillan, 54 M. 703—acct. acti. on, 15; app. & e. 1169, 1175; sales, 355; trial, 150, 154.
Ware v. State, 71 M. 204—int. liq. 223.
Ware v. Washington, 6 S. & M. 737; dower, 7, 11, 69.
Ware, Calhoun v.—34 M. 146.
Ware, Moore v.—51 M. 206.
Ware, Story v.—35 M. 399.
Warfield v. Gordon, 23 So. 520—stip. 14.
Warfield v. State, 96 M. 170—crim. l. 636, 1128.
Warfield v. State, 53 So. 397—crim. l. 4.
Warfield, Frazier v.—9 S. & M. 220.
Warfield, Gordon v.—74 M. 553.
Warfield, Kiern v.—60 M. 799.
War, Ingram v.—5 S. & M. 746.
Wark, Young v.—76 M. 829.
Warmack v. Boyd, 63 M. 488—usury, 74, 102.
Warmack, Boyd v.—62 M. 536.
Warmack, Henderson v.—27 M. 830.
Warmack, Shrimpton v.—72 M. 208.

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Warner v. Warner, 33 M. 547—des. & d. 63; div. 254; eq. 143, 153; life est. 21, 23.
Warner, Myer v.—64 M. 610.
Warner, Myer v.—1 So. 837.
Warren v. African Baptist Church, 50 M. 223—forc. e. & d. 42; j. p. 159; new tr. 113.
Warren v. Brown, 25 M. 66—ack. 23, 56; hus. & w. 49½, 119.
Warren v. Davis, 90 M. 336—home. 141.
Warren v. Frank Gardner Hardware &c. Co. 96 M. 284—new tr. 85, 161.
Warren v. Haley, Sm. & M. Ch. 647—des. & d. 52; est. 8; hus. & w. 119.
Warren v. Ingram, 96 M. 438—wills, 616.
Warren v. Jones, 70 M. 202—agric. 10; land. & t. 252a; partners. 288.
Warren v. Robbins, 23 M. 309—interpl. 4.
Warren v. Stone, 69 M. 375—schools, 16.
Warren v. Whitesides, 34 M. 17—princ. & s. 194.
Warren v. Worman, W. 387—libel, 6, 79.
Warren, Aaron v.—62 M. 370.
Warren County v. Booth, 81 M. 267—counties, 113; statut. 197.
Warren County v. Catchings, 46 So. 709—pub. lands, 188.
Warren County v. Cowan, 60 M. 876—counties, 136.
Warren County v. Craig, 29 So. 821—tax. 583.
Warren County v. Dabney, 81 M. 273—counties, 113.
Warren County v. Gans, 80 M. 76—land. & t. 134; replev. 13, 15; waste, 9.
Warren County v. Klein, 51 M. 807—counties, 165, 168, 189, 204; mand. 102, 164, 174, 176, 178; tax. 301.
Warren County v. Lamkin, 93 M. 123—lim. of act. 11.
Warren County v. Lanier, 87 M. 606—app. & e. 148.
Warren County v. Mastronardi, 76 M. 273—high. 7.
Warren County v. Nall, 78 M. 726—pub. lands, 142; tax. 217.
Warren County v. Rand, 88 M. 395—mun. corp. 96; trial, 295.
Warren County v. Stone, 69 M. 375—const. law, 11, 22; counties, 156; fines, 20.
Warren County v. Stone, 69 M. 383—mand. 190.
Warren County v. Worrell, 67 M. 154—costs, 295; counties, 139; crim. l. 1076; prisons, 18.
Warren County, Bourdeaux v.—66 M. 231.
Warren County, Groton Bridge &c. Co. v.—80 M. 214.
Warren County, Hill v.—8 So. 257.
Warren County, Jarvis v.—49 M. 603.
Warren County, Klein v.—51 M. 878.
Warren County, Kuhn v.—54 So. 442.
Warren County, Murch v.—73 M. 356.
Warren, Gasqet v.—2 S. & M. 514.
Warren-Gee Lumber Co., Niagara Lis. Co. v.—94 M. 159.
Warren, Graham v.—81 M. 330.
Warren, Herrin v.—61 M. 509.
Warren, Hyde v.—46 M. 13.
Warren, Jones v.—70 M. 227.
Warren Mills v. New Orleans Seed Co. 65 M. 391—inj. 14, 19, 116.
Warren, Simms v.—67 M. 278.
Warren, Simms v.—68 M. 447.
Warren, Smith v.—2 H. 895.
Warren, Williamson v.—55 M. 199.
Warrick, Anderson v.—2 Miss. Dec. 313.
Warring, McLean v.—13 So. 236.
Warson, Yazoo &c. R. Co. v.—82 M. 89.
Warwick, Richardson v.—7 H. 131.
Wash v. Heard, 27 M. 400—eq. 119; proc. 86.
Wash v. State, 14 S. & M. 120—ind. 133, 203; slaves, 18, 18b.
Wash v. State, 28 M. 267—ind. 130.
Washburn v. Blundell, 75 M. 266—princ. & s. 173.
Washburn v. Dorsey, 8 S. & M. 214—ex. & ad. 469.
Washburn v. Phillips, 5 S. & M. 600—courts, 200¼; ex. & ad. 484.
Washburn v. Philips, 6 S. & M. 425—ex. & ad. 438, 453, 473, 537, 537d; judgm. 749.
Washburn, Andrews v.—3 S. & M. 109.
Washburne v. White, 62 M. 545—eject. 87.
Washburn, Murdock v.—1 S. & M. 546.
Wash, Head v.—31 M. 358.
Washington v. Greenwood, 23 So. 258—int. liq. 187.
Washington v. McCaughan, 34 M. 304—ex. & ad. 328, 351, 389; judgm. 572.
Washington v. Planters' Bank, 1 H. 230—bills & n. 444; interest, 61; judgm. 131.
Washington v. Soria, 73 M. 665—action, 29; act. on c. 1; elect. rem. 3; eq. 232; frds. st. of, 56, 119, 129, 139; lim. of act. 17, 19, 21, 39; plead. 204, 218; ven. & pur. 301.
Washington v. State, 76 M. 270; hom. 354; ind. 186; weap. 14.
Washington v. State, 78 M. 189—crim. l. 915.
Washington v. State, 93 M. 270—crim. l. 260, 260a, 1031.
Washington v. State, 21 So. 656—hom. 245.
Washington v. State, 29 So. 77—crim. l. 595; larc. 54.

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Washington v. State, 53 So. 416—bailm. 1; jury, 19.
Washington, Black v.—65 M. 60.
Washington County, Branton v.—79 M. 277.
Washington County, Cameron v.—47 M. 264.
Washington County, Lewis v.—62 M. 160.
Washington County, Rabb v.—62 M. 589.
Washington County, Spencer v.—92 M. 230.
Washington, Pass Christian v.—81 M. 470.
Washington Steam Fire Co. No. 3 State v.—76 M. 449.
Washington, Vicksburg Water-Works &c. Co. v.—1 S. & M. 536.
Washington, Ware v.—6 S. & M. 737.
Washington, Yazoo &c. R. Co. v.—92 M. 129.
Waskam v. Waskam, 31 M. 154—div. 27.
Wasson v. Connor, 54 M. 351—ack. 20, 54; chat. m. 48; ven. & pur. 231.
Waterbury v. McMillan, 46 M. 635—cncts. 324; int. rev. 19; plead. 218.
Waterman, Berry v.—71 M. 497.
Waters v. Bossel, 58 M. 602—annu. 1; ven. & pur. 285.
Waters v. Bossel, 2 Miss. Dec. 414—eq. 326.
Waters v. Mobile &c. R. Co. 74 M. 534—action, 28, 53; carr. 130½; j. p. 38; parties, 6.
Waters, Commercial Bank v.—10 S. & M. 559.
Water Valley v. Davis, 73 M. 521; mun. corp. 642.
Water Valley, Burke v.—87 M. 732.
Water Valley, Harris v.—78 M. 659.
Water Val. Mfg. Co. v. Seaman, 53 M. 655—corp. 80, 88, 93; ex. & ad. 151, 187; guard. & w. 33, 45.
Water Valley, Porter v.—70 M. 560.
Water Valley, Romberger v.—63 M. 218.
Wathen v. Glass, 54 M. 382—des. & d. 79; est. 10; ex. & ad. 41; inf. 72; ins. p. 91; mtg. 199; ven. & pur. 232.
Watkins v. Adams, 32 M. 333—ex. & ad. 31.
Watkins v. Duvall, 69 M. 364—hus. & w. 48; land. & t. 203, 229, 242.
Watkins v. Gregory, 69 M. 469—cov. 99.
Watkins v. Guthrie, 38 So. 370—app. & e. 843; sales, 41, 178.
Watkins v. McDonald, 41 So. 376—app. & e. 154, 173, 1010; mtg. 342d.
Watkins v. Owens, 47 M. 593—eq. 32; imp. 4.
Watkins v. State, 60 M. 323—crim. l. 769; larc. 11; trial, 267.
Watkins v. State, 11 So. 532—high. 151.
Watkins v. Watkins, 88 M. 148—des. & d. 44.
Watkins Machine &c. Co. v. Cincinnati Rubber Mfg. Co. 52 So. 629—corp. 507.
Watkins, Abernethy v.—2 Miss. Dec. 682.
Watkins, Browning v.—10 S. & M. 482.
Watkins, Gordon v.—Sm. & M. Ch. 37.
Watkins, Kendrick v.—54 M. 495.
Watkins, Lester v.—41 M. 647.
Watkins, Pierce v.—74 M. 394.
Watkins, Priestly v.—62 M. 798.
Watkins, Scott v.—2 S. & M. 233.
Watkins, Taylor v.—13 So. 811.
Watkins, Weyburn v.—90 M. 728.
Watkins, Whittington v.—1 Miss. Dec. 81.
Watley v. Mobile &c. R. Co., 9 So. 445—r. r. 400; trial, 169.
Watly, Mobile &c. R. Co. v.—69 M. 145.
Watly, Mobile &c. R. Co. v.—69 M. 475.
Watson v. Austin, 63 M. 469—ven. & pur. 35, 37.
Watson v. Blackwood, 50 M. 15—wills, 441, 483.
Watson v. Butler, 26 M. 178—wills, 243.
Watson v. Byrd, 53 M. 480—cred. s. 1; des. & d. 88, 137; eq. 230, 240, 242, 314a; lim. of act. 180.
Watson v. Carolina Portland Cement Co. 93 M. 553—chat. m. 138.
Watson v. Dickens, 12 S. & M. 608—app. & e. 525, 998, 1002; chat. m. 133; fraud. conv. 193; new tr. 102, 149.
Watson v. Doherty, 56 M. 628—counties, 163; statut. 95.
Watson v. Duncan, 84 M. 763—hus. & w. 34; witn. 159.
Watson v. Hannum, 10 S. & M. 521—execution, 293, 301.
Watson v. Perkins, 88 M. 64—elect. rem. 3, 7; mtg. 199, 342, 342c, 342d, 369a, 373.
Watson v. Pipes, 32 M. 451—wills, 72, 111, 117.
Watson v. Sawyers, 54 M. 64—spec. perf. 96, 116; tax. 62; ven. & pur. 148, 198.
Watson v. Southern Ins. Co. 31 So. 904—ins. 115, 624.
Watson v. State, 36 M. 593—larc. 14, 39, 44, 48.
Watson v. State, 81 M. 700—crim. l. 600.
Watson v. State, 96 M. 627—crim. l. 937.
Watson v. Williams, 36 M. 331—cmpt. 19, 30, 32, 55, 66.
Watson, Baggett v.—70 M. 64.
Watson, Booth v.—5 S. & M. 295.
Watson, Busick v.—72 M. 244.
Watson, Cameron v.—40 M. 191.
Watson, Carman v.—1 H. 333.
Watson, Dakin v.—59 M. 619.
Watson, Davis v.—54 M. 679.
Watson, Dorr v.—28 M. 383.
Watson, Duncan v.—2 S. & M. 121.
Watson, Duncan v.—28 M. 187.

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Watson, Eggleston v.—53 M. 339.
Watson, Gibbes v.—92 M. 9.
Watson, Hudson v.—26 M. 357.
Watson, Illinois Cent. R. Co. v.—39 So. 69.
Watson, Perkins v.—92 M. 452.
Watson, Pickens v.—13 S. & M. 691.
Watson, Powell v.—66 M. 176.
Watson, Rankin County v.—70 M. 85.
Watson, Rose v.—54 M. 673.
Watson, Western Union Tel. Co. v.—82 M. 101.
Watt v. Allgood, 62 M. 38—ins. p. 43.
Watt v. Conger, 13 S. & M. 412—acct. st. 13; fraud. conv. 173.
Watt v. Mitchell, 6 H. 131—bills & n. 422.
Watt, Russell v.—41 M. 602.
Watts v. Ainsworth, 89 M. 40—sales, 471.
Watts v. Bonner, 66 M. 629—can. of i. 2; mtg. 116.
Watts v. Gunn, 53 M. 502—lim. of act. 36, 70, 78; quiet. t. 34.
Watts v. Patton, 66 M. 54—app. & e. 680; eq. 143, 223; sales, 110.
Watts v. Smith, 24 M. 77—eq. 177; bills & n. 512; disc. 14; parties, 4; witn. 82, 84, 107.
Watts v. State, 90 M. 757—crim. l. 595.
Watts, Adams v.—76 M. 667.
Watts, Hit-tuk-ho-mi v.—7 S. & M. 363.
Watts Mercantile Co. v. Buchanan, 92 M. 540—corp. 388.
Watts, Newberger Cotton Co. v.—49 So. 146.
Watts, Sunflower &c. Co. v.—77 M. 56.
Watt, Wade v.—41 M. 248.
Watt, Wright v.—52 M. 634.
Waul v. Kirkman, 13 S. & M. 599—app. & e. 1001, 1003; cncts. 70; ex. & ad. 433; frds. st. of, 9, 23; hus. & w. 18.
Waul v. Kirkman, 25 M. 609—hus. & w. 152; ex. & ad. 162, 417, 450; lim. of act. 5, 143, 151.
Waul v. Kirkman, 27 M. 823—frds. st. of, 9; trial, 156.
Wauls, Lucas v.—12 S. & M. 157.
Waycaster, Jackson Electric &c. Co. v.—92 M. 816.
Wayne County v. Helton, 79 M. 122—lim. of act. 6.
Wayne County v. Mobile &c. R. Co.—56 So. 173; tax. 459.
W. C. Wood Lumber Co. v. Davidge, 49 So. 610—mast. & s. 293.
W. C. Wood Lumber Co. Gibson v.—91 M. 702.
Wear v. Ragan, 30 M. 83—arb. & a. 7.
Wear &c. Co. v. Kelly, 84 M. 236—frds. st. of, 17.
Weast, Brown v.—7 H. 181.
Weatherbee Bros. v. Lillybeck, 86 M. 156—ven. & pur. 310.
Weatherby v. Shackelford, 37 M. 559—judgm. 534; princ. & s. 66.
Weatherford, Brooks Oil Co. v.—91 M. 501.
Weathersby v. Pearl River Lumber Co. 88 M. 535—judgm. 572.
Weathersby v. Proby, 1 H. 98—execution, 153d, 154b.
Weathersby v. Sinclair, 43 M. 189—ex. & ad. 90; judgm. 26; mech. liens, 1, 56, 180, 276, 291, 309; plead. 1.
Weathersby v. Sleeper, 42 M. 732—fixt. 1, 5, 6; liens, 7; replev. 33.
Weathersby v. State, 95 M. 300—crim. l. 945.
Weathersby v. Thoma, 57 M. 296—app. & e. 931; tax. 679.
Weathersby v. Weathersby, 13 S. & M. 685—wills, 654.
Weathersby v. Weathersby, 31 M. 662—lim. of act. 130.
Weathersby v. Weathersby, 39 M. 652—hus. & w. 279.
Weathersby v. Weathersby, 40 M. 462—chat. m. 6, 34; sales, 453.
Weathersby, Cocke v.—5 S. & M. 333.
Weathersby, Illinois Cent. R. Co. v.—63 M. 581.
Weathersby, Langford v.—1 Miss. Dec. 238.
Weathersby, McIntyre v.—1 H. 331.
Weatherspoon, Bien v.—1 H. 28.
Weaver v. Nelson, 12 So. 597—jud. s. 21.
Weaver v. Norwood, 59 M. 665—dom. 4; ex. & ad. 10, 12, 380, 389, 389c, 389d; subrog. 16.
Weaver v. Norwood, 1 Miss. Dec. 72—eq. 61.
Weaver v. Williams, 75 M. 945—ex. & ad. 104, 539, 544; partit. 83.
Weaver, Brown v.—76 M. 7.
Weaver, Greenwood v.—96 M. 604.
Weaver, Kelly v.—37 M. 631.
Weaver, Rives v.—36 M. 374.
Webb v. Frierson, 15 So. 934—execution. 196.
Webb v. Miller, 24 M. 638—garn. 165.
Webb v. State, 73 M. 456—crim. l. 390, 789; hom. 166.
Webb v. State, 21 So. 133—crim. l. 1174; seduct. 43.
Webb v. State, 55 So. 356—rob. 16.
Webb v. Webb, 54 So. 840—can. of i. 59; deeds, 70.
Webb, Bramblet v.—11 S. & M. 438.
Webber v. Everman, 47 M. 540—sheriffs, 125.
Webber, Dowell v.—2 S. & M. 452.
Webber, Peck v.—7 H. 658.

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Webb, Ex parte, 96 M. 8—rewards, 1, 13.
Webb, Frank v.—67 M. 462.
Webb, Nance v.—42 M. 268.
Webb, McMahon v.—52 M. 424.
Webb, Scarborough v.—59 M. 449.
Webb, Shotwell v.—23 M. 375.
Webb, Taylor v.—54 M. 36.
Webb, Taylor v.—56 M. 631.
Webb, Western Union Tel. Co. v.—48 So. 408.
Webb, Wilkinson v.—75 M. 403.
Webly, Standifer v.—26 M. 145.
Webster v. Parker, 42 M. 465—ex. & ad. 43, 322, 324, 363, 454; propty. 3.
Webster v. Skipwith, 26 M. 341—judgm. 405, 435, 440; new tr. 91.
Webster v. Tiernan, 4 H. 352—app. & e. 548; paymt. 60; plead. 110, 164, 252.
Webster, Campbell v.—31 M. 345.
Webster County, Garner v.—79 M. 565.
Weddell v. Seal, 45 M. 726—j. p. 157, 166.
Wedgeworth, Barnett v.—1 Miss. Dec. 334.
Weed Machine Co. Cox v.—57 M. 350.
Weeks v. State, 31 M. 490—crim. l. 135, 598, 1166; gr. jury, 3, 40, 68; ind. 25.
Weeks v. Thrasher, 52 M. 142—eq. 427; ex. & ad. 138.
Weeks, Teague v.—89 M. 360.
Weems v. Love Mfg. Co. 74 M. 831—assign. f. b. c. 40, 217, 243, 248, 249; jud. s. 52.
Weems v. McCaughan, 7 S. & M. 422—cov. 12, 94; deeds, 33.
Weems v. Mayfield, 75 M. 286—frds. st. of, 60.
Weems, Ex parte, 96 M. 635—hawk. & p. 7.
Weems, Green v.—85 M. 566.
Weems, Mobile &c. R. Co. v.—74 M. 513.
Weems, Raiford v.—68 M. 138.
Weems, Stroud v.—2 Miss. Dec. 367.
Weems, Winner v.—77 M. 662.
Weightman v. Louisville &c. R. Co. 70 M. 563—carr. 272, 281.
Weil v. Shedd, 8 So. 329—execution, 206.
Weiler v. Monroe County, 74 M. 682—ev. 180; pub. lands, 55.
Weiler v. Monroe County, 76 M. 492—lim. of act. 165; pub. lands, 54.
Weiler, Roberts v.—52 M. 299.
Weiler, Roberts v.—55 M. 249.
Weil, Hanon v.—69 M. 476.
Weille v. Levy, 74 M. 34—lim. of act. 89.
Weimer v. Scales, 74 M. 1—assign. f. b. c. 168, 218, 220, 267.
Weinberg, Binder v.—94 M. 817.
Weiner v. Dickerson, 82 M. 63—tax. 679.
Weiner, Mobile &c. R. Co. v.—49 M. 725.
Weinstein, Illinois Cent. R. Co. v.—55 So. 48.
Weir v. Field, 67 M. 292—lim. of act. 19, 105; mtg. 559.
Weir v. Jones, 84 M. 602, 610—app. & e. 518, 532; mtg. 342, 357, 369, 369a.
Weir v. Killian, 59 M. 520—app. & e. 423.
Weir v. Kitchens, 52 M. 74—tax. 558, 745, 787.
Weir v. Monahan, 67 M. 434—ex. & ad. 20, 24, 27, 120a, 422, 462, 537, 537i; guard. & w. 8; lim. of act. 174.
Weir-Booger Dry Goods Co. v. Kelly, 80 M. 64—princ. & s. 176; subrog. 41.
Weis v. Aaron, 75 M. 138—app. & e. 880; judgm. 12.
Weis v. Basket, 71 M. 771—attch. 196; execution, 221; land. & t. 229½, 271.
Weise v. Rutland, 71 M. 933—agric. 10, 11.
Weisinger v. Cocke, 67 M. 511—deeds, 55, 61.
Weisinger, Wright v.—5 S. & M. 210.
Weiss v. Louisville &c. R. Co. 7 So. 390—app. & E. 944.
Weissinger v. Studebaker, 73 M. 480—attch. 39, 156.
Welborn v. Anderson, 37 M. 155—adv. pos. 69, 77, 97, 99; champ. 1; trial, 60.
Welborn v. Mayrant, 48 M. 652—war, 31.
Welborn v. Spears, 32 M. 138—app. & e. 923, 1025, 1027; tresp. 20.
Welch v. Cliburne, 94 M. 443—bast. 33.
Welch v. Jamison, 1 H. 160—plead. 89, 194.
Welch v. Lawson, 32 M. 170—frds. st. of, 126; ven. & pur. 351.
Welch v. Smith, 65 M. 394—records, 17.
Welch v. State, 68 M. 341—gr. jury, 39; ind. 137.
Welch v. Williams, 85 M. 301—spec. perf. 63.
Wellborn v. Muller, 84 M. 726—mun. corp. 43.
Wellbourn, Ferris v.—64 M. 29.
Weller, Green v.—32 M. 650.
Wellons v. Newell, 7 S. & M. 399—eq. 43, 365.
Wellons, Herring v.—5 S. & M. 354.
Wellons, Neal v.—12 S. & M. 649.
Wells v. Alabama &c. R. Co. 67 M. 24—carr. 271, 275; princ. & a. 115.
Wells v. Andrews, 60 M. 373—guard. & w. 170; hab. corp. 24.
Wells v. Brander, 10 S. & M. 348—attch. 184; bankr. 20, 137, 193.
Wells v. Edwards Hotel &c. R. Co. 50 So. 628—assign, 24, 93.
Wells v. Gay, 93 M. 268—jud. s. 61.
Wells v. McNeill, 93 M. 407—counties, 192.
Wells v. Mitchell, 39 M. 800—ex. & ad. 314b, 380.

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Wells v. Patterson, 7 H. 32—bills. & n. 460; dism. 23; paymt. 69.
Wells v. Shipp, W. 353—ev. 119, 314, 471.
Wells v. Smith, 44 M. 296—app. & e. 925, 1010; ex. & ad. 323, 333, 388a, 451; inf. 76, 89, 91; spec. perf. 66.
Wells v. State, 90 M. 516—rec. s. goods, 7.
Wells v. State, 96 M. 500—crim. l. 1171.
Wells v. State, 18 So. 117—crim. l. 596, 823.
Wells v. Treadwell, 28 M. 717—fraud. conv. 235, 270; hus. & w. 30, 34, 49½, 111.
Wells v. Wells, 35 M. 638—cncts. 101; hus. & w. 34, 35; wills, 2, 194, 242, 434.
Wells v. Woodley, 5 H. 484—app. & e. 386, 398; judgm. 134; plead. 433.
Wells v. Wooten, 2 Miss. Dec. 41—assign. f. b. c. 151.
Wells, Boone v.—91 M. 799.
Wells, Burton v.—30 M. 688.
Wells, Byrd v.—40 M. 711.
Wells, Hall v.—54 M. 289.
Wells, Hoover v.—33 M. 526.
Wells, Hoover v.—35 M. 159.
Wells, Hoover v.—39 M. 445.
Wells, McPike v.—54 M. 136.
Wells, Mitchell v.—37 M. 235.
Wells, Myrick v.—52 M. 149.
Wells, Newton County v.—67 M. 151.
Wells, Postal Tel. &c. Co. v.—82 M. 733.
Wells, Robertson v.—28 M. 90.
Wells, Smith v.—46 M. 64.
Wells, Wilkins v.—9 S. & M. 325.
Welsh v. Alabama &c. R. Co. 70 M. 20—mast. & s. 228, 289; release, 17.
Welsh v. Jamison, 1 H. 160—j. p. 86; sheriffs, 79.
Wemple v. Dangerfield, 2 S. & M. 445—bills & n. 416.
Wenans v. Lindsey, 1 H. 577—atty. & c. 97; ev. 246; witn. 197.
Werner Sawmill Co. v. Sheffield, 89 M. 12—attch. 72.
Wesley v. Native Lumber Co. 53 So. 346—torts, 10.
Wesley v. State, 37 M. 327—app. & e. 1064; crim. l. 381, 763, 765, 1172; hom. 115, 188; slaves, 18c.
Wesling v. Noonan, 31 M. 599—tender, 16; trial, 80; wareh. 29.
Wessinger v. Mauaur &c. Co. 75 M. 64—attch. 47, 75; plead. 143; venue, 44.
Wesson v. Collins, 72 M. 844—cncts. 125; mun. corp. 120, 183; offic. 93; paymt. 82; statut. 218; tax. 549.
Wesson, Buckingham v.—54 M. 526.
Wesson, Miller v.—58 M. 831.
West v. Gibbs, 42 M. 168—courts, 198; ex. & ad. 479.
West v. McClure, 85 M. 296—action, 27; courts, 3.
West v. Moore, 37 M. 114—wills, 464, 655, 657.
West v. Poindexter, W. 303—witn. 82.
West v. Robertson, 67 M. 2[illegible]—life est. 27; trusts, 216.
West v. State, 70 M. 598—crim. l. 970; ind. 145, 165; int. liq. 111, 146, 205, 221, 223; statut. 241.
West v. State, 80 M. 710—hom. 311; jury, 67, 70, 110.
West v. West &c. R. Co. 61 M. 536—em. dom. 191, 237, 242, 243; estop. 59.
West, Brady v.—50 M. 68.
Westbrook v. Beverly, 11 S. & M. 419—lim. of. act. 148.
Westbrook v. De Soto County, 1 Miss. Dec. 203—counties, 213.
Westbrook v. Hawkins, 59 M. 499—dower, 75; lim. of act. 44.
Westbrook v. Mobile &c. R. Co. 66 M. 560—neg. 85, 94, 115; parent & c. 7; r. r. 359.
Westbrook v. Munger, 61 M. 329—eq. 71, 87; ex. & ad. 334, 423; lim. of act. 103; trusts, 30½, 371.
Westbrook v. Munger, 62 M. 316—eq. 441; execution, 41; lim. of act. 36, 60; plead. 14; trust, 30½.
Westbrook v. Munger, 64 M. 575—app. & e. 851; ex. & ad. 385.
Westbrook v. State, 52 M. 777—escape, 11.
Westbrook, Adams v.—41 M. 385.
Westbrook, De Soto County v.—64 M. 312.
Westbrooks v. State, 76 M. 710—crim. l. 876; ind. 70, 71, 121.
Westbrook, Whitfield v.—40 M. 311.
West, Brown v.—80 M. 764.
West Const. Co. Posey v.—92 M. 736.
West, Erb v.—19 So. 829.
Westerfield v. Merchant, 93 M. 791—tax. 722.
Western Assur. Co. v. Ferrell, 40 So. 8—ins. 336, 645.
Western Assurance Co. v. McPike, 62 M. 740—ins. 323.
Western Assurance Co. v. Mayer, 64 M. 795—trial, 154.
Western Assurance Co. v. Phelps, 77 M. 625—ins. 124, 389, 494, 500, 504.
Western Assur. Co. v. White, 25 So. 494—ins. 377, 554.
Western Assurance Co. Ghio v.—65 M. 532.
Western Assurance Co. McPike v.—61 M. 37.
Western Assur. Co. Searles v.—88 M. 260.

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Western Assur. Soc. v. Ferrell, 92 M. 103—ins. 173, 614.
Western Union Tel. Co. v. Adams Mach. Co. 92 M. 849—tel. & t. 67.
Western Union Tel. Co. v. Allen, 66 M. 549—tel. & t. 56, 78.
Western Union Tel. Co. v. Clarke, 71 M. 157—tel. & t. 78.
Western Union Tel. Co. v. Clifton, 68 M. 307—tel. & t. 67.
Western Union Tel. Co. v. Dodson, 54 So. 844—tel. & t. 71.
Western Union Tel. Co. v. Dozier, 67 M. 288—mast. & s. 302; tel. & t. 35, 48.
Western Union Tel. Co. v. Goodbar, 7 So. 214—tel. & t. 39.
Western Union Tel. Co. v. Hall, 79 M. 623—tel. & t. 78.
Western Union Tel. Co. v. Hiller, 93 M. 658—app. & e. 930; tel. & t. 69, 71.
Western Union Tel. Co. v. Jackson, 95 M. 471—dam. 215; ev. 244.
Western Union Tel. Co. v. Jones, 69 M. 658—app. & e. 234, 998; mast. & s. 302; tel. & t. 35, 68, 78.
Western Union Tel. Co. v. Liddell, 68 M. 1—mast. & s. 302; tel. & t. 35, 53.
Western Union Tel. Co. v. Littlejohn, 72 M. 1025—gaming, 2; new tr. 67; tel. & t. 77.
Western Union Telegraph Co. v. Lyons, 93 M. 590—tel. & t. 39.
Western Union Tel. Co. v. McLaurin, 70 M. 26—Sunday, 18; tel. & t. 38, 67.
Western Union Tel. Co. v. McCants, 46 So. 535—tel. & t. 70.
Western Union Tel. Co. v. McCormick, 27 So. 606—tel. & t. 78.
Western Union Tel. Co. v. Miller, 52 So. 701—tel. & t. 69.
Western Union Tel. Co. v. Mississippi Railroad Commission, 74 M. 80—com. 28; const. law, 303; r. r. 9; tel. & t. 26, 78.
Western Union Tel. Co. v. Morgan, 92 M. 108—tel. & t. 79.
Western Union Tel. Co. v. Pallota, 81 M. 216—tel. & t. 66, 67.
Western Union Tel. Co. v. Patty Dry Goods Co. 96 M. 781—tel. & t. 67.
Western Union Tel. Co. v. Pearce, 82 M. 487—tel. & t. 38, 67.
Western Union Tel. Co. v. Rhett, 50 So. 696—tel. & t. 61.
Western Union Tel. Co. v. Rogers, 68 M. 748—dam. 50; tel. & t. 68.
Western Union Tel. Co. v. Spratley, 84 M. 86—tel. & t. 67, 69.
Western Union Tel. Co. v. Sullivan, 70 M. 447—courts, 121; j. p. 39½, 145.
Western Union Tel. Co. v. Watson, 82 M. 101—tel. & t. 67, 69.
Western Union Tel. Co. v. Webb, 48 So. 408—tel. & t. 67.
Western Union Tel. Co. Alexander v.—66 M. 161.
Western Union Tel. Co. Alexander v.—67 M. 386.
Western Union Tel. Co. Anderson v.—77 M. 851.
Western Union Tel. Co. Clements v.—77 M. 747.
Western Union Tel. Co. Cocke v.—84 M. 380.
Western Union Tel. Co. Dodson v.—52 So. 693.
Western Union Tel. Co. Duncan v.—93 M. 500.
Western Union Tel. Co. Fairley v.—73 M. 6.
Western Union Tel. Co. Hartzog v.—34 So. 361.
Western Union Tel. Co. Hartzog v.—84 M. 448.
Western Union Tel. Co. Hilley v.—85 M. 67.
Western Union Tel. Co. Johnson v.—79 M. 58.
Western Union Tel. Co. Magouirk v.—79 M. 632.
Western Union Tel. Co. Marshall v.—79 M. 154.
Western Union Tel. Co. Meggett v.—69 M. 198.
Western Union Tel. Co. Shingleur v.—72 M. 1030.
Western Union Tel. Co. Steinberger v.—52 So. 691.
Western Union Tel. Co. Sultan v.—92 M. 785.
Western Union Tel. Co. Wilkins v.—68 M. 6.
West Feliciana &c. R. Co. v. Johnson, 5 H. 273—banks, 103; corp. 316; plead. 106; statut. 254, 260.
West Feliciana &c. R. Co. v. Stockett, 13 S. & M. 395—const. law, 171; ex. & ad. 422, 437; lim. of act. 5.
West Feliciana &c. R. Co. v. Stockett, 27 M. 739—app. & e. 1169; courts, 200¼; eq. 447; ex. & ad. 419.
West Feliciana, Carmichael v.—2 H. 817.
West Feliciana &c. R. Co. Forniquet v.—6 H. 116.
West Feliciana &c. R. Co. Thornton v.—29 M. 143.
West, Georgia Pac. &c. R. Co. v.—66 M. 310.
West, Goodbar v.—1 Miss. Dec. 447.
West, Harris v.—25 M. 156.

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Westmoreland v. Walker, 25 M. 76—sales, 346, 418, 425.
Westmoreland v. Wooten, 51 M. 825—land. & t. 246, 252, 252a, 253, 257; liens, 1.
Westmoreland, Smith v.—12 S. & M. 663.
Weston v. Hancock County, 54 So. 307—app. & e. 811; counties, 172, 176, 183; high. 111.
West, Payson v.—W. 515.
West, Peoples' Bank v.—67 M. 729.
West, Perry v.—40 M. 233.
West, Plummer v.—41 M. 69.
West Point Tel. &c. Co. v. Rose, 76 M. 61—corp. 308, 448.
West Point, Bell v.—51 M. 262.
West Point, Board of Education v.—50 M. 638.
West, Porter v.—64 M. 548.
West, Proskey v.—8 S. & M. 711.
West, Stevens v.—1 H. 308.
West, Swann v.—41 M. 104.
West, Yazoo &c. R. Co. v.—78 M. 789.
West &c. R. Co. West v.—61 M. 536.
Wetherbee v. Roots, 72 M. 355—courts, 88; statut. 225¾; witn. 159.
Wetlin v. Mount, 73 M. 526—chat. m. 48.
Wetlin, Bramlett v.—71 M. 902.
Wetter v. Dinkins, 70 M. 835—assign. f. b. c. 136.
Weyburn v. Watkins, 90 M. 728—mtg. 352, 369, 369a.
Weztbrook v. Block, 2 Miss. Dec. 720—eject. 11.
W. F. Zimmerman Lumber Co. v. Elder, 29 So. 466—sales, 234, 478.
Whaley, Marble v.—33 M. 157.
Whaley, Marble v.—35 M. 527.
Whaley, Smart v.—6 S. & M. 308.
Wharton v. Conger, 9 S. & M. 510—attch. 2, 162, 175, 226, 327.
Wharton v. Porter, 10 S. & M. 305—judgm. 572; plead. 225, 229; supersed. 8.
Wharton v. State, 41 M. 680—crim. l. 990.
Whatley v. Hughes, 53 M. 268—cncts. 108; ex. & ad. 18.
Whatley v. Thomas, 2 Miss. Dec. 590—app. & e. 1175.
Whatley, Meeks v.—48 M. 337.
Wheat, Boswell v.—37 M. 610.
Wheatley v. Abbott, 32 M. 343—gifts, 17.
Wheatley, Semmes v.—7 So. 430.
Wheatley, Thompson v.—5 S. & M. 499.
Wheatly v. Thorn, 23 M. 62—assa. 36.
Wheatly, Noel v.—30 M. 181.
Wheeler v. Biggs, 12 So. 596—rec. 34.
Wheeler v. Biggs, 15 So. 118—fraud. conv. 103, 311.
Wheeler v. Brem, 33 M. 126—wills, 734.
Wheeler v. Dixon, 51 M. 550—land. & t. 229½.
Wheeler v. Lynch, 89 M. 157—tax. 764.
Wheeler v. Pannell, 96 M. 382—land. & t. 19.
Wheeler v. Slavens, 13 S. & M. 623—attch. 2, 338.
Wheeler v. State, 64 M. 462—crim. l. 15; int. liq. 40; states, 272; statut. 276, 277.
Wheeler v. State, 76 M. 265—crim. l. 622, 814; ind. 169.
Wheeler, Ex parte, 24 So. 261—bail, 44.
Wheeler, Hoover v.—23 M. 314.
Wheeler, Tyler v.—1 Miss. Dec. 251.
Wheeler &c. Mfg. Co. v. Ligon, 62 M. 560—tax. 431, 693.
Wheeless v. Williams, 62 M. 369—bills & n. 125; interest, 37.
Wheeless, Ship v.—33 M. 646.
Wheelock v. Cozzens, 6 H. 279—replev. 2.
Wheelwright, Denney v.—60 M. 733.
Whelan, Ehrman v.—40 So. 430.
Wheless, Lane v.—46 M. 666.
W. H. Gallaspy &c. Co. v. Massey, 54 So. 805—lis pens. 3.
Whiston, Brooks v.—7 S. & M. 513.
Whit v. State, 85 M. 208—crim. l. 595, 1088, 1128.
Whit v. State, 87 M. 564—crim. l. 723.
Whitaker v. Comfort, W. 421—plead. 212.
Whitaker v. Dick, 5 H. 296—mtg. 305.
Whitaker v. Robinson, 8 S. & M. 349—set-off, 35.
Whitcomb v. Reid, 31 M. 567—exemp. 30, 45.
White v. Eason, 15 So. 66—gaming, 31.
White v. Englehard, 2 S. & M. 38—app. & e. 1050; bills & n. 387.
White v. Gilbert, 39 M. 802—ex. & ad. 135.
White v. Graves, 24 M. 166—adv. pos. 43; replev. 26, 97.
White v. Illinois Cent. R. Co. 55 So. 593—carr. 243, 280; ev. 20; statut. 225¾.
White v. Jenkins, 79 M. 57—mtg. 342e.
White v. Jenkins, 33 So. 287—estop. 92.
White v. Johnson, 23 M. 68—lim. of act. 70; statut. 158, 159, 160, 225.
White v. Jones, 83 M. 231—app. & e. 496; eq. 351.
White v. George S. Leatherberry, Jr. Co. 82 M. 103—logs, 34; sales, 418.
White v. Lee, 52 So. 206—brok. 96; princ. & a. 150.
White v. Lefoldt, 78 M. 173—partit. 102.
White v. Littlefield, 7 H. 406—costs, 11; guard. & w. 136.
White v. Louisville &c. R. Co. 72 M. 12—

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death, 31; mast. & s. 101, 140, 213, 219, 270, 286, 289; neg. 136.
White v. McComb City Drug Co. 86 M. 498—drug, 5.
White v. Martin, 75 M. 646—tax. 575.
White v. Memphis &c. R. Co. 64 M. 566—em. dom. 167, 243.
White v. Post, 91 M. 685—ins. 12.
White v. Presly, 54 M. 313—app. & e. 1051; cov. 67, 77, 102, 117, 130, 139; crim. l. 1169.
White v. Ratcliff, 54 So. 658—ins. 212.
White v. Roach, 53 So. 622—attch. 306.
White v. Shumate, 50 M. 130—j. p. 157.
White v. State, 1 S. & M. 149—hab. corp. 1, 21; perj. 9, 11.
White v. State, 42 M. 635—pardon, 9.
White v. State, 52 M. 216—crim. l. 385, 508, 509, 665, 666½, 829; jury, 103, 109, 131; trial, 187, 267; witn. 77, 297, 306, 317.
White v. State, 70 M. 253—arr. 61; hom. 20, 166.
White v. State, 73 M. 50—witn. 69.
White v. State, 89 M. 675—crim. l. 1151.
White v. State, 95 M. 75—anim. 43.
White v. State, 25 So. 1039—weap. 17b.
White v. State, 45 So. 611—crim. l. 594, 937.
White v. State, 2 Miss. Dec. 562—crim. l. 829, 1157.
White v. Thomas, 52 M. 49—chat. m. 12; eq. 232; liens, 17.
White v. Trotter, 14 S. & M. 30—fraud. conv. 29b, 30, 183, 294; mtg. 362.
White v. Tucker, 52 M. 145—cov. 101, 130; lim. of act. 196.
White v. Vicksburg R. &c. Co. 31 So. 709—st. r. r. 117.
White v. Waide, W. 263—partners. 258.
White v. White, 2 H. 931—mon. recd. 6.
White v. Yazoo City, 27 M. 357—em. dom. 32; mun. corp. 381.
White, Bonner v.—78 M. 653.
White, Chandler v.—71 M. 161.
White, Coleman v.—38 So. 336.
White, Collier v.—67 M. 133.
White, Crott v.—36 M. 455.
White, Dowd v.—34 M. 510.
White, Emanuel v.—34 M. 56.
White, Evans v.—31 So. 833.
White, Ferguson v.—18 So. 124.
White, Friley v.—31 M. 442.
White, Frizell v.—27 M. 198.
White, Goodman v.—25 M. 163.
White, Hamblett v.—11 So. 185.
White, Harralson v.—38 M. 178.
Whitehead v. Cade, 1 H. 95—ex. & ad. 434; set-off, 4, 51.
Whitehead v. Curry, 67 M. 637—tax. 674a.
Whitehead v. Ducker, 11 S. & M. 98—atty. & c. 63, 146.
Whitehead v. Henderson, 4 S. & M. 704—app. & e. 838; attch. 301; garn. 124, 177, 179.
Whitehead v. Middleton, 2 H. 692—dower, 8, 22, 40.
Whitehead v. Mississippi Cent. R. Co. 41 M. 225—plead. 245.
Whitehead v. State, 52 So. 259—jury, 103, 116.
Whitehead v. Wooten, 43 M. 523—mtg. 466; rec. 1, 15, 35.
Whitehead, Ammons v.—31 M. 99.
Whitehead, Armstrong v.—81 M. 35.
Whitehead, Goss v.—33 M. 213.
Whitehead, Heard v.—41 M. 404.
Whitehead, Howze v.—93 M. 578.
Whitehead, Jenkins v.—1 S. & M. 157.
Whitehead, Jenkins v.—7 S. & M. 577.
Whitehead, Knight v.—26 M. 245.
Whitehead, Louisville &c. R. Co. v.—71 M. 451.
Whitehead, Meyer v.—62 M. 387.
Whitehead, Miss. Cent. R. Co. v.—41 M. 225.
Whitehead, Tucker v.—58 M. 762.
Whitehead, Tucker v.—59 M. 594.
Whitehead, Universal Life Ins. Co. v.—58 M. 226.
White, Illinois Cent. R. Co. v.—52 So. 449.
White, Ivey v.—50 M. 142.
White, Johnson v.—13 S. & M. 584.
White, Lewis v.—69 M. 352.
White, McCain v.—67 M. 243.
White, McGehee v.—31 M. 708.
White, McIntyre v.—5 H. 298.
White, McRovie v.—52 M. 406.
White, Maxey v.—53 M. 80.
White, Merritt v.—37 M. 438.
White, Ormond v.—85 M. 276.
White, Robinson v.—7 S. & M. 39.
White Sand Lumber Co. Pine Cone Lumber Co. v.—38 So. 188.
White Sewing Machine Co. Chapman v.—76 M. 821.
White Sewing Mach. Co. Chapman v.—77 M. 890.
White Sewing Mach. Co. Chapman v.—78 M. 438.
Whitesides v. Thurlkill, 12 S. & M. 599—carr. 147; ship. 119.
Whitesides, Warren v.—34 M. 17.
White, Trotter v.—10 S. & M. 607.
White, Trotter v.—26 M. 88.
White, Washburne v.—62 M. 545.
White, Western Assur. Co. v.—25 So. 494.

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White, Vicksburg &c. R. Co. v.—82 M. 468.
White, Yazoo &c. R. Co. v.—82 M. 120.
White, Young v.—25 M. 146.
Whitfield v. Burke, 86 M. 435—powers, 42.
Whitfield v. Evans, 56 M. 488—eq. 22; ex. & ad. 117, 537g.
Whitfield v. Harris, 48 M. 710—escrow, 11; judgm. 786; ven. & pur. 213, 337.
Whitfield v. Lyon, 93 M. 443—life est. 24; ven. & pur. 187; wills, 742.
Whitfield v. Meridian, 66 M. 570—dedi. 42; mun. corp. 757, 763.
Whitfield v. Rogers, 26 M. 84—inj. 45; nuis. 22.
Whitfield v. Tatum, 83 M. 153—anim. 47.
Whitfield v. Thompson, 85 M. 749—ex. & ad. 138; wills, 613.
Whitfield v. Westbrook, 40 M. 311—app. & e. 494, 502; excep. 1; mal. pros. 16, 21, 64, 65, 71, 72.
Whitfield v. Whitfield, 40 M. 352—dam. 91; det. 19; gifts, 5, 48; parent & c. 9; replev. 92; sales, 418.
Whitfield v. Whitfield, 44 M. 254—dam. 91; det. 8, 17, 19; replev. 118; witn. 65.
Whitfield v. Wooldridge, 23 M. 183—plead. 222; tax. 568a, 570, 570a, 570b.
Whitfield v. Zellnor, 24 M. 663—work and lab. 29.
Whitfield, Cook v.—41 M. 541.
Whitfield, Jackson v.—51 M. 202.
Whitfield, McGavock v.—45 M. 452.
Whitfield, McIntyre v.—13 S. & M. 88.
Whitfield, Memphis &c. R. Co. v.—44 M. 466.
Whitfield, Mobile &c. R. Co. v.—44 M. 466.
Whitfield, Ward v.—64 M. 754.
Whiting, Green v.—1 S. & M. 579.
Whiting, Jackson v.—84 M. 163.
Whiting, Lombard v.—W. 229.
Whiting, Parker v.—6 H. 352.
Whitington v. Watkins, 1 Miss. Dec. 81—replev. 8, 11.
Whitley v. State, 78 M. 255—crim. l. 519, 522, 537.
Whitley v. Stephenson, 38 M. 113—des. & d. 52; dower, 10; ex. & ad. 3, 173, 181; exemp. 30.
Whitlock v. State, 6 So. 237—crim. l. 369.
Whitlock v. Yazoo &c. R. Co. 91 M. 779—eq. 51.
Whitman v. Owen, 76 M. 783—schools, 135, 138.
Whitney v. Cook, 53 M. 551—acc. & s. 15; assign. 138; trial, 167, 197; u. s. 111.
Whitney v. Cotten, 53 M. 689—partners. 67, 81, 180, 258, 258a, 258b.
Whitney v. Cowan, 55 M. 626—assign. 104; ev. 345, 462; interpl. 13, 25, 33; judgm. 846.
Whitney v. Freeland, 26 M. 481—assign. f. b. c. 341; fraud. conv. 206.
Whitney v. Gregory, 16 So. 292—app. & e. 148, 880; attch. 315.
Whitney v. Hanover Nat. Bank, 71 M. 1009—app. & e. 1167; cred. s. 33; eq. 2, 114; judgm. 473, 500, 506; rec. 3, 59.
Whitney v. Marks, 16 So. 348—attch. 315.
Whitney v. State, 52 M. 732—lim. of act. 11; states, 18c, 171.
Whitney v. Whitney, 7 S. & M. 740—guard. & w. 25, 137.
Whitney, Atkinson v.—67 M. 655.
Whitney, Kaufman v.—50 M. 103.
Whittaker v. Godwin, 53 So. 413—app. & e. 643, 1178; contin. 12; replev. 107.
Whittaker v. State, 45 So. 145—weap. 17a.
Whitten v. State, 61 M. 717—crim. l. 181, 184, 185, 575, 867, 1029, 1033.
Whitten v. State, 95 M. 410—crim. l. 1166½.
Whitten, Batesville Gin Co. v.—96 M. 210.
Whitten, McClendon v.—95 M. 124.
Whitten, McKee v.—25 M. 31.
Whittington v. Clark, 8 S. & M. 480—deeds, 46; j. p. 86; seals, 3.
Whittington v. State, 62 M. 796—int. liq. 164.
Whittington, Marsh v.—88 M. 400.
Whittington, Yazoo &c. R. Co. v.—74 M. 410.
Whittle v. State, 79 M. 327—crim. l. 399; perj. 34.
Whittle, Threefoot v.—15 So. 120.
Whitton v. Smith, Freem. Ch. 231—deeds, 179; partners. 263, 269.
Whitton v. State, 37 M. 379—crim. l. 32, 772; int. liq. 161, 171.
Whitworth v. Carter, 41 M. 639—app. & e. 321, 324.
Whitworth v. Carter, 43 M. 61—hus. & w. 79, 85, 86, 148, 156; slaves, 7.
Whitworth v. Harris, 40 M. 483—deeds, 109; ev. 460; partners. 103; spec. perf. 112; subscrip. 5; ven. & pur. 20.
Whitworth v. Lyons, 39 M. 467—home. 104.
Whitworth v. Tilman, 40 M. 76—princ. & s. 153, 181, 190.
Whorter v. Donald, 39 M. 779—ex. & ad. 221, 227.
Whyte v. Mills, 64 M. 158—clks. of c. 72; counties, 87.
Wiborn, Board of Levee Com'rs v.—74 M. 396.
Wicker, Morton v.—87 M. 365.
Wickham v. Green, 61 M. 463—assign. f. b. c. 151, 175.
Wier, Field v.—28 M. 56.

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Wier, Stiles v.—26 M. 187.
Wier, Tate v.—24 M. 465.
Wiggins v. McGimpsey, 13 S. & M. 532—app. & e. 1008, 1068; cncts. 274; crim. l. 1172; judgm. 766; new tr. 160; trial, 252; ven. & pur. 87, 144, 228, 231, 304, 308a.
Wiggins, State v.—30 So. 712.
Wiggle v. Orven, 43 M. 158—app. & e. 67.
Wiggle v. Owen, 45 M. 691—courts, 202c; eq. 430; guard. & w. 68; judgm. 298; lim. of act. 114.
Wiggle v. Thomasson, 11 S. & M. 452—bills & n. 130.
Wightman v. Reynolds, 24 M. 675—eject. 8, 15, 82, 86, 113; estop. 36.
Wilborn v. State, 8 S. & M. 345—larc. 81.
Wilbourn v. Bishop, 62 M. 341—spec. perf. 65; ven. & pur. 220, 344.
Wilbourn v. Shell, 59 M. 205—wills, 234.
Wilbourn v. Wilbourn, 48 M. 38—ex. & ad. 131.
Wilbourn, Apperson v.—58 M. 439.
Wilbourn, Illinois Cent. R. Co. v.—74 M. 284.
Wilbourn, Stevens v.—88 M. 514.
Wilburn v. Cologere, 52 So. 794—replev. 70, 101.
Wilburn v. State, 73 M. 245—crim. l. 763; hom. 300g.
Wilby v. State, 93 M. 767—const. law, 82; licens. 13; statut. 245.
Wilcher v. Thompson, 12 So. 828—fraud. conv. 103; home. 55.
Wilcox v. McNutt, 2 H. 776—bills & n. 510.
Wilcox v. Mills, Sm. & M. Ch. 85—mtg. 493.
Wilcox v. Mitchell, 4 H. 272—bills & n. 415, 420; excep. 44; notaries, 1.
Wilcox v. Mitchell, 4 S. & M. 744—app. & e. 404.
Wilcox v. Routh, 9 S. & M. 476—bills & n. 414, 415, 420, 526; princ. & a. 91, 109, 177.
Wilcox v. Williamson, 61 M. 310—crim. l. 186; false imp. 15; judges, 36; j. p. 23; sheriffs, 122.
Wilcox, Brown v.—14 S. & M. 127.
Wilcox, McNutt v.—Freem. Ch. 116.
Wilcox, McNutt v.—3 H. 417.
Wilcox, Oakey v.—3 H. 330.
Wilcox, Williamson v.—63 M. 335.
Wilczinski v. Lick, 68 M. 596—chat. m. 138; land. & t. 5, 248; ven. & pur. 59.
Wilczinski v. Louisville &c. R. Co. 66 M. 595—cncts. 151; dedi. 40, 43; r. r. 73; ref. of inst. 15, 42.
Wilczinski, Stockner v.—71 M. 340.
Wildberger v. Hartford Fire Ins. Co. 72 M. 338—ins. 81.
Wildberger v. Puckett, 78 M. 650—quiet. t. 34.
Wildberger v. Shaw, 84 M. 442—tax. 175.
Wildberger, Equitable Fire Ins. Co. v.—74 M. 375.
Wildberger, Goyer Cold Storage Co. v.—71 M. 438.
Wilder, Anderson v.—83 M. 606.
Wildey v. Bonney, 31 M. 644—ev. 119; frds. st. of, 68; partit. 5.
Wildy v. Bonney, 26 M. 35—execution, 34; hus. & w. 195.
Wildy v. Bonney, 28 M. 710—partit. 94.
Wildy v. Bonny, 35 M. 77—inj. 177.
Wile v. State, 60 M. 260—ind. 57; perj. 20.
Wiley v. Gray, 36 M. 510—hus. & w. 30, 31c, 86, 144.
Wiley v. State, 74 M. 727—crim. l. 59; int. liq. 146, 166.
Wiley, Doss v.—72 M. 179.
Wiley, Grubb v.—9 S. & M. 29.
Wiley, Reed v.—5 S. & M. 394.
Wiley, Southern R. Co. v.—88 M. 825.
Wiley, State v.—76 M. 282.
Willie v. Brooks, 45 M. 542—estop. 92, 93, 98; guard & w. 115; imp. 4; inf. 29, 31a.
Wilkerson v. Dockery, 2 Miss. Dec. 50—ex. & ad. 222, 226.
Wilkerson v. Hudson, 71 M. 130—tax. 792.
Wilkerson v. Mayfield, 27 M. 542—pub. lands, 34.
Wilkerson v. Meyer Drug Co. 24 So. 971—attch. 299.
Wilkerson v. Moffett-West Drug Co. 21 So. 564—fraud. conv. 285, 294.
Wilkerson v. State, 78 M. 356—crim l. 855.
Wilkerson v. Summers, 15 So. 130—app. & e. 1201; lim. of act. 202.
Wilkerson v. Webb, 75 M. 403—mtg. 48.
Wilkerson, Belcher v.—54 M. 677.
Wilkerson, Davis v.—48 M. 585.
Wilkerson, Jenkins v.—76 M. 368.
Wilkerson, Mhoon v.—47 M. 633.
Wilkes v. Coopwood, 39 M. 348—app. & e. 1175; judgm. 650.
Wilkes v. Gates, 68 M. 263—chat. m. 173.
Wilkes, Andrews v.—6 H. 554.
Wilkes, Independent Order of Sons and Daughters of Jacob of America v.—53 So. 493.
Wilkie v. Collins, 48 M. 496—crim. l. 305; death, 2; marr. 40.
Wilkings, Harper v.—65 M. 215.
Wilkings, Schoolfield v.—60 M. 238.
Wilkins v. Commercial Bank, 6 H. 217—bills & n. 414.

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Wilkins v. Humphreys, 23 M. 311—ven. & pur. 259, 266, 275.
Wilkins v. Riley, 47 M. 306—bills & n. 106, 111; cncts. 128, 153; comp. fl. 1.
Wilkins v. State, 93 M. 695—crim. l. 996.
Wilkins v. Wells, 9 S. & M. 325—ack. 12; deeds, 47.
Wilkins v. Western Union Tel. Co. 68 M. 6—judgm. 715; tel. & t. 78.
Wilkins, Dickey v.—17 So. 374.
Wilkins, Gilleland v.—1 H. 574.
Wilkins, Hambrick v.—65 M. 18.
Wilkinson v. Barringer, 23 M. 319—ex. & ad. 223; statut. 267.
Wilkinson v. Cook, 44 M. 367—app. & e. 1173; exemp. 5; plead. 433; slaves, 7.
Wilkinson v. Davis, Freem. Ch. 53—indians, 15; ven. & pur. 61.
Wilkinson v. Dockery, 12 So. 585—attch. 47.
Wilkinson v. Flowers, 37 M. 579—dism. 23; judgm. 854; mtg. 319, 424; lim. of act. 44, 111, 167; princ. & s. 168, 183.
Wilkinson v. Gaines, 96 M. 688—const. law, 309; drains, 12, 40.
Wilkinson v. Jenkins, 33 So. 838—tax. 182.
Wilkinson v. Lee. See Wilkinson v. Gaines.
Wilkinson v. Light &c. Co. 78 M. 389—waters, 204.
Wilkinson v. Moore, 27 M. 365—ex. & ad. 437.
Wilkinson v. Patterson, 6 H. 193—plead. 164, 434.
Wilkinson v. Pillar, 71 M. 678—quiet. t. 44.
Wilkinson v. Searles, 70 M. 392—set-off, 30.
Wilkinson v. State, 77 M. 705—crim. l. 394, 970; hom. 174; ind. 125e, 200.
Wilkinson v. Strickland, 35 So. 177—cem. 15; eject. 16.
Wilkinson v. Taylor Mfg. Co. 67 M. 231—cncts. 16; ev. 416, 460; frds. st. of, 118.
Wilkinson v. Tiffany, 5 H. 411—dism. 23.
Wilkinson v. Webb, 75 M. 403—deeds, 38; ev. 25.
Wilkinson v. Wingate, 46 M. 280—app. & e. 102, 792; plead. 218.
Wilkinson, Anderson v.—10 S. & M. 601.
Wilkinson, Burrus v.—31 M. 537.
Wilkinson, Cage v.—3 S. & M. 223.
Wilkinson County v. Jones, 52 So. 453—rewards, 5.
Wilkinson, Grayson v.—5 S. & M. 268.
Wilkinson, Hughes v.—28 M. 600.
Wilkinson, Hughes v.—37 M. 482.
Wilkinson, Hunter v.—44 M. 721.
Wilkinson, Miss. Union Bank v.—3 S. & M. 78.
Wilkinson, Selser v.—W. 108.
Wilkinson, Williamson v.—81 M. 503.
Wilkins, Rose v.—78 M. 401.
Wilkins, Sims v.—5 S. & M. 234.
Wilkins, Vicksburg v.—47 M. 404.
Wilkins, Winn v.—35 M. 186.
Wilkins, Wooldridge v.—3 H. 360.
Williams v. Alcorn Electric Light Co. 53 So. 958—mech. liens, 38.
Williams v. Ball, 2 Miss. Dec. 536—wills, 459.
Williams v. Bank of Commerce, 71 M. 858—bills & n. 91; corp. 642, 657, 660; inj. 185.
Williams v. Bonner, 79 M. 664—guard. & w. 49.
Williams v. Brickell, 37 M. 682—ev. 168; phys. 13.
Williams v. Cammack, 27 M. 209—counties, 52; em. dom. 2; eq. 190; inj. 216; lev. 23; statut. 64; tax. 3, 191, 192, 615.
Williams v. Campbell, 46 M. 57—ex. & ad. 103, 118, 375; guard. & w. 53; trusts, 179.
Williams v. Childress, 25 M. 78—ex. & ad. 337, 367, 388d.
Williams v. Claiborne, Sm. & M. Ch. 355—deeds, 95; hus. & w. 31a, 31c.
Williams v. Claiborne, 7 S. & M. 488—deeds, 95, 97; hus. & w. 31c, 119.
Williams v. Cocke, 6 So. 774—land. & t. 34.
Williams v. Creswell, 51 M. 817—corp. 631; mtg. 453.
Williams v. Crook, 63 M. 9—chat. m. 46, 49, 126; mtg. 48.
Williams v. Crutcher, 5 H. 71—execution, 153c.
Williams v. Devine, 52 M. 139—chat. m. 174; replev. 22.
Williams v. Droyfus, 79 M. 245—mtg. 346, 349.
Williams v. Duncan, 44 M. 375—inf. 73; ven. & pur. 104.
Williams v. Flippin, 68 M. 680—ex. & ad. 527, 537h; lim. of act. 83.
Williams v. Gage, 49 M. 777—execution, 265; garn. 1; partners. 180, 208, 220, 297.
Williams v. Gurguard, 2 H. 722—insolv. 6.
Williams v. Hale, 12 S. & M. 562—ex. & ad. 200; exemp. 30.
Williams v. Harris, 2 H. 627—plead. 18, 93; sales, 352.
Williams v. Jones, 10 S. & M. 108—cncts. 164; judgm. 407; spec. perf. 53.
Williams v. Jones, 42 M. 270—garn. 148, 159.
Williams v. Link, 64 M. 641—exemp. 48.
Williams v. Lowndes County, 27 M. 621—clks. of c. 10; counties, 204.
Williams v. Luckett, 77 M. 394—cncts. 151;

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

judgm. 600, 714, 720; mast. & s. 80.
Williams v. Miller, 10 S. & M. 139—bills & n. 512; witn. 82.
Williams v. Mobile &c. R. Co. 19 So. 90—carr. 354.
Williams v. Montgomery, 10 S. & M. 321—dism. 76.
Williams v. Mosely, 5 H. 520—gifts, 5, 46; parent & c. 9.
Williams v. Neville, 53 So. 594—corp. 320.
Williams v. Newberry, 32 M. 256—ev. 133, 143; torts, 27; tresp. 45, 56; trial, 60.
Williams v. New Orleans R. Co. 60 M. 689—em. dom. 249, 271.
Williams v. Northern Bank, 7 S. & M. 28—dism. 29.
Williams v. Oppelt, 1 S. & M. 559—eject. 52, 113; proc. 161, 164.
Williams v. Planters' Ins. Co. 57 M. 759—corp. 493; mal. pros. 46; plead. 64; princ. & a. 159.
Williams v. Ramsey, 52 M. 851—excep. 11, 38; mand. 57.
Williams v. Ratcliff, 42 M. 145—execution, 21; wills, 613.
Williams v. Rhodes, 33 M. 137—eq. 43.
Williams v. Sayers, 79 M. 50—replev. 8.
Williams v. Schwab, 56 M. 338—hus. & w. 171; paymt. 40.
Williams v. Sharkey County, 74 M. 122—tax. 316.
Williams v. Simpson, 70 M. 113—forc. e. & d. 12; licens. 39.
Williams v. Southern R. Co. 33 So. 972—trial, 143.
Williams v. State, 12 S. & M. 58—crim. l. 59, 398; gaming, 79, 94.
Williams v. State, 32 M. 389—crim. l. 731, 769; jury, 97, 104, 110, 131; trial, 182.
Williams v. State, 37 M. 407—jury, 110.
Williams v. State, 47 M. 609—rape, 8.
Williams v. State, 42 M. 328—hom. 141, 142; ind. 57, 107, 110.
Williams v. State, 2 Miss. Dec. 601—crim. l. 522.
Williams v. State, 63 M. 58—larc. 54, 79.
Williams v. State, 72 M. 117—crim. l. 522, 532, 538.
Williams v. State, 73 M. 820—crim. l. 789; witn. 398, 405.
Williams v. State, 79 M. 555—crim. l. 385, 413, 419.
Williams v. State, 87 M. 373—witn. 299.
Williams v. State, 90 M. 319—crim. l. 761, 814.
Williams v. State, 92 M. 70—crim. l. 1151; seduct. 36.
Williams v. State, 95 M. 671—crim. l. 766, 822, 838, 1172.
Williams v. State, 4 So. 550—crim. l. 993.
Williams v. State, 23 So. 547—crim. l. 598.
Williams v. State, 49 So. 513—crim. l. 552.
Williams v. State, 54 So. 857—crim. l. 941, 942, 945.
Williams v. Staton, 5 S. & M. 347—guar. 7, 36, 83.
Williams v. Stewart, 12 S. & M. 533—app. & e. 374, 462; supersed. 7.
Williams v. Stewart, 79 M. 46—j. p. 40.
Williams v. Stratton, 10 S. & M. 418—ex. & ad. 115, 408; inf. 109; judgm. 393; mtg. 30.
Williams v. Stritz, 17 So. 227—counties, 108.
Williams v. Tishomingo Sav. Inst. 57 M. 633—bills & n. 296.
Williams v. Tucker, 47 M. 678—can. of i. 2; quiet. t. 7; ten. in c. 42, 55.
Williams v. Williams, 11 S. & M. 393—arb. & a. 56, 57, 67; assum. 17; trial, 332.
Williams v. Williams, 34 M. 143—j. p. 192.
Williams v. Williams, 43 M. 430—ex. & ad. 475, 510.
Williams v. Williams, 23 So. 291—sales, 478.
Williams v. Yazoo &c. R. Co. 82 M. 659—hus. & w. 231.
Williams v. Yazoo &c. R. Co. 93 M. 77—carr. 159.
Williams, Adams v.—52 So. 865.
Williams, Adams v.—57 M. 38.
Williams, Alabama &c. R. Co. v.—78 M. 209.
Williams, Ames v.—72 M. 760.
Williams, Ames v.—73 M. 772.
Williams, Ames v.—74 M. 404.
Williams, Anderson v.—24 M. 684.
Williams, Avera v.—81 M. 714.
Williams, Baine v.—10 S. & M. 113.
Williams, Bank of Louisiana v.—46 M. 618.
Williams, Bowers v.—34 M. 324.
Williams, Brent v.—79 M. 355.
Williams, Butler v.—14 S. & M. 54.
Williams, Butt v.—15 So. 130.
Williams Co. Melton v.—83 M. 624.
Williams, Davis v.—57 M. 843.
Williams, Davis v.—73 M. 708.
Williams, Dawson v.—Freem. Ch. 99.
Williams, De Marco v.—12 So. 552.
Williams, Dickman v.—50 M. 500.
Williams, Dozier v.—47 M. 605.
Williams, Dyer v.—62 M. 302.
Williams, Fore v.—35 M. 533.
Williams, Frierson v.—57 M. 451.

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Williams, Fritz v.—16 So. 359.
Williams, Graves v.—2 S. & M. 286.
Williams, Grayson v.—W. 298.
Williams, Greene v.—58 M. 752.
Williams, Gwinn v.—27 M. 324.
Williams, Haley v.—8 S. & M. 487.
Williams, Harness v.—64 M. 600.
Williams, Hooker v.—18 So. 420.
Williams, Hubert v.—W. 175.
Williams, Irwin v.—W. 314.
Williams, Jackson v.—92 M. 301.
Williams, Jackson Bank—77 M. 398.
Williams, James v.—44 M. 47.
Williams, Johns v.—66 M. 350.
Williams, Jones v.—62 M. 183.
Williams, Joor v.—38 M. 546.
Williams, Lamar v.—39 M. 342.
Williams, Land v.—12 S. & M. 362.
Williams, Locke v.—36 M. 187.
Williams, Louisville &c. R. Co. v.—69 M. 631.
Williams, Marsh v.—1 H. 132.
Williams, Martin v.—42 M. 210.
Williams, May v.—61 M. 125.
Williams, Moore v.—44 M. 61.
Williams, Moseby v.—5 H. 520.
Williams, Newman v.—29 M. 212.
Williams, New Orleans &c. R. Co. v.—96 M. 373.
Williamson v. Childress, 26 M. 328—ex. & ad. 456.
Williamson v. Downs, 34 M. 402—acct. 22; acct. st. 19; app. & e. 267; hus. & w. 168; mtg. 609.
Williamson v. Louisville &c. R. Co. 6 So. 205—quiet. t. 34.
Williamson v. Raney, Freem. Ch. 112—ven. & pur. 37, 117, 228.
Williamson v. State, 59 M. 235—witn. 87.
Williamson v. State, 64 M. 229—crim. l. 141.
Williamson v. Warren, 55 M. 199—guard. & w. 87, 90, 97.
Williamson v. Wilcox, 63 M. 335—false imp. 9; sheriffs, 122.
Williamson v. Williamson, 3 S. & M. 715—.const. law, 51; eq. 10; ex. & ad. 148, 320, 389, 389b; statut. 82, 247; ven. & pur. 239.
Williamson v. Williamson, 52 M. 725—execution, 221.
Williamson v. Wilkinson, 81 M. 503—fraud. conv. 51.
Williamson, Brien v.—7 H. 14.
Williamson, Vanderburg v.—52 M. 233.
Williamson, Wilcox v.—61 M. 310.
Williams, Patty v.—71 M. 837.
Williams, Peck-Hammond Co. v.—77 M. 824.
Williams, Pinson v.—23 M. 64.
Williams, Planters' Ins Co. v.—60 M. 916.
Williams, Pollock v.—42 M. 88.
Williams, Robertson v.—6 H. 579.
Williams, Seals v.—80 M. 234.
Williams, Smith v.—36 M. 545.
Williams, Smith v.—38 M. 48.
Williams, Spengler v.—67 M. 1.
Williams, State v.—49 M. 640.
Williams, State v.—72 M. 992.
Williams, State v.—54 So. 951.
Williams, Thompson v.—7 S. & M. 270.
Williams, Thompson v.—10 S. & M. 173.
Williams, United States Fidelity &c. Co. v.—96 M. 10.
Williams, Walker v.—30 M. 165.
Williams, Walker v.—84 M. 392.
Williams, Watson v.—36 M. 331.
Williams, Weaver v.—75 M. 945.
Williams, Welch v.—85 M. 301.
Williams, Wheelers v.—62 M. 369.
Williams, Wilson v.—52 M. 487.
Williams, Windham v.—27 M. 313.
Williams, Winner v.—82 M. 669.
Williams, Yazoo &c. R. Co. v.—67 M. 18.
Williams, Yazoo &c. R. Co. v.—87 M. 344.
Willingham, State v.—86 M. 203.
Willis v. Ellis, 53 So. 498—frds. st. of, 18, 103, 113.
Willis v. Gattman, 53 M. 721—ack. 23; estop. 26; fraud. conv. 103; hus. & w. 10, 194; lis pens. 25; quiet. t. 7; ref. of inst. 10, 27.
Willis v. Higginbotham, 61 M. 164—arb. & a. 35.
Willis v. Ives, 1 S. & M. 307—app. & e. 154; bonds, 51; cncts. 334; ev. 404; judgm. 408; princ. & s. 156, 168.
Willis v. Loeb, 59 M. 169—app. & e. 708; execution, 129, 178, 180, 202; partners. 220.
Willis v. Memphis Grocery Co. 19 So. 101—hus. & w. 37; princ. & a. 145.
Willis v. State, 27 So. 524—assa. 96.
Willis Bank v. Evans, 10 S. & M. 35—quiet. t. 44.
Willis, Caldwell v.—57 M. 555.
Willis, Hollingsworth v.—64 M. 152.
Willis, Loring v.—4 H. 383.
Willis, McKinney v.—64 M. 82.
Willis, Moody v.—41 M. 347.
Willis, Parker v.—27 M. 766.
Willis, Postal Tel. Co. v.—93 M. 540.
Willis, Smith v.—78 M. 243.
Willis, Travis v.—55 M. 557.
Willoughby, Mutual Benefit Life Ins. Co. v. —54 So. 834.
Wills v. Reed, 86 M. 446—ease. 15, 18; high. 7, 8; priv. roads, 2.

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Wills v. Woodley, 5 H. 484—app. & e. 460.
Wilmot v. Yazoo &c. R. Co. 76 M. 374—adv. pos. 58; plead. 173; r. r. 73; tresp. 42.
Wilmoth, Carver &c. Co. v.—1 Miss. Dec. 468.
Wilmot, Worthington v.—59 M. 608.
Wilson v. Alabama &c. R. Co. 63 M. 352—carr. 265.
Wilson v. Alabama &c. R. Co. 77 M. 714—app. & e. 170; health, 9, 22.
Wilson v. Basket, 47 M. 637—app. & e. 904; judgm. 567.
Wilson v. Beauchamp, 44 M. 556—trusts, 85.
Wilson v. Beauchamp, 50 M. 24—app. & e. 1009, 1011; des. & d. 104; ev. 565; hus. & w. 49½, 130.
Wilson v. Brown, 94 M. 608—app. & e. 704.
Wilson v. Clarke, 27 M. 270—new tr. 89; witn. 101, 114.
Wilson v. Cox, 49 M. 538—des. & d. 2; dower, 2; wills, 240, 436, 778, 780, 782.
Wilson v. Cox, 50 M. 133—ven. & pur. 142.
Wilson v. Duncan, 44 M. 642—inf. 36; partit. 39.
Wilson v. Gray, 59 M. 525—home. 118a.
Wilson v. Griffith, 24 M. 468—states, 167.
Wilson v. Hansboro, 50 So. 982—app. & e. 801.
Wilson v. Hansboro, 54 So. 845—crim. l. 996; judgm. 299, 313, 324.
Wilson v. Henderson, 9 S. & M. 375—alt. inst. 1, 11, 26, 30.
Wilson v. Horne, 37 M. 477—app. & e. 1003; ev. 452.
Wilson v. Ivy, 32 M. 233—lim. of act. 45, 98, 100.
Wilson v. Jourdan, 79 M. 133—app. & e. 372; garn. 54.
Wilson v. Kirkland, W. 155—execution, 69, 159.
Wilson v. Kohlheim, 46 M. 346—app. & e. 1063; fraud. conv. 54, 270; new tr. 41; trial, 267.
Wilson v. McElroy, 2 S. & M. 241—action, 13; assign. 120; bankr. 137; insolv. 82; judgm. 839; parties, 4.
Wilson v. May Pants Co. 37 So. 813—judgm. 570.
Wilson v. Montgomery, 14 S. & M. 205—app. & e. 1145; judgm. 440.
Wilson v. New Orleans &c. R. Co. 63 M. 352—carr. 254, 271, 277, 277a, 294, 319; dam. 208.
Wilson v. New Orleans &c. R. Co. 68 M. 9—carr. 333.
Wilson v. Owens, 1 H. 126—app. & e. 272; crim. l. 1146.
Wilson v. Parker, 14 So. 264—est. 1; life est. 8, 17; remaind. 16; ven. & pur. 220.
Wilson v. Polk, 13 S. & M. 131—assist. 4.
Wilson v. Pugh, 32 M. 196—app. & e. 923; forc. e. & d. 14.
Wilson v. Pugh, 61 M. 449—app. & e. 359.
Wilson v. Rodewald, 49 M. 506—venue, 44.
Wilson v. Rodewald, 61 M. 228—judgm. 209, 272.
Wilson v. Sibley, 54 M. 656—guard. & w. 125; lim. of act. 104, 171.
Wilson v. State, 42 M. 639—crim. l. 261, 262.
Wilson v. State, 70 M. 595—gr. jury, 39; ind. 137.
Wilson v. State, 71 M. 880—crim. l. 509, 763, 785b, 809, 811, 834.
Wilson v. State, 80 M. 388—crim. l. 211; ind. 70, 76.
Wilson v. State, 81 M. 404—crim. l. 789; weap. 17b.
Wilson v. State, 85 M. 687—forg. 10, 19.
Wilson v. Sykes, 67 M. 617—tax. 695, 699.
Wilson v. Vaughan, 61 M. 472—mtg. 168.
Wilson v. Wallace, 64 M. 13—counties, 196; rewards, 5.
Wilson v. Williams, 52 M. 487—adv. pos. 62, 100; const. law, 191; eject. 20, 24, 68, 90, 110, 121, 146; ev. 143; lim. of act. 181; propty. 10.
Wilson v. Wood, 84 M. 728—land. & t. 116, 293.
Wilson v. Zook, 69 M. 694—app. & e. 881, 882, 932, 1004; contin. 26; trial, 270, 421.
Wilson, Bibb v.—31 M. 624.
Wilson, Carradine v.—61 M. 573.
Wilson, Caruthers v.—1 S. & M. 527.
Wilson, Chaffe v.—59 M. 42.
Wilson, Clark v.—53 M. 119.
Wilson, Clark v.—56 M. 753.
Wilson Cotton Oil Co. Kosciusko Oil Mill &c. Co. v.—90 M. 551.
Wilson, Crum v.—61 M. 233.
Wilson, Falls v.—24 M. 168.
Wilson, Fletcher v.—Sm. & M. Ch. 376.
Wilson, Ford v.—35 M. 490.
Wilson, Fossett v.—59 M. 1.
Wilson, Freeman v.—51 M. 329.
Wilson, Grayson v.—27 M. 553.
Wilson, Henderson v.—6 H. 65.
Wilson, Henderson v.—4 S. & M. 732.
Wilson, Heth v.—55 M. 587.
Wilson, Hodge v.—12 S. & M. 498.
Wilson, Humphreys v.—43 M. 328.
Wilson, Jennings v.—71 M. 42.
Wilson, McFarland v.—2 S. & M. 269.

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Wilson, National B. & L. Assn. v.—78 M. 993.
Wilson, O'Brien v.—82 M. 93.
Wilson, O'Brien v.—86 M. 540.
Wilson, Pearson v.—57 M. 848.
Wilson, Ross v.—7 S. & M. 753.
Wilson, Sistrunk v.—54 So. 89.
Wilson, Skinner v.—61 M. 90.
Wilson, State v.—51 So. 715.
Wilson, Swann v.—24 M. 471.
Wilson, Tarpley v.—33 M. 467.
Wilson, Tucker v.—68 M. 693.
Wilson, Wallis v.—34 M. 357.
Wilson, Walton v.—30 M. 576.
Wilson, Witcher v.—47 M. 663.
Wilson, Yazoo &c. R. Co. v.—83 M. 224.
Wilson, Young v.—24 M. 694.
Wiltburger v. Randolph, W. 20—interest, 18.
Wiltcher v. State, 54 So. 726—crim. l. 865, 1169; hom. 203.
Wilty v. Hightower, 6 S. & M. 345—records, 9; ven. & pur. 110, 112, 115, 232, 308.
Wilty v. Hightower, 12 S. & M. 478—cov. 94, 102.
Wilzinski v. Greenville, 85 M. 393—em. dom. 2.
Wimberly v. Boland, 72 M. 241—attch. 141, 154; clks. of c. 6; offic. 48, 105.
Wimberly v. Wortham, 3 So. 459—chat. m. 278.
Wimberly, Cochran v.—44 M. 503.
Wimberly, Ex parte, 57 M. 437—cmpt. 21; elec. 275, 305; hab. corp. 29; inj. 28; prohib. 5.
Wimberly, Kelly v.—61 M. 548.
Wimberly, Ross v.—60 M. 345.
Wimbush v. Chinault, 58 M. 234—app. & e. 62.
Winans, Herring v.—Sm. & M. Ch. 466.
Winborn v. King, 35 M. 157—ex. & ad. 471.
Winchester, Freeman v.—10 S. & M. 577.
Winchester, Henderson v.—31 M. 290.
Windham v. Chisholm, 35 M. 531—eject. 33; schools, 55.
Windham v. State, 91 M. 845—crim. l. 561, 718; hom. 300e.
Windham v. Williams, 27 M. 313—app. & e. 662; excep. 6; ex. & ad. 154; jury, 148; replev. 92.
Windham, Branch Bank v.—31 M. 317.
Windham, Scott v.—73 M. 76.
Windsor v. Kennedy, 52 M. 164—paymt. 39, 40.
Winegarden v. State, 87 M. 264—bailm. 44.
Wineman, Cole v.—80 M. 73.
Wineman, Holder v.—76 M. 824.
Winfield v. Jackson, 89 M. 272—crim. l. 260a, 304, 719; mun. corp. 112.
Wing v. Minor, 7 So. 347—tax. 614.
Wingate v. Wallis, 5 S. & M. 249—costs, 176; ex. & ad. 26, 35.
Wingate v. Wooten, 5 S. & M. 245—ex. & ad. 32.
Wingate, Russ v.—30 M. 440.
Wingate, Wallace v.—6 S. & M. 151.
Wingate, Wilkinson v.—46 M. 280.
Wingate, Wooten v.—6 S. & M. 271.
Wingfield, Davis v.—42 M. 251.
Wingo v. State, 62 M. 311—crim. l. 711.
Wingo v. State, 91 M. 865—crim. l. 554.
Winn v. Barnett, 31 M. 653—ex. & ad. 415e, 425; fraud. conv. 172.
Winn v. Cole, W. 119—eject. 8; pub. lands, 97, 110, 114, 115, 135, 203, 209, 211; trial, 400.
Winn v. Dillon, 27 M. 494—princ. & a. 69; trusts, 95.
Winn v. Levy, 2 H. 902—app. & e. 881; judgm. 110, 134; plead. 431, 433.
Winn v. Skipwith, 14 S. & M. 14—bonds, 125, 128; ev. 91, 208.
Winn v. Wilkins, 35 M. 186—bills & n. 364.
Winn, Belzoni Drainage Commission v.—53 So. 778.
Winner v. Brandon, 82 M. 767—eq. 351.
Winner v. Weems, 77 M. 662—corp. 672; garn. 158.
Winner v. Williams, 82 M. 669—app. & e. 1007; fixt. 27, 159; j. p. 159.
Winner, O'Gwinn v.—25 So. 354.
Winn, Everet v.—Sm. & M. Ch. 67.
Winn, Hand v.—52 M. 784.
Winona v. Bank of Winona, 69 M. 663—mun. corp. 957.
Winona Cotton Mills, Adams v.—92 M. 743.
Winona, Thompson v.—96 M. 591.
Winslow, Mears v.—Sm. & M. Ch. 449.
Winslow, Stokes v.—31 M. 518.
Winstead v. Davis, 40 M. 785—bills & n. 352, 497; ven. & pur. 308, 308a.
Winston v. Franklin Academy, 28 M. 118—ex. & ad. 150; land. & t. 55, 61, 79, 275.
Winston v. McLendon, 43 M. 254—ex. & ad. 363, 419; hus. & w. 221; inf. 76, 89; pros. 96.
Winston v. Miller, 12 S. & M. 550—attch. 217; bills & n. 130; dism. 44; exemp. 93; judgm. 17, 119, 209; plead. 433; proc. 36.
Winston v. Otley, 25 M. 451—execution, 250, 256, 272.
Winston, Baskins v.—24 M. 431.

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[This Table refers to the topic and section of the Digest.—Vol. 1 comprises topics ABANDONMENT to EJECTMENT; Vol. 2, ELECTION OF REMEDIES to JUSTICES OF THE PEACE; Vol. 3, LANDLORD AND TENANT to TIME; Vol. 4, TORTS to WORK AND LABOR.]

Winston County Union Warehouse Co. v.—94 M. 348.
Winston, Dunn v.—31 M. 135.
Winston, Shearer v.—33 M. 149.
Winston, Smith v.—2 H. 601.
Winter v. Winter, W. 211—ex. & ad. 525.
Winter, Drane v.—41 M. 517.
Winters v. Claitor, 54 M. 341—app. & e. 384, 460, 784; bankr. 137, 343; eq. 173; fraud. conv. 103, 237; judgm. 780.
Winterton v. State, 65 M. 238—int. liq. 40.
Winterton v. Illinois Cent. R. Co. 73 M. 831—app. & e. 971; trial, 63.
Winters, Bridges v.—42 M. 135.
Winter, Spain v.—W. 152.
Wintham v. Williams, 27 M. 313—trial, 336.
Winton v. Day, 96 M. 1—tax. 615, 684.
Wiscassett Mills, McInnis v.—78 M. 52.
Wiscassett Mills, McInnis v.—17 So. 605.
Wise v. Brooks, 69 M. 891—ref. of inst. 15, 42.
Wise v. Hyatt, 68 M. 714—eq. 427; guard. & w. 99; tax. 674a; ten. in c. 20.
Wise v. Thread Co. 84 M. 200—ev. 178, 332; judgm. 768; j. p. 72.
Wise v. Wynn, 59 M. 588—ev. 289.
Wise v. Yazoo City, 96 M. 507—em. dom. 1, 8, 9; mun. corp. 57.
Wisconsin Lumber Co. v. State, 54 So. 247—const. law, 123; pub. lands, 142.
Wiseman v. Parker, 73 M. 378—home. 48, 52, 141.
Witcher v. Wilson, 47 M. 663—ex. & ad. 6, 14, 450, 544; hus. & w. 102.
Witczinski v. Everman, 51 M. 841—chat. m. 52, 145, 225; sales, 235.
Withers v. Bullock, 53 M. 539—app. & e. 906; lim. of act. 85.
Withers v. Hart, 51 So. 714—alt. inst. 26.
Withers, Commissioners of Homochitto River v.—29 M. 21.
Withers, Homochitto River Com'rs v.—29 M. 21.
Withers, Neibert v.—Sm. & M. 599.
Witherspoon v. Blewett, 47 M. 570—bailm. 23; statut. 183; trover, 6; witn. 133.
Witherspoon v. Cain, W. 407—paymt. 72; trial, 70.
Witherspoon v. Meridian, 69 M. 288—adv. pos. 4, 8; bound. 37; dedi. 19; estop. 62; high. 17, 157; mun. corp. 654.
Witherspoon v. Spring, 3 H. 60—execution, 155e.
Witherspoon, Hazlett v.—25 So. 150.
Witherspoon, Houston v.—68 M. 188.
Witherspoon, Houston v.—68 M. 190.
Witherspoon, Shurtliff v.—1 S. & M. 613.
Witherspoon, Turnbull v.—W. 351.
Withers, Robley v.—95 M. 318.
Witkowski v. Maxwell, 69 M. 56—app. & e. 1051; bills & n. 411, 420, 510; hus. & w. 44, 146½.
Witty, Ellis v.—63 M. 117.
Witty, Gamble v.—55 M. 26.
Wiygul, Kansas City &c. R. Co. v.—82 M. 223.
Woffard, Shaw v.—82 M. 143.
Wofford v. Ashcraft, 47 M. 641—eq. 346; pigs. 52; refer. 62; ven. & pur. 115, 274, 307, 308.
Wofford v. Bailey, 57 M. 239—quiet. t. 3, 13.
Wofford v. Holmes County, 44 M. 579—lost inst. 13, 17, 18; mtg. 411, 476.
Wofford, Bank of Winona v.—71 M. 711.
Wofford, Harrington v.—46 M. 31.
Wofford, Petrie v.—30 M. 698.
Wofford, Redus v.—4 S. & M. 579.
Wofford, State v.—10 S. & M. 626.
Wofford, State v.—56 So. 162.
Wohner v. Handy, 68 M. 153—attch. 355; subrog. 16.
Woldridge v. Wilkins, 3 H. 360—citiz. 13.
Wolerstein, Bunch v.—62 M. 56.
Wolf v. Johnson, 30 M. 513—land. & t. 222.
Wolf v. Kahn, 62 M. 814—attch. 63; partners. 162; princ. & a. 145.
Wolf v. Simmons, 75 M. 539—bankr. 58.
Wolf, Biles v.—49 So. 267.
Wolf, Brantly v.—60 M. 420.
Wolfe v. Angevine, 57 M. 767—forc. e. & d. 14.
Wolfe v. Brown, 11 So. 879—lim. of act. 72; tax. 410.
Wolfe v. Crawford, 54 M. 514—carr. 75; execution, 179; ship. 106.
Wolfe v. Dowell, 13 S. & M. 103—eject. 8, 15; execution, 36; judgm. 780; mtg. 315.
Wolfe v. Martin, 1 H. 30—jury, 148.
Wolfe v. Murphy, 60 M. 1—counties, 52; tax. 431, 476, 546, 734.
Wolfe v. State, 59 M. 338—guard. & w. 182a.
Wolfe, Dederick v.—68 M. 500.
Wolfe, Richardson v.—31 M. 616.
Wolfe, Southern Express Co. v.—41 M. 79.
Wolf, Faison v.—63 M. 24.
Wolf, Krippendorf v.—70 M. 81.
Wolley v. Bowie, 41 M. 553—bills & n. 540; courts, 10.
Womack v. Boyd, 31 M. 443—ex. & ad. 180, 194.
Womack v. Nichols, 39 M. 320—sheriffs, 125.
Womack, McLeod v.—50 So. 66.

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Womack, Miller v.—Freem. Ch. 486.
Womble, Massey v.—69 M. 347.
Wood v. American Life Ins. Co. 7 H. 609—app. & e. 1006, 1175; bills & n. 510; notaries, 9; trial, 82; witn. 69.
Wood v. Baily, 77 M. 815—attch. 125.
Wood v. Bott, 56 M. 128—dower, 114; ex. & ad. 175, 365; wills, 782.
Wood v. Bryant, 68 M. 198—dower, 71; partit. 12, 15, 45.
Wood v. Chickasaw County, 85 M. 120—courts, 57.
Wood v. Ford, 29 M. 57—adv. pos. 45, 61; des. & d. 91; eq. 87; ex. & ad. 314b; lim. of act. 180.
Wood v. Gibbs, 35 M. 559—bills & n. 66, 128, 397, 425; can. of i. 44; judgm. 106; new tr. 41; trial, 59.
Wood v. Henderson, 2 H. 893—guard. & w. 21.
Wood v. Meyer, 7 So. 359—corp. 460; plead. 218, 356.
Wood v. Myer, 54 So. 73—mtg. 455.
Wood v. Page, 55 M. 105—attch. 209; judgm. 17a.
Wood v. Robinson, 3 S. & M. 271—execution, 348; sheriffs, 87.
Wood v. Stafford, 50 M. 370—guard. & w. 53, 108, 118; trusts, 102.
Wood v. State, 43 M. 364—crim. l. 854.
Wood v. State, 58 M. 741—crim. l. 449.
Wood v. State, 62 M. 220—crim. l. 1035.
Wood v. State, 64 M. 761—crim. l. 700, 801, 829, 830, 1032, 1171; hom. 141, 273, 336; ind. 189.
Wood v. State, 81 M. 408—crim. l. 814; hom. 300g, 308.
Woodard, Connell v.—5 H. 665.
Woodberry v. McClurg, 78 M. 831—corp. 12, 370.
Wood, Bott v.—56 M. 136.
Wood, Boule v.—43 So. 480.
Wood, Bowles v.—90 M. 742.
Wood, Buckner v.—45 M. 57.
Woodburn, Bainbridge v.—52 M. 95.
Woodburn &c. Wheel Co. Tichenor v.—54 M. 589.
Wood, Canty v.—38 So. 315.
Wood, Chambliss v.—84 M. 209.
Wood, Grand Gulf Bank v.—12 S. & M. 482.
Wood, Grenada v.—81 M. 308.
Woodham, Cumberland Tel. Co. v.—54 So. 890.
Wood, Hooke v.—2 H. 867.
Woodhouse v. Lee, 6 S. & M. 161—abate. & r. 75, 77; dism. 23.
Woodley, Wells v.—5 H. 484.
Woodliffe v. Connor, 45 M. 552—judgm. 17d; partners. 204.
Wood Lumber Co. Parker v.—54 So. 252.
Woodman v. Fulton, 47 M. 682—eq. 452; lim. of act. 7.
Woodman, Fulton v.—40 M. 593.
Woodman, Fulton v.—54 M. 158.
Wood, Merchants' Wharfboat Assn. v.—64 M. 661.
Wood, Merchants' &c. Assn. v.—3 So. 248.
Wood, Mitchell v.—47 M. 321.
Wood, Peavy v.—71 M. 981.
Woodruff v. Okolona, 57 M. 806—estop. 80; mun. corp. 925, 940.
Woodruff v. State, 66 M. 298—lev. 34; paymt. 10; states, 146.
Woodruff v. State, 77 M. 68—const. law, 138; lev. 21, 24, 25, 27, 28, 28e, 34; lim. of act. 22, 39.
Woodruff, Sovereign Camp Woodmen of the World v.—80 M. 546.
Woodruff, State v.—81 M. 456.
Woodruff, State v.—83 M. 107.
Woodruff, State v.—83 M. 111.
Woodruff, Yazoo &c. R. Co. v.—53 So. 687.
Woods v. Bowles, 92 M. 843—home. 84.
Woods v. Buie, 5 H. 285—const. law, 169.
Woods v. Campbell, 87 M. 782—adv. pos. 6; eq. 66; home. 121; plead. 258.
Woods v. Chesborough, 95 M. 63—eq. 430.
Woods v. Davidson, 57 M. 206—costs, 127; j. p. 159.
Woods v. Elliott, 49 M. 168—ex. & ad. 481; lim. of act. 113, 114.
Woods v. Garnett, 72 M. 78—mtg. 154, 372; ven. & pur. 231, 233.
Woods v. Gibbs, 35 M. 559—new tr. 69.
Woods v. Ridley, 27 M. 119—app. & e. 202; ex. & ad. 95, 479; wills, 136, 141, 209; witn. 94.
Woods v. Riley, 72 M. 73—inj. 45; waste, 17.
Woods v. Rozelle, 75 M. 782—mtg. 374.
Woods v. State, 43 M. 364—crim. l. 854, 925.
Woods v. State, 67 M. 575—crim. l. 786; weap. 17a.
Woods v. State, 81 M. 164—crim. l. 163; ind. 124.
Woods v. State, 90 M. 245—hom. 163, 292.
Woods v. State, 43 So. 289—hom. 292.
Woods v. Sturdevant, 38 M. 68—eq. 348; ev. 589; gifts, 5; parent & c. 9.
Woods v. State, 43 M. 364—crim. l. 855.
Woodsen v. Owens, 12 So. 207—app. & e. 999; bills & n. 328; cncts. 144.
Wood, Scott v.—41 M. 661.
Woods, Davis v.—95 M. 432.

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Woods, George v.—94 M. 268.
Woodside v. State, 2 H. 655—crim. l. 1165; gr. jury, 22; hom. 200; ind. 25, 71; jury, 58, 67, 68, 70, 115, 116.
Woods, James v.—65 M. 528.
Woods, Lewis v.—4 H. 86.
Woodson v. Colored Grand Lodge of Knights of Honor of America, 52 So. 457—ins. 793.
Woodson v. Hopkins, 85 M. 171—eq. 25, 65.
Woodson v. State, 94 M. 370—crim. l. 208.
Woodson, Mitchell v.—37 M. 567.
Woods, Terry v.—6 S. & M. 139.
Woods, Vause v.—46 M. 120.
Woodville v. Jenks, 94 M. 210—app. & e. 1167; courts, 487.
Woodville, McGehee v.—59 M. 648.
Woodville, Still v.—38 M. 646.
Woodward v. Fisher, 11 S. & M. 303—ex. & ad. 411, 416, 453, 453b.
Woodward v. May, 4 H. 389—const. law, 208; jury, 10; princ. & s. 181, 189.
Woodward v. State, 89 M. 348—crim. l. 594.
Woodward, Ford v.—2 S. & M. 260.
Woodward, Purvis v.—78 M. 916.
Woodward, Purvis v.—78 M. 922.
Woodward, Ramey v.—90 M. 777.
Wood, Wilson v.—84 M. 728.
Wooldridge v. Wilkins, 3 H. 360—dower, 7, 8, 17, 86; ev. 342.
Wooldridge v. Bowmar, 64 M. 34—insolv. 80; mtg. 563.
Wooldridge v. Wilkins, 3 H. 360—app. & e. 841; dower, 28; ev. 175.
Wooldridge, King v.—78 M. 179.
Wooldridge, Whitefield v.—23 M. 183.
Wooldridge v. Campbell, 61 M. 634—trusts, 102.
Woolf, Battle v.—23 M. 318.
Woolfolk v. Cage, W. 300—attch. 3.
Woolfolk, Ray v.—1 S. & M. 523.
Woolley, Illinois Cent. R. Co. v.—77 M. 927.
Woolner v. Spalding, 65 M. 204—attch. 351; ev. 551; sheriffs, 126, 127.
Wooten v. Buchanan, 49 M. 386—paymt. 38; princ. & s. 167; subrog. 13; ven. & pur. 292.
Wooten v. Clark, 23 M. 75—bankr. 418; fraud, 13; fraud. conv. 107, 131.
Wooten v. Gwin, 56 M. 422—land. & t. 252a.
Wooten v. Miller, 7 S. & M. 380—cncts. 101, 108, 137, 138, 140; princ. & a. 78.
Wooten v. Mobile &c. R. Co. 79 M. 26—carr. 328, 347.
Wooten v. Mobile &c. R. Co. 89 M. 322—ev. 355; trial, 167.
Wooten v. Read, 2 S. & M. 585—work & lab. 18.
Wooten v. Wingate, 6 S. & M. 271—app. & e. 664; excep. 26.
Wooten, Crump v.—41 M. 611.
Wooten, Culp v.—79 M. 503.
Wooten, Ex parte, 62 M. 174—jury, 10.
Wooten, Foster v.—67 M. 540.
Wooten, Wells v.—2 Miss. Dec. 41.
Wooten, Westmoreland v.—51 M. 825.
Wooten, Whitehead v.—43 M. 523.
Wooten, Wingate v.—5 S. & M. 245.
Word v. Sykes, 61 M. 649—elec. 290, 293, 294, 299; ev. 387; witn. 297.
Work v. Glaskins, 33 M. 539—bills & n. 272; hus. & w. 85, 130, 179; interest, 18, 48.
Work v. Harper, 24 M. 517—judgm. 500, 660½, 788; release, 28; ven. & pur. 231.
Work v. Harper, 31 M. 107—execution, 126; judgm. 799; lim. of act. 98, 111; princ. & s. 168.
Work v. Mallory, 25 M. 172—costs, 232, 247.
Work, Swann v.—24 M. 439.
Work &c. Co. v. Waggoner, 82 M. 591—garn. 93, 178.
Worman, Warren v.—W. 387.
Wormley, Phillips v.—58 M. 398.
Worrell, Vicksburg Bank v.—67 M. 47.
Worrell, Warren County v.—67 M. 154.
Worsham v. McLeod, 11 So. 107—contin. 7; land. & t. 212, 231, 254; stip. 14.
Worten v. Howard, 2 S. & M. 527—abate. & r. 72; app. & e. 693; ex. & ad. 314a, 367, 383.
Wortham v. State, 59 M. 179—gaming, 94, 95; statut. 241.
Wortham v. State, 80 M. 205—crim. l. 58; int. liq. 131, 146.
Wortham, Wallace v.—25 M. 119.
Wortham, Wimberly v.—3 So. 459.
Wortheimer-Swartz Shoe Co. Broach v.—21 So. 300.
Wortheimer-Swartz Shoe Co. Broach v.—21 So. 307.
Worthington v. Wilmot, 59 M. 608—mtg. 547, 594.
Worthy, Coates v.—72 M. 575.
Woten Cotton Co. Gulf Compress Co. v.—54 So. 86.
Woulard, Marion County v.—77 M. 343.
Wragg v. Kelly, 42 M. 231—attch. 69.
Wragg, Glenn v.—41 M. 654.
Wray v. Cox, 86 M. 638—frds. st. of, 23.
Wray v. Doe—see Wray v. Ho-ya-pa-nubby.
Wray v. Doe, 10 S. & M. 452—ev. 83, 342; indians, 14, 27.
Wray v. Kelly, 53 So. 492—crim. l. 241; hab. corp. 38; statut. 190.

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Wray, Ex parte, 30 M. 673—bail, 41, 49; hom. 12, 18, 112, 231.
Wren v. Gayden, 1 H. 365—eq. 102, 150; ex. & ad. 17, 314e, 442, 527; guard. & w. 173.
Wren v. Hoffman, 41 M. 616—bills & n. 94, 352; ev. 400, 429, 432; paymt. 18; plead. 189.
Wren v. Pearce, 4 S. & M. 91—frds. st. of, 17, 108; guar. 8, 13, 82.
Wren v. Span, 1 H. 115—ex. & ad. 229, 433, 442; plead. 162, 217.
Wren, Bank of Mississippi v.—3 S. & M. 791.
Wren, Ex parte, 62 M. 512—mun. corp. 408; statut. 285, 286.
Wright v. Alexander, 11 S. & M. 411—new tr. 102; plead. 85.
Wright v. Bank of Alabama, 6 S. & M. 251—excep. 9, 13.
Wright v. Beck, 10 S. & M. 277—ex. & ad. 12.
Wright v. Bixler, W. 256—judgm. 698.
Wright v. Brander, 62 M. 82—eq. 195; ven. & pur. 280.
Wright v. Cantzon, 31 M. 514—jud. s. 41.
Wright v. Clark, 34 M. 116—bills & n. 423; trial, 252.
Wright v. Correro, 93 M. 306—trade-marks, 23.
Wright v. Craig, 92 M. 218—app. & e. 1203; land. & t. 229½, 229i.
Wright v. Frank, 61 M. 32—eq. 115, 195, 197, 225, 273, 288, 367; ven. & pur. 280.
Wright v. Hardy, 76 M. 524—cov. 77; deeds, 124; land. & t. 30, 201, 217.
Wright v. Henderson, 7 H. 539—execution, 36; fraud. conv. 207, 226.
Wright v. Lauderdale County, 71 M. 800—can. of i. 36; eq. 117; pub. lands, 124.
Wright v. Mordaunt, 77 M. 537—lim. of act. 2.
Wright v. Petrie, Sm. & M. Ch. 282—cncts. 319, 350, 547; cred. s. 1; dam. 24; execution, 40; r. r. 110, 111.
Wright v. Petrie, Sm. & M. Ch. 326—app. & e. 67.
Wright v. Shelton, Sm. & M. Ch. 399—eq. 108; garn. 3.
Wright v. Simmons, 1 S. & M. 389—j. p. 159, 174, 192.
Wright v. State, 50 M. 332—crim. l. 399; j. p. 210.
Wright v. State, 82 M. 421—crim. l. 695, 1036, 1043.
Wright v. Steamer Vesta, 5 H. 152—seals, 3.
Wright v. Walton, 56 M. 1—hus. & w. 84, 151.
Wright v. Watt, 52 M. 634—execution, 351; princ. & s. 124, 128.
Wright v. Weisinger, 5 S. & M. 210—app. & e. 1025; judgm. 16, 417, 525, 822, 937; plead. 289.
Wright v. Wright, 2 Miss. Dec. 667—div. 37, 110.
Wright, Bowles v.—34 M. 409.
Wright, Correro v.—47 So. 379.
Wright, Dickson v.—52 M. 585.
Wright, Dillard v.—11 S. & M. 455.
Wright, Flanneken v.—64 M. 217.
Wright, Geren v.—8 S. & M. 360.
Wright, Gleason v.—53 M. 247.
Wright, Houck v.—77 M. 476.
Wright, Houck v.—23 So. 422.
Wright, Hunt v.—70 M. 298.
Wright, Leath v.—2 H. 774.
Wright, New v.—44 M. 202.
Wright, Petrie v.—6 S. & M. 647.
Wright, Powers v.—62 M. 35.
Wright, Rice v.—48 M. 679.
Wright, Taylor v.—54 M. 722.
Wright, Yazoo &c. R. Co. v.—78 M. 125.
W. T. Adams Mach Co. v. Thomas, 87 M. 391—set-off, 35.
Wyatt v. Beaty, 10 S. & M. 463—judgm. 753.
Wyatt v. Brown, 8 S. & M. 365—dower, 7, 44.
Wyatt v. Wyatt, 81 M. 219—des. & d. 62; fraud. conv. 172; hus. & w. 277; lim. of act. 73; ten. in c. 19.
Wyatt, Starling v.—27 So. 526.
Wyatt, Thomas v.—9 S. & M. 308.
Wynn, Arnold v.—26 M. 338.
Wynn, Cockerel v.—12 S. & M. 117.
Wynne v. Mason, 72 M. 424—estop. 70, 101; fraud. conv. 95, 103, 172; hus. & w. 47; inj. 188.
Wynne v. Mississippi &c. R. Co. 45 M. 569—sheriffs, 43, 48, 49.
Wynne, Doe v.—23 M. 251.
Wynne, Miss. &c. R. Co. v.—42 M. 315.
Wynn v. State, 63 M. 260—crim. l. 59.
Wynn v. State, 67 M. 312—offic. 18; schools, 48.
Wynn v. Stone, 69 M. 80—lev. 2, 28g.
Wynn, Wise v.—59 M. 588.
Wyse v. Dandridge, 35 M. 672—chat. m. 82; sales, 234; trusts, 2, 203.

Y

Yager, Mechanics' Bank v.—62 M. 529.
Yalabusha County v. Carbry, 3 S. & M. 529—app. & e. 840; cert. 62; counties, 47, 50, 57, 58, 205, 208; venue, 36.
Yalabusha County v. Ray, 12 S. & M. 342—mand. 57, 179.
Yalabusha, Rotenberry v.—67 M. 470.

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Yale v. Baum, 70 M. 225, 11 So. 879—inj. 181, 244, 251; judgm. 570.
Yale v. McLaurin, 66 M. 461—exemp. 50.
Yale v. McDaniel, 69 M. 337—attch. 2, 74, 154.
Yale v. McLaurin, 66 M. 461—exemp. 50.
Yale v. Taylor Mfg. Co. 63 M. 598—princ. & a. 143, 145.
Yale, Hooker v.—56 M. 197.
Yancy, Benbrook v.—96 M. 536.
Yandell v. Madison County, 79 M. 212—counties, 205; work & lab. 8.
Yandell v. Madison County, 81 M. 288—health, 7.
Yandell v. Pugh, 53 M. 295—dower, 112, 114; ex. & ad. 319, 334, 410, 453; judgm. 678; lim. of act. 105; tax. 764, 819.
Yarborough v. Harper, 25 M. 112—execution, 188; sheriffs, 113.
Yarborough v. Thompson, 3 S. & M. 291—garn. 143; interpl. 4, 5.
Yarborough, Knight v.—7 S. & M. 179.
Yarbrough v. Gilland, 77 M. 139—lim. of act. 140, 150.
Yarbrough v. State, 70 M. 593—crim. l. 721.
Yarrell, McCorkle v.—55 M. 576.
Yates v. Clark, 56 M. 212—ex. & ad. 26, 34, 138, 145; powers, 33.
Mead, 68 M. 787—judgm. 899; mtg. 186; subrog. 34.
Yates v. Mead, 69 M. 473—inj. 234.
Yates, Peeples v.—88 M. 289.
Yates, Pickering v.—36 So. 10.
Yates, Randel v.—48 M. 685.
Yazoo City v. Birchett, 89 M. 700—electr. 12; mun. corp. 733.
Yazoo City v. Lightcap, 82 M. 148—const. law, 63; mun. corp. 9, 10, 918.
Yazoo City v. State, 48 M. 440—int. liq. 95; statut. 95.
Yazoo City, Booze v.—94 M. 428.
Yazoo City, Love v.—91 M. 535.
Yazoo City, Mann v.—31 M. 574.
Yazoo City, People's Ware House Co. v.—52 So. 481.
Yazoo City, Thomas v.—95 M. 395.
Yazoo City Transp. Co. v. Smith, 78 M. 140—mast. & s. 204, 217.
Yazoo City, White v.—27 M. 357.
Yazoo City, Wise v.—96 M. 507.
Yazoo County, Carraway v.—1 H. 21.
Yazoo County, Commercial Bank v.—6 H. 530.
Yazoo Delta Investment Co. v. Suddoth, 70 M. 416—tax. 489, 495.
Yazoo Delta Lumber Co. Eastland v.—90 M. 330.
Yazoo, Delta Lumber Co. McMahon v.—92 M. 459.
Yazoo Library Assn. Yazoo Public Schools v.—12 So. 30.
Yazoo Lumber Co. v. Clark, 86 M. 288—home. 118a.
Yazoo Lumber Co. v. Clark, 95 M. 244—estop. 54.
Yazoo-Mississippi Delta v. Lee, 85 M. 508—app. & e. 1051.
Yazoo-Mississippi Delta Board v. Dancy, 3 So. 568—em. dom. 2, 250, 267.
Yazoo-Mississippi Delta, Bobo v.—92 M. 792.
Yazoo Miss. Delta, Dorr v.—28 So. 938.
Yazoo Mississippi Delta, Ham v.—83 M. 534.
Yazoo-Miss. Delta Levee Board, Owens v.—74 M. 269.
Yazoo-Mississippi Delta, State v.—96 M. 677.
Yazoo & Mississippi Delta v. Short, 38 So. 330—lev. 14, 24.
Yazoo Public Schools v. Yazoo Library Assn. 12 So. 30—schools, 66.
Yazoo &c. R. Co. v. Adams. See Adams v. Yazoo &c. R. Co; Gulf &c. R. Co. v. Adams.
Yazoo &c. R. Co. v. Adams, 73 M. 648—tax. 389, 606.
Yazoo &c. R. Co. v. Adams, 76 M. 545—mun. corp. 967; tax. 124½, 204.
Yazoo &c. R. Co. v. Adams, 77 M. 194—tax. 192.
Yazoo &c. R. Co. v. Adams, 77 M. 764—const. law, 229, 284; tax. 362, 634.
Yazoo &c. R. Co. v. Adams, 77 M. 780—plead. 217; tax. 196.
Yazoo &c. R. Co. v. Adams, 78 M. 977—app. & e. 238; inj. 244.
Yazoo &c. R. Co. v. Adams, 81 M. 90—app. & e. 747, 856; courts, 93; eq. 324; judgm. 714; rem. of c. 25; tax. 196, 203, 231, 248, 389.
Yazoo &c. R. Co. v. Adams, 90 M. 559—const. law, 287.
Yazoo &c. R. Co. v. Adams, 31 So. 427—em. dom. 150, 224.
Yazoo &c. R. Co. v. Adams, 52 So. 794—r. r. 112.
Yazoo &c. R. Co. v. Aden, 77 M. 382—carr. 254, 347.
Yazoo &c. R Co. v. Anderson, 76 M. 582—r. r. 102.
Yazoo &c. R. Co. v. Anderson, 77 M. 28—carr. 352.
Yazoo &c. R. Co. v. Baldwin, 78 M. 57—cncts. 324, 328.

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Yazoo &c. R. Co. v. Barrow, 89 M. 808—cov. 123.

Yazoo &c. R. Co. v. Beattie, 49 So. 609—carr. 303, 347; dam. 132.

Yazoo &c. R. Co. v. Bent, 94 M. 681—carr. 11, 52, 63; com. 61; const. law, 297.

Yazoo &c. R. Co. v. Block, 86 M. 426—mast. & s. 198, 249.

Yazoo &c. R. Co. v. Blum, 89 M. 242—carr. 99.

Yazoo &c. R. Co. v. Blum Co. 88 M. 180—carr. 98, 99.

Yazoo &c. R. Co. v. Bruce, 54 So. 241—trial, 253.

Yazoo &c. R. Co. v. Brown, 54 So. 804—waters, 171.

Yazoo &c. R. Co. v. Brumfield, 64 M. 637—r. r. 419.

Yazoo &c. R. Co. v. Byrd, 89 M. 308—app. & e. 884; carr. 321, 331, 340, 348.

Yazoo &c. R. Co. v. Christmas, 89 M. 686—carr. 105, 106, 193.

Yazoo &c. R. Co. v. Cobb, 94 M. 561—dam. 131; mast. & s. 139.

Yazoo &c. R. Co. v. Cox, 40 So. 547—carr. 228.

Yazoo &c. R. Co. v. Darden, 34 So. 386—r. r. 104.

Yazoo &c. R. Co. v. Davis, 73 M. 678—em. dom. 92; waters, 54, 62.

Yazoo &c. R. Co. v. Eakin, 79 M. 735—r. r. 327, 401.

Yazoo &c. R. Co. v. Edwards, 78 M. 950—abst. of t. 3; statut. 99.

Yazoo &c. R. Co. v. Farr, 94 M. 557—death, 99; mast. & s. 247, 264.

Yazoo &c. R. Co. v. Faust, 32 So. 9—carr. 277a.

Yazoo &c. R. Co. v. Faust, 34 So. 356—carr. 277b.

Yazoo &c. R. Co. v. Fitzgerald, 50 So. 631—carr. 283, 319.

Yazoo &c. R. Co. v. Foster, 23 So. 581—tel. & t. 53.

Yazoo &c. R. Co. v. Fulton, 71 M. 385—acc. & s. 15, 17; garn. 188, 229, 232.

Yazoo &c. R. Co. v. Georgia Home Ins. Co. 85 M. 7—carr. 391.

Yazoo &c. R. Co. v. Grant, 86 M. 565—carr. 307, 315, 319; dam. 129; plead. 132; trial, 59.

Yazoo &c. R. Co. v. Greenwood Grocery Co. 51 So. 450—com. 56.

Yazoo &c. R. Co. v. Hardie, 55 So. 42—carr. 276, 277a.

Yazoo &c. R. Co. v. Hardie, 55 So. 967—app. & e. 880; carr. 271; dam. 87, 91.

Yazoo &c. R. Co. v. Harrington, 85 M. 366—const. law, 297; r. r. 103.

Yazoo &c. R. Co. v. Hubbard, 85 M. 480—dam. 107; r. r. 104.

Yazoo &c. R. Co. v. Hughes, 94 M. 242—bailm. 31; carr. 141; wareh. 24, 34.

Yazoo &c. R. Co. v. Hughes, 50 So. 627—carr. 277a.

Yazoo &c. R. Co. v. Humphrey, 83 M. 721—carr. 266, 315, 316, 318, 324, 329, 345, 348.

Yazoo &c. R. Co. v. Jeffries, 55 So. 354—ex. & ad. 32.

Yazoo &c. R. Co. v. Jennings, 90 M. 93—em. dom. 203, 150.

Yazoo &c. R. Co. v. Jones, 73 M. 229—ev. 120, 243; r. r. 481.

Yazoo &c. R. Co. v. Kelly, 53 So. 779—dam. 131; trial, 296.

Yazoo &c. R. Co. v. Keystone Lumber Co. 90 M. 391—carr. 10, 20.

Yazoo &c. R. Co. v. Lambuth, 74 M. 758—r. r. 443.

Yazoo &c. R. Co. v. Landrum, 89 M. 399—r. r. 251.

Yazoo &c. R. Co. v. Lane, 46 So. 959—dam. 132.

Yazoo &c. R. Co. v. Lefoldt, 87 M. 317—em. dom. 6.

Yazoo &c. R. Co. v. Love, 69 M. 109—tax. 549.

Yazoo &c. R. Co. v. McKay, 91 M. 138—carr. 99.

Yazoo &c. R. Co. v. McLarty, 71 M. 755—tax. 679.

Yazoo &c. R. Co. v. Martin, 29 So. 829—app. & e. 1063; carr. 283; r. r. 282.

Yazoo &c. R. Co. v. Martin, 94 M. 700—ev. 440; r. r. 171.

Yazoo & M. V. R. Co. v. Mattingly, 37 So. 708—carr. 277a, 277b; dam. 87.

Yazoo &c. R. Co. v. Metcalf, 84 M. 242—r. r. 231, 274, 278, 358.

Yazoo &c. R. Co. v. Millsaps, 76 M. 855—carr. 99, 123, 135.

Yazoo &c. R. Co. v. Mitchell, 83 M. 179—carr. 277, 278; dam. 208.

Yazoo &c. R. Co. v. Neal, 93 M. 680—comp. 14; r. r. 104.

Yazoo &c. R. Co. v. Parker, 88 M. 193—mast. & s. 228.

Yazoo &c. R. Co. v. Payne, 92 M. 126—j. p. 44.

Yazoo &c. R. Co. v. Payne, 93 M. 50—spec. perf. 4, 62.

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Yazoo &c. R. Co. v. Reid, 90 M. 616—app. & e. 69.
Yazoo &c. R. Co. v. Rivers, 93 M. 557—app. & e. 1053; libel, 102; lim. of act. 127; trial, 126.
Yazoo &c. R. Co. v. Roberts, 88 M. 80—carr. 305, 316, 328; jury, 131.
Yazoo &c. R. Co. v. Rodgers, 80 M. 200—carr. 356.
Yazoo &c. R. Co. v. Sallis, 89 M. 636—r. r. 103, 104.
Yazoo &c. R. Co. v. Sanders, 87 M. 607—nuis. 50.
Yazoo &c. R. Co. v. Schraag, 84 M. 125—app. & e. 193, 231; mast. & s. 87, 198, 216, 259, 264, 289; plead. 433.
Yazoo &c. R. Co. v. Scott, 95 M. 43—dam. 132; mast. & s. 228, 281.
Yazoo &c. R. Co. v. Searles, 85 M. 520—carr. 39, 100, 188; const. law, 89; cncts. 103; monop. 8, 11, 16, 28.
Yazoo &c. R. Co. v. Shelby, 95 M. 155—carr. 283.
Yazoo &c. R. Co. v. Slaughter, 92 M. 289—mast. & s. 88, 114, 265; neg. 94.
Yazoo &c. R. Co. v. Smith, 68 M. 359—r. r. 419.
Yazoo &c. R. Co. v. Smith, 82 M. 656—carr. 277a; trial, 252, 295.
Yazoo &c. R. Co. v. Smith, 90 M. 44—release, 35.
Yazoo &c. R. Co. v. Southern Ry. Co. 83 M. 746—r. r. 119; statut. 75, 79.
Yazoo &c. R. Co. v. Stansberry, 53 So. 389—mast. & s. 88.
Yazoo &c. R. Co. v. Thomas, 65 M. 553—tax. 204, 205.
Yazoo &c. R. Co. v. Wallace, 90 M. 609—app. & e. 1140; const. law, 329; plead. 64.
Yazoo &c. R. Co. v. Wallace, 91 M. 492—dam. 132.
Yazoo &c. R. Co. v. Washington, 92 M. 129—death, 31; mast. & s. 294.
Yazoo &c. R. Co. v. Watson, 82 M. 89—r. r. 303.
Yazoo &c. R. Co. v. West, 78 M. 789—tax. 573, 589, 656.
Yazoo &c. R. Co. v. Whittington, 74 M. 410—r. r. 419.
Yazoo &c. R. Co. v. White, 82 M. 120—carr. 278.
Yazoo &c. R. Co. v. Williams, 67 M. 18—app. & e. 698, 712, 999.
Yazoo &c. R. Co. v. Williams, 87 M. 344—app. & e. 1063; carr. 384; dam. 87, 94, 215; trial, 285, 295.
Yazoo &c. R. Co. v. Wilson, 83 M. 224—assign. 76; carr. 104; parties, 4.
Yazoo &c. R. Co. v. Woodruff, 53 So. 687—app. & e. 179; mast. & s. 204, 264.
Yazoo &c R. Co. v. Wright, 78 M. 125—r. r. 405, 419.
Yazoo &c. R. Co. v. Young, 28 So. 826—r. r. 411.
Yazoo &c. R. Co. Adams v.—75 M. 275.
Yazoo &c. R. Co. Adams v.—77 M. 194.
Yazoo &c. R. Co. Allen v.—88 M. 25.
Yazoo &c. R. Co. Andrews v.—86 M. 129.
Yazoo &c. R. Co. Arbour v.—96 M. 340.
Yazoo &c. R. Co. Archer v.—82 M. 110.
Yazoo &c. R. Co. Belzoni Oil Co. v.—94 M. 58.
Yazoo &c. R. Co. Board of Levee Com'rs v.—25 So. 664.
Yazoo &c. R. Co. Brown v.—88 M. 687.
Yazoo &c. R. Co. Busby v.—90 M. 13.
Yazoo &c. R. Co. Campbell v.—95 M. 309.
Yazoo &c. R. Co. Clarksdale v.—29 So. 93.
Yazoo &c. R. Co. Coleman v.—90 M. 629.
Yazoo &c. R. Co. Conners v.—86 M. 356.
Yazoo &c. R. Co. Cooper v.—82 M. 634.
Yazoo &c. R. Co. Cumberland &c. Tel. Co. v.—90 M. 686.
Yazoo &c. R. Co. Dampf v.—95 M. 85.
Yazoo &c. R. Co. Davis v.—95 M. 540.
Yazoo &c. R. Co. Dougherty v.—84 M. 502.
Yazoo &c. R. Co. Drake v.—79 M. 84.
Yazoo &c. R. Co. Foster v.—72 M. 886.
Yazoo &c. R. Co. Gibbons v.—33 So. 5.
Yazoo &c. R. Co. Gibson v.—43 So. 674.
Yazoo &c. R. Co. Hamilton v.—72 M. 39.
Yazoo &c. R. Co. Hamlin v.—72 M. 39.
Yazoo &c. R. Co. Hollonshed v.—55 So. 40.
Yazoo &c. R. Co. Irwin v.—55 So. 49.
Yazoo &c. R. Co. Johnson v.—94 M. 447.
Yazoo &c. R. Co. Jones v.—90 M. 547.
Yazoo &c. R. Co. Kent v.—77 M. 494.
Yazoo &c. R. Co. Keystone Lumber Yard v.—94 M. 192.
Yazoo &c. R. Co. Keystone Lumber Yard v.—96 M. 116.
Yazoo &c. R. Co. Keystone Lumber Yard v.—53 So. 8.
Yazoo &c. R. Co. King v.—87 M. 270.
Yazoo &c. R. Co. Kittle v.—92 M. 381.
Yazoo &c. R. Co. Metcalf v.—52 So. 355.
Yazoo &c. R. Co. Morehead v.—84 M. 112.
Yazoo &c. R. Co. Murdock v.—77 M. 25.
Yazoo &c. R. Co. Murdock v.—29 So. 25.
Yazoo &c. R. Co. O'Kelly v.—94 M. 635.
Yazoo &c. R. Co. Owens v.—74 M. 821.
Yazoo &c. R. Co. Owens v.—94 M. 378.
Yazoo &c. R. Co. Paxton v.—76 M. 536.

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Yazoo &c. R. Co. Reid v.—74 M. 769.
Yazoo &c. R. Co. Reid v.—94 M. 639.
Yazoo &c. R. Co. Rivers v.—90 M. 196.
Yazoo &c. R. Co. Romano v.—87 M. 721.
Yazoo &c. R. Co. Scott v.—72 M. 37.
Yazoo &c. R. Co. Silver Creek Nav. &c. Co. v. —90 M. 345.
Yazoo &c R. Co. Sims v.—38 M. 23.
Yazoo &c. R. Co. Sledge v.—87 M. 566.
Yazoo &c. R. Co. State v.—87 M. 679.
Yazoo &c. R. Co. Stevens v.—81 M. 195.
Yazoo &c. R. Co. Stone v.—62 M. 607.
Yazoo &c. R. Co. Sullivan v.—85 M. 649.
Yazoo &c. R. Co. Tate v.—78 M. 842.
Yazoo &c. R. Co. Thompson v.—72 M. 715.
Yazoo &c. R. Co. Toler v.—31 So. 788.
Yazoo &c. R. Co. Turner v.—33 So. 283.
Yazoo &c. R. Co. Vicksburg Waterworks Co. v.—96 M. 807.
Yazoo &c. R. Co. Ward v.—79 M. 145.
Yazoo &c. R. Co. Whitlock v.—91 M. 779.
Yazoo &c. R. Co. Williams v.—82 M. 659.
Yazoo &c. R. Co. Williams v.—93 M. 77.
Yazoo &c. R. Co. Wilmot v.—76 M. 374.
Yeager v. Knight, 60 M. 730—inf. 25, 93.
Yeamans, Detterly v.—39 M. 475.
Yeates v. Mead, 65 M. 89—execution, 172; ven. & pur. 238.
Yeizer v. Burke, 3 S. & M. 439—afft. 11; app. & e. 194; eq. 71, 320, 330; execution, 169; judgm. 428, 437.
Yeizer, Burn v.—27 M. 188.
Yellowly v. Beardsley, 76 M. 613—mtg. 352, 354, 372.
Yerby, Davis v.—Sm. & M. Ch. 508.
Yerby, Prosser v.—1 H. 87.
Yerger v. Carter Dry Goods Co. 27 So. 989—assign. f. b. c. 135.
Yerger v. Ferguson, 55 M. 190—ex. & ad. 327, 337, 345, 351; insolv. 82; jud. s. 11.
Yerger v. Foote, 48 M. 62—ex. & ad. 333; paymt. 18.
Yerger v. Greenwood, 77 M. 378—app. & e. 546; mun. corp. 33.
Yerger v. State, 91 M. 802—prisons, 5, 9; quo w. 25; statut. 187.
Yerger, Hebron v.—65 M. 548.
Yerger, Helm v.—61 M. 44.
Yerger, Miazza v.—53 M. 135.
Yocona Mills v. Gibbs, 27 So. 647—inj. 191.
Yoder, Carlisle v.—69 M. 384.
Yongue v. Billups, 23 M. 407—new tr. 96.
York v. Crawford, 42 M. 508—dam. 197; judgm. 128a; proc. 134.
Yost v. Alderson, 58 M. 40—eq. 419.
Young v. Barr, 69 M. 879—forc. e. & d. 14.
Young v. Bumpass, Freem. Ch. 241—fraud, 15, 24, 25.
Young v. Cook, 30 M. 320—lim. of act. 5, 95, 100, 101; wills, 745.
Young v. Elgin, 27 So. 595—app. & e. 1007; deeds, 55.
Young v. Englehard, 1 H. 19—new tr. 162.
Young v. Hughes, 12 S. & M. 93—const. law, 50; states, 127; trusts, 245.
Young v. Illinois Cent. R. Co. 88 M. 446—r. r. 415, 441, 446.
Young v. Jacoway, 9 S. & M. 212—ev. 461.
Young v. Leflore County, 81 M. 466—counties, 205.
Young v. Mock, 79 M. 714—partners. 209.
Young v. Pickens, 45 M. 553—abate. & r. 71. attch. 337, 351; judgm. 860; replev. 123; slaves, 24.
Young v. Power, 41 M. 197—acc. & s. 4; ev. 267; gifts, 17, 33; release, 1; trial, 242.
Young v. Rankin, 4 H. 27—appr. 7, 24.
Young v. Ross, 31 M. 556—ex. & ad. 296.
Young v. Salley, 83 M. 362—sales, 471, 478.
Young v. Southern R. Co. 52 So. 19—r. r. 358.
Young v. State, 2 H. 865—ind. 7.
Young v. State, 24 So. 316—crim. l. 1094, 1144.
Young v. State Life Ins. Co. 91 M. 710—cncts. 103, 104.
Young v. Surget, 34 So. 322—app. & e. 928.
Young v. Thompson, 3 S. & M. 129—slaves, 8.
Young v. Walker, 70 M. 813—app. & e. 1185; estop. 92; inf. 29; lim. of act. 130.
Young v. Wark, 76 M. 829—wills, 94, 262.
Young v. White, 25 M. 146—fraud. conv. 276.
Young v. Wilson, 24 M. 694—app. & e. 1003; new tr. 71.
Young v. Young, 25 M. 38—gifts, 17.
Young, Ashley v.—79 M. 129.
Young, Barrier v.—96 M. 160.
Young, Billingslea v.—33 M. 95.
Young, Campbell v.—3 H. 301.
Young, Crocket v.—1 S. & M. 241.
Young, Dean v.—13 S. & M. 118.
Young, McCaughan v.—85 M. 277.
Young, Magee v.—40 M. 164.
Young, Nash v.—31 M. 134.
Young, Pearce v.—W. 259.
Young, Sanders v.—31 M. 111.
Young, Shattuck v.—2 S. & M. 30.
Young, Thompson v.—30 M. 17.
Young, Tishomingo Sav. Inst. v.—87 M. 473.
Young, Yazoo &c. R. Co. v.—28 So. 826.

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Z

Zackery v. Mobile &c. R. Co. 74 M. 520—carr. 236.
Zecharie v. Bowers. See Kerr v. Bowers.
Zecharie v. Bowers, 1 S. & M. 584—cred. s. 11.
Zecharie v. Bowers, 3 S. & M. 641—eq. 418.
Zeigler v. Mobile &c. R. Co. 87 M. 367—carr. 404, 408.
Zeigler, Alexander v.—84 M. 560.
Zeigler, Catchot v.—92 M. 191.
Zellnor, Whitfield v.—24 M. 663.
Zemurray v. Bouldin, 87 M. 583—licens. 8, 36, 41.
Zimmerman v. Planters' &c. Assn. 1 Miss. Dec. 256—trusts, 181.
Zimmerman Lumber Co. v. Elder, 29 So. 466—land. & t. 246.
Zimmerman Lumber Co. Van Duzer v.—43 So. 177.
Zimmerman, Scharff v.—60 M. 760.
Zingerling v. Henderson, 18 So. 432—tax. 679, 802.
Zollicoffer, Tucker v.—12 S. & M. 591.
Zook, Wilson v.—69 M. 694.
Zukoski v. McIntyre, 93 M. 806—execution, 21; home. 5, 33, 118a, 167; quiet. t. 9.
Zukoski v. McIntyre, 47 So. 666—app. & e. 1178.

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Cases Which Construe the Various Constitutions and Statutes of Mississippi.

CONSTITUTIONS CONSTRUED

CONSTITUTION 1817.

Article 1, Sections 6, 7, 8.

Libel. Instructions. Reading law books in argument.

Oakes v. State, — M. —, 54 So. 79.

Article 4, Section 7.

Authorizes legislature to establish in each county, court of probate for granting of letters testamentary, &c.

Servis v. Beatty, 32 M. 52.

Article 5, Section 3.

State to be divided into convenient court districts. Territorial extent. Const. 1890, § 152.

Hinton v. Perry County, 84 M. 536, 36 So. 565.

Article 5, Section 8.

Justices of peace. Jurisdiction. "Amount in controversy."

Planters' Bank v. Coulson, 6 H. 395.

Bell v. West Point, 51 M. 262.

Article 6, Section 8.

No money to be drawn from treasury but in consequence of appropriation made by law.

Colbert v. State, 86 M. 769, 30 So. 65.

Article 6, Section 19.

New counties. Area. Const. 1890, § 260.

Hinton v. Perry County, 84 M. 536, 36 So. 565.

Article "Mode of Revising" &c. Section 1.

Amendment. Const. 1890, § 273.

State v. Powell, 77 M. 543, 27 So. 927, 48 L. R. A. 652.

Schedule, Section 5.

English statutes of no effect in this state.

Boarman v. Catlett, 13 S. & M. 149.

CONSTITUTION 1832.

Article 1, Section 1.

Exclusive privilege non-grantable by legislature to any person, &c., except in consideration, &c. Invalidates Poindexter's Code, p. 142, § 160.

Smith v. Smith, 1 H. 102.

Woodward v. May, 4 H. 389.

See Scott v. Nichols, 27 M. 94, 61 Am. Dec. 503n.

Denies power to legislature to grant exclusive privilege to any person, &c., except, &c. Unviolated by H. & H., pp. 558–564, §§ 46–67.

Peck v. Critchlow, 7 H. 243.

Article 1, Section 2.

Political power inherent in people. Laws 1858, p. 33.

Alcorn v. Hamer, 38 M. 652.

Article 1, Section 10.

Accused in criminal prosecution has right to demand nature and cause of accusation against him. Certainty in indictment.

Norris v. State, 33 M. 373.

Impartial jury of county where offense was committed. Division of county into court districts.

Alfred v. State, 37 M. 296, 2 Mor. St. Cas. 1235.

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Lindsley v. Coahoma County, 69 M. 815, 11 So. 336.
See Hinton v. Perry County, 84 M. 536, 36 So. 565.
Native Lumber Co. v. Harrison County, 89 M. 171, 42 So. 665.

Does not invalidate Code 1857, p. 616, art. 265. Neither means, mode, nor circumstances of commission of murder, necessarily embraced in "nature and cause of accusation."

Newcomb v. State, 37 M. 383, 2 Mor. St. Cas. 1303.

Forbids deprivation of property, but by due course of law. Invalidates so much of Laws 1850, p. 50, ch. 2, as provides for forfeiture on failure to pay taxes due.

Griffin v. Mixon, 38 M. 424.

Prohibits deprivation of property without due process of law. Does not invalidate act of February 6, 1860.

Nash v. Fletcher, 44 M. 609.

Article 1, Section 13.

Eminent domain. "Just compensation." Laws 1850, p. 50.

Griffin v. Mixon, 38 M. 424.

Article 1, Section 14.

Justice to be administered without sale, denial or delay. Terms of high court.

Opinion of the Court, 41 M. 54.

Article 1, Section 19.

Obligation of contracts declared inviolable by legislation. Laws 1852, p. 66, ch. 36.

Morrison v. McDaniel, 30 M. 213.

Inviolability of contracts. Unrestrictive of legislature's general right to legislate concerning divorces. Does not invalidate Laws 1860, p. 202.

Carson v. Carson, 40 M. 349.

Prohibits legislative impairment of obligation of contracts. Does not invalidate Laws 1867, p. 373, ch. 282.

Cowan v. McCutchen, 43 M. 207.

Article 1, Section 28.

Right to trial by jury to remain inviolate. Poindexter's Code, p. 142, § 160.

Smith v. Smith, 1 H. 102.
Woodward v. May, 4 H. 389.
See Peck v. Critchlow, 7 H. 243.
Scott v. Nichols, 27 M. 94, 61 Am. Dec. 503n.

Guarantees right of trial by jury. Does not invalidate H. & H., p. 642, § 42.

Lewis v. Garrett, 5 H. 434.

Article 1, Section 30.

Did not abolish office of notary public. Laws 1834, p. 29, § 3.

Dennistoun v. Potts, 26 M. 13.

Article 2, Section 4.

Legislative power cannot be delegated by legislature to whole, or any portion, of people, &c. Laws 1858, p. 33.

Alcorn v. Hamer, 38 M. 652.

Article 3, Section 4.

Legislature. Style of laws.

Swann v. Buck, 40 M. 268.

Article 3, Section 26.

Operates of own force to avoid appointment of member of legislature to office created during his term of service.

Shelby v. Alcorn, 36 M. 273, 72 Am. Dec. 169n.
See Brady v. Howe, 50 M. 607.

Prohibits appointment of senator or representative to any civil office created during his term.

Sublett v. Bedwell, 47 M. 266, 12 Am. Rep. 338n.

Article 4, Section 4.

Right of high court to review judgment for contempt on writ of error.

Watson v. Williams, 36 M. 331.
Shattuck v. State, 51 M. 50, 24 Am. Rep. 624.

Jurisdiction of high court. Does not invalidate Code 1857, p. 419, art. 33, making judgment of circuit court on appeal from board of police, final.

Dismukes v. Stokes, 41 M. 430.

High court. Jurisdiction.

Bank of Mississippi v. Duncan, 52 M. 740.

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Article 4, Section 7.

High court to be held twice in each year at such place as legislature shall direct, &c. "Due course of law."

Coffman v. Bank of Kentucky, 40 M. 29, 90 Am. Dec. 311.

Terms of high court: place of holding.

Opinion of the Court, 41 M. 54.

Article 4, Section 13.

Circuit judges to be elected by qualified electors of each judicial district.

Leachman v. Musgrove, 45 M. 511.

State to be divided into convenient court districts. Extent.

Alfred v. State, 37 M. 296, 2 Mor. St. Cas. 1235.

See Hinton v. Perry County, 84 M. 536, 36 So. 565.

Article 4, Section 14.

Circuit court. Jurisdiction.

Swann v. Buck, 40 M. 268.

Article 4, Section 15.

Circuit court to be held in each county at least twice in each year. "Due course of law."

Coffman v. Bank of Kentucky, 40 M. 29, 90 Am. Dec. 311.

See Alfred v. State, 37 M. 296, 2 Mor. St. Cas. 1235.

Article 4, Section 16.

Superior courts of chancery. Jurisdiction.

Blanton v. King, 2 H. 856.

Carmichael v. Browder, 3 H. 252.

Servis v. Beatty, 32 M. 52.

Suits against state, involving matters either of law or equity, may be brought in superior court of chancery.

Farish v. State, 4 H. 170.

Chancery court. Jurisdiction embraces that conferred by foreign attachment law, H. C., pp. 801, 823.

Freeman v. Guion, 11 S. & M. 58.

Not abrogated by void act of March 2, 1854.

Green v. Weller, 32 M. 650.

Chancery court. "Full jurisdiction." Bond of receiver.

Bank of Mississippi v. Duncan, 52 M. 740.

Chancery court, without jurisdiction to order sale, on petition of life tenant, for purpose of reinvestment, &c., of estate of infant remaindermen.

Hoskins v. Ames, 78 M. 986, 29 So. 828.

Article 4, Section 18.

Courts of probate. Jurisdiction.

Blanton v. King, 2 H. 856.

Carmichael v. Browder, 3 H. 252.

Servis v. Beatty, 32 M. 52.

Probate court. Jurisdiction in matter of "allotment" of dower.

Jiggitts v. Bennett, 31 M. 610.

See Jiggitts v. Jiggitts, 40 M. 718.

Authorizes establishment of courts of probate. Jurisdiction. "Fatherless child."

Stewart v. Morrison, 38 M. 417.

Ex parte Atkinson, 40 M. 17.

Earle v. Crum, 42 M. 165.

Probate court cannot appoint guardian for minor, resident in foreign county.

Duke v. State, 57 M. 229.

Article 4, Section 19.

Clerk of high court. Act approved February 21, 1867.

Opinion of the Court, 41 M. 54.

Article 4, Section 20.

Boards of police. Right to locate county seat. "Police."

Monet v. Jones, 10 S. & M. 237.

Boards of police. Majority of each may transact business. Jurisdiction. Power to build or repair court-houses.

Odineal v. Barry, 24 M. 9.

Boards of police. "Full jurisdiction over roads, highways, and ferries."

Tegarden v. McBean, 33 M. 283.

Jurisdiction of boards of supervisors. Ferries. Power of legislature to license.

Blake v. McCarty, 56 M. 654.

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Article 4, Section 23.
Justices of peace. Jurisdiction.
Planters' Bank v. Coulson, 6 H. 395.
Bell v. West Point, 51 M. 262.

Article 4, Section 24.
Authorizes legislature to establish other necessary inferior courts and abolish same whenever expedient.
Bank of Mississippi v. Duncan, 52 M. 740.

Article 5, Section 13.
Authorizes legislature to provide for filling of all vacancies for which no provision is therein made. District attorney.
Keithler v. State, 10 S. & M. 192, 1 Mor. St. Cas, 403.
Filling vacancies in offices.
Brady v. Howe, 50 M. 607.

Article 5, Section 16.
Orders, resolutions, &c. Approval by governor.
Swann v. Buck, 40 M. 268.

Article 7, Section 2.
Contracts for purchase of slaves, introduced into this state as merchandise or for sale since May 1, 1833, are void.
Green v. Robinson, 5 H. 80.
Glidewell v. Hite, 5 H. 110.
Cowen v. Boyce, 5 H. 769.
Brien v. Williamson, 7 H. 14.
Wooten v. Miller, 7 S. & M. 380.
Hoover v. Pierce, 26 M. 627.
See Deans v. McLendon, 30 M. 343.
Mitchell v. Wells, 37 M. 235.
Barker v. Justice, 41 M. 240.

Article 7, Section 6.
Laws of general nature. Time of taking effect. Laws 1865, p. 256, ch. 105.
Swann v. Buck, 40 M. 268.

Article 7, Section 7.
No money to be drawn from treasury but in consequence of appropriation made by law.
Swann v. Buck, 40 M. 268.
Colbert v. State, 86 M. 769, 39 So. 65.

Article 7, Section 8.
Appropriation of money to objects of internal improvement to be by bill approved, &c. Laws 1858, p. 33.
Alcorn v. Hamer, 38 M. 652.

Article 7, Section 10.
Legislature to direct by law in what manner, and in what courts suits may be brought against state.
Swann v. Buck, 40 M. 268.

Article 7, Section 15.
Divorces from bonds of matrimony. Prohibition upon, and implied authorization of legislature. Chancery.
Carson v. Carson, 40 M. 349.

Article 7, Section 17.
County. Area. Division into court districts.
Alfred v. State, 37 M. 296, 2 Mor. St. Cas. 1235.
Lindsley v. Coahoma County, 69 M. 815, 11 So. 336.
See Hinton v. Perry County, 84 M. 536, 36 So. 565.
Native Lumber Co. v. Harrison County, 89 M. 171, 42 So. 665.

Article "Mode of Revising," &c, Section 1.
Amendment. "Branch." "House."
Green v. Weller, 32 M. 650.
Amendment. Const. 1890, § 273.
State v. Powell, 77 M. 543, 27 So. 927, 48 L. R. A. 652.

Schedule, Sections 1-4.
Do not invalidate Laws 1834, p. 29, § 3, as to proof or acknowledgment of deed, &c., before notary public.
Dennistoun v. Potts, 26 M. 13.

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Amendment of 1865.

Terms of high court: place of holding.
Opinion of the Court, 41 M. 54.

High Court. Invalidates act of February 21, 1867, as to terms, &c.
Mobile &c. R. Co. v. Mattan, 41 M. 692.

CONSTITUTION 1869.

Preamble.

Constitution not to be construed so as to defeat declared purposes.
Cooper v. Moore, 44 M. 386.

Adopted as organic law December 1, 1869. Not functionally operative in all its parts until complete organization of state government.
State v. Williams, 49 M. 640.

Article 1, Section 2.

Due process of law. Laws 1872, p. 217.
Brown v. Levee Commissioners, 50 M. 468.

Property. Deprivation. Due process of law. Laws 1871, p. 397, extending corporate limits of Natchez.
Martin v. Dix, 52 M. 53, 24 Am. Rep. 661.

Invalidates Laws 1876, p. 166, in so far as latter seeks to validate tax titles void under existing law.
Dingey v. Paxton, 60 M. 1038.

Article 1, Section 3.

Inviolability of right to writ of habeas corpus. Does not invalidate Code 1880, § 2534.
Ex parte Hamilton, 65 M. 98, 3 So. 68.

Article 1, Section 5.

Former jeopardy, etc.
Parker v. State, 51 M. 535.
Finch v. State, 53 M. 363.
Moore v. State, 59 M. 25.
Johnson v. State, 59 M. 543.
Montross v. State, 61 M. 429.
Smith v. State, 67 M. 116, 7 So. 208.
Gibson v. State, 68 M. 241, 8 So. 329.

Article 1, Section 7.

"Nature and cause of the accusation." Indictment for violation of liquor law.
Riley v. State, 43 M. 397, 2 Mor. St. Cas. 1632.
Surratt v. State, 45 M. 601.

Fair and impartial trial. Compulsory process for witnesses, etc.
Penn v. State, 62 M. 450.
Logan v. State, 50 M. 269.
Thompson v. State, 51 M. 353.
Stubbs v. State, 49 M. 716.
Lee v. State, 51 M. 566.
Ex parte Jefferson, 62 M. 223.
Wingo v. State, 62 M. 311.

Guarantee of right to be present, violated by placing defendant, on trial for misdemeanor, under the rule.
Garmon v. State, 66 M. 196, 5 So. 385.

Impartial jury of county. Laws 1873, pp. 161, 166. Laws 1878, p. 147. Laws 1888, p. 74.
Lindsley v. Coahoma County, 69 M. 815, 11 So. 336.
See Native Lumber Co. v. Harrison County, 89 M. 171, 42 So. 665.

Article 1, Section 8.

Capital case. Bail: when allowable.
Street v. State, 43 M. 1.
Ex parte Bridewell, 57 M. 39.
Ex parte Fortenberry, 53 M. 428.
Ex parte Patterson, 56 M. 161.
Ex parte Hamilton, 65 M. 147, 3 So. 241.

Article 1, Section 9.

Prohibits laws impairing obligation of contracts. Laws 1875, p. 11, "abatement act."
Gibbs v. Green, 54 M. 592.
Bunch v. Wolerstein, 62 M. 56.

Ex post facto law. Obligation of contracts.
Board of Education v. Aberdeen, 56 M. 518.
Sullivan v. Lafayette County, 58 M. 790.

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Seal v. Donnelly, 60 M. 658.
Montjoy v. Pillow, 64 M. 705, 2 So. 108.
Musgrove v. Vicksburg &c. R. Co., 50 M. 677.
Stone v. Yazoo &c. R. Co., 62 M. 607, 52 Am. Rep. 193.
Lindzey v. State, 65 M. 542, 5 So. 99, 7 Am. St. 674.

Legislation impairing obligation of contracts forbidden. Invalidates Laws 1884, p. 321.
Priestly v. Watkins, 62 M. 798.

Article 1, Section 10.

Taking property without compensation.
Nash v. Fletcher, 44 M. 609.
Griffin v. Dogan, 48 M. 11.
Macon v. Patty, 57 M. 378, 34 Am. Rep. 451.
Richardson v. Levee Commissioners, 68 M. 539, 9 So. 351.
Pearson v. Johnson, 54 M. 259.

Private property. Public use. Due compensation. Laws 1871, p. 397, extending corporate limits of Natchez.
Martin v. Dix, 52 M. 53, 24 Am. Rep. 661.

Due compensation, condition upon which private property may be taken for public use. Laws 1882, p. 273.
Cage v. Trager, 60 M. 563.

Eminent domain. "Due compensation." Laws 1882, p. 920.
New Orleans &c. R. Co. v. Drake, 60 M. 621.

Requires due compensation to be made for private property taken for public use. Invalidates Laws 1886, p. 107, § 7.
Board of Levee Commissioners v. Dancy, 65 M. 335, 3 So. 568.

Article 1, Section 11.

Prohibits imprisonment for debt. Does not invalidate Laws 1878, p. 164.
Ex parte Meyer, 57 M. 85.

Article 1, Section 12.

Jury trial.
Hunt v. State, 61 M. 577.
Marlar v. State, 62 M. 677.
White v. State, 52 M. 216.

Article 1, Section 13.

Constitution of grand jury. Quashal of indictment.
Head v. State, 44 M. 731, 2 Mor. St. Cas. 1700.

Does not invalidate Code 1871, § 724.
Nelson v. State, 57 M. 286, 34 Am. Rep. 444.

Article 1, Section 21.

Public schools. Separation of races.
Chrisman v. Brookhaven, 70 M. 477, 12 So. 458.

Article 1, Section 28.

Due course of law. Laws 1872, p. 217.
Brown v. Levee Commissioners, 50 M. 468.

Due course of law. Invalidates, by reason of discrimination between classes of persons as to incidents of appeal, Laws 1882, p. 110.
Chicago &c. R. Co. v. Moss, 60 M. 641.

Article 1, Section 29.

Intended to limit tenure of office to some certain, fixed and definite period, ascertained according to divisions of time in calendar, by days, weeks, months and years.
Newsom v. Cocke, 44 M. 352, 7 Am. Rep. 686.

Public officers: term of office must be for definite period.
Kimball &c. Co. v. Alcorn, 45 M. 151.

Article 1, Section 30.

Right of litigant to conduct suit in person, &c. Exclusion of witnesses.
French v. Sale, 63 M. 386.
See Smith v. Team, 16 So. 492.

Article 1, Section 31.

Conviction before justice of peace without charge having been preferred, void.
Bigham v. State, 59 M. 529.

Prosecution before justice of peace. Trial without jury.
Ex parte Wooten, 62 M. 174.
See Telheard v. Bay St. Louis, 87 M. 580, 40 So. 326.

Creation of inferior courts. Municipal court. Jurisdiction. Indictment, &c.

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Bell v. McKinney, 63 M. 187.
Miller v. State, 53 M. 403.
Peebles v. State, 55 M. 434.
Bluminberg v. State, 58 M. 528.

Article 4, Section 1.
Legislative department. Enactment of laws.
Barnes v. Pike County, 51 M. 305.
Beck v. Allen, 58 M. 143.
Schulherr v. Bordeaux, 64 M. 59, 8 So. 201.

Article 4, Sections 6, 7.
Political year. Term of public officer. County treasurer.
State v. Williams, 49 M. 640.

Article 4, Section 12.
Enactment of laws.
Rohrbacher v. Jackson, 51 M. 735.

Article 4, Section 16.
Chancery clerk. Eligibility. Public moneys unaccounted for.
Brady v. Howe, 50 M. 607.
Officer. Eligibility. Defalcation.
Matthews v. Copiah County, 53 M. 715, 24 Am. Rep. 715.
Hoskins v. Bradley, 57 M. 814.

Article 4, Section 17.
Ineligibility to office. Conviction of infamous crime.
Brady v. Howe, 50 M. 607.
Embezzlement. Pardon. Right to vote.
Jones v. Alcorn County, 56 M. 766, 31 Am. Rep. 385.

Article 4, Section 18.
Conviction of giving or offering bribe to secure election or appointment, as disqualification for office.
Brady v. Howe, 50 M. 607.

Article 4, Section 24.
Approval by governor of act after legislature's final adjournment.
Hardee v. Gibbs, 50 M. 802.
Bowen v. Gilleylen, 58 M. 813.
Bills: how approved. Adjournment.
State v. Coahoma County, 64 M. 358, 1 So. 501.

Article 4, Section 26.
No money can be drawn from treasury, except on appropriation made by law.
Colbert v. State, 86 M. 769, 39 So. 65.

Article 4, Section 28.
Civil officers of state. Impeachment.
Newsom v. Cocke, 44 M. 352, 7 Am. Rep. 686.

Article 4, Section 29.
Impeachment of civil officers of state. Concurrence of two-thirds of senators present, necessary to conviction.
Newsom v. Cocke, 44 M. 352, 7 Am. Rep. 686.

Article 4, Section 30.
Judgment on impeachment of civil officer of state.
Newsom v. Cocke, 44 M. 352, 7 Am. Rep. 686.

Article 4, Section 33.
Legislature to provide for enumeration of inhabitants.
Beck v. Allen, 58 M. 143.

Article 4, Section 37.
New county. Appointment of chancery clerk.
Brady v. West, 50 M. 68.
New county. Payment of debts. Legislative power.
Portwood v. Montgomery County, 52 M. 523.
Legislature to provide for organization of new counties.
Beck v. Allen, 58 M. 143.
Counties. Area. Laws 1873, pp. 161, 166. Laws 1878, p. 147. Laws 1888, p. 74.
Lindsley v. Coahoma County, 69 M. 815, 11 So. 336.
See Native Lumber Co. v. Harrison County, 89 M. 171, 42 So. 665.

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New counties. Extent. Const. 1890, § 260.
Hinton v. Perry County, 84 M. 536, 36 So. 565.

Article 4, Section 38.
Operates of its own force to avoid appointment of member of legislature to office created during his term of service.
Shelby v. Alcorn, 36 M. 273, 72 Am. Dec. 169n.
See Brady v. Howe, 50 M. 607.
Officer. Eligibility. Member of legislature.
Brady v. West, 50 M. 68.

Article 4, Section 39.
Contested elections. Legislative power.
Sublett v. Bedwell, 47 M. 266, 12 Am. Rep. 338-n.
Beck v. Allen, 58 M. 143.
Contested elections. Does not invalidate Laws 1886, p. 35.
Schulherr v. Bordeaux, 64 M. 59, 8 So. 201.
Lemon v. Peyton, 64 M. 161, 8 So. 235.

Article 5, Section 10.
Pardon. Respite. Right to vote.
Jones v. Alcorn County, 56 M. 766, 31 Am. Rep. 385.
Power of governor to grant respite to person sentenced to be hanged, and to fix later day for execution.
Ex parte Fleming, 60 M. 910.

Article 5, Section 13.
New county. Appointment of officer. Term.
Brady v. West, 50 M. 68.
O'Leary v. Adler, 51 M. 28.

Article 5, Section 17.
Governor: absence from state. Power of lieutenant governor.
Brady v. Howe, 50 M. 607.

Article 5, Section 21.
County officers. Tenure of office.
Newsom v. Cocke, 44 M. 352, 7 Am. Rep. 686.
French v. State, 52 M. 759.
State v. Tonella, 70 M. 701, 14 So. 7, 22 L. R. A. 346.
State v. Thibodeaux, 69 M. 92.
Assessor, &c., to be elected in each county, &c. Contravened by Laws 1888, p. 24.
Hawkins v. Mangum, 78 M. 97, 28 So. 872.

Article 5, Section 22.
Tenure of office. Applies only to officers elected by people, &c.
Newsom v. Cocke, 44 M. 352, 7 Am. Rep. 686.
Officer. Term. Holding over.
State v. Williams, 49 M. 640.
Burnham v. Sumner, 50 M. 517.
Hyde v. State, 52 M. 665.

Article 6.
Describes officers therein referred to, "territorially."
Leachman v. Musgrove, 45 M. 511.

Article 6, Section 4.
Jurisdiction of supreme court.
Planters' Ins. Co. v. Cramer, 47 M. 200.
Brown v. Carraway, 47 M. 668.
Hall v. Wells, 54 M. 289.

Article 6, Sections 5, 11.
Appointment to office. Vacancies.
Brady v. Howe, 50 M. 607.

Article 6, Section 13.
State to be divided into convenient court districts. Const. 1890, § 152.
Hinton v. Perry County, 84 M. 536, 36 So. 565.

Article 6, Section 14.
Circuit courts. "Original jurisdiction in all matters, civil and criminal."
Bell v. West Point, 51 M. 262.
Circuit court. Jurisdiction.
Martin v. Harden, 52 M. 694.

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Martin v. Harvey, 54 M. 685.
Planters' Ins. Co. v. Cramer, 47 M. 200.
Spratley v. Kitchens, 55 M. 578.
McLendon v. Pass, 66 M. 110, 5 So. 234.
Bernheimer v. Martin, 66 M. 486, 6 So. 326.
Hull v. Lyon, 59 M. 218.
Montross v. State, 61 M. 429.
See Illinois Cent. R. Co. v. LeBlanc, 74 M. 650, 21 So. 748.

Article 6, Section 15.

Circuit judges. Judicial districts.
Price v. Anderson, 65 M. 410, 4 So. 96.

Article 6, Section 16.

Chancery court. Jurisdiction and powers.
Troup v. Price, 49 M. 248.
Bank of Mississippi v. Duncan, 52 M. 740.
Dobbins v. Halfacre, 52 M. 561.
Buie v. Pollock, 55 M. 309.
Wathen v. Glass, 54 M. 382.
Epperson v. Nugent, 57 M. 45.
Eyrich v. Capital State Bank, 67 M. 60, 6 So. 615.
Robinson v. Burritt, 66 M. 356, 6 So. 206.

Chancery courts. Full jurisdiction.
Smith v. Everett, 50 M. 575.

Chancery courts. Full equity jurisdiction. Matters testamentary, administration, minors' business, &c.
Bell v. West Point, 51 M. 262.

Chancery jurisdiction. Estate of deceased.
Hunt v. Potter, 58 M. 96.

Gave probate jurisdiction to chancery courts.
Dickerson v. Askew, 82 M. 436, 34 So. 157.

Article 6, Section 17.

Chancellor. Appointment. Vacancy.
Brady v. Howe, 50 M. 607.
Christian v. Gibbs, 53 M. 314.

Chancery districts. Chancellors. Amendment adopted in 1875. See Laws 1876, p. 2.
Bailey v. State, 56 M. 637.

Article 6, Section 18.

Refers to prosecutions under state laws,—not to recovery of penalties under municipal ordinances.
Alexander v. Greenville, 54 M. 659.

All criminal indictments, informations and affidavits must conclude "against the peace and dignity of the state of Mississippi."
Love v. State, 8 So. 465.

Article 6, Section 19.

New county. Officer. Term.
Brady v. West, 50 M. 68.

Article 6, Section 20.

Boards of supervisors. Jurisdiction.
Howe v. State, 53 M. 57.
Jefferson County v. Arrighi, 54 M. 668.
Aligood v. Hill, 54 M. 666.

Jurisdiction of boards of supervisors. Ferries. Power of legislature to license.
Blake v. McCarthy, 56 M. 654.

Board of supervisors. Taxes. Jurisdiction. Roads. Ferries, &c.
Beck v. Allen, 58 M. 143.
Sullivan v. Lafayette County, 58 M. 790.
Paxton v. Baum, 59 M. 531.
Seal v. Donnelly, 60 M. 658.

Full jurisdiction of supervisors over roads, ferries and bridges.
Monroe County v. Strong, 78 M. 565, 29 So. 530.

Article 6, Section 21.

County offices. Filling vacancies.
Brady v. Howe, 50 M. 607.

Article 6, Section 23.

Justices of the peace. Jurisdiction, appeal, &c.

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Randall v. Kline, 44 M. 313.
Sublett v. Bedwell, 47 M. 266, 12 Am. Rep. 338n.
Usher v. Moss, 50 M. 208.
Shattuck v. Miller, 50 M. 386.
Morris v. Shryock, 50 M. 590.
New Orleans &c. R. Co. v. Evans, 49 M. 785.
Jackson v. Whitfield, 51 M. 202.
Davis v. Holberg, 59 M. 362.
Bell v. West Point, 51 M. 262.
Higgins v. Deloach, 54 M. 498.
State v. Luckey, 51 M. 528.
Pittman v. Chrisman, 59 M. 124.
Chicago, &c. R. Co. v. Moss, 60 M. 641.
McLendon v. Pass, 66 M. 110, 15 So. 234.
Bernheimer v. Martin, 66 M. 486, 6 So. 326.
Drysdale v. Biloxi Canning Co., 67 M. 534, 7 So. 541.
Rich v. Calhoun, 12 So. 707.
Illinois Cent. R. Co. v. Brookhaven Mach. Co., 71 M. 663, 16 So. 252.

Secures right of appeal under regulations to be prescribed by law. Bond.
Woods v. Davidson, 57 M. 206.

Justice of the peace. Territorial jurisdiction of mayor.
Heggie v. Stone, 70 M. 39, 12 So. 253.

Article 6, Section 24.

Inferior courts: creation and abolition.
Planters' Ins. Co. v. Cramer, 47 M. 200.
Bell v. McKinney, 63 M. 187.

Article 6, Section 25.

District attorneys. Term of office. Compensation.
Fant v. Gibbs, 54 M. 396.

Article 6, Section 26.

County officer. Wilful neglect of duty or misdemeanor. Indictment. Conviction. Removal from office.
Newsom v. Cocke, 44 M. 352, 7 Am. Rep. 686.
Brady v. Howe, 50 M. 607.

Officer. Removal from office.
Ex parte Lehman, 60 M. 967.
Hyde v. State, 52 M. 665.
Shattuck v. State, 51 M. 575.

Article 7, Section 2.

Embezzlement. Pardon. Right to vote.
Jones v. Alcorn County, 56 M. 766, 31 Am. Rep. 385.

Electors. Right to vote. Registration.
Hawkins v. Carroll County, 50 M. 735.

Franchise. Electors.
Ratliff v. Beale, 74 M. 247, 20 So. 865.

Article 8, Section 1.

Uniform system of free public schools.
State Board of Education v. Aberdeen, 56 M. 518.

Common school fund: how to be applied.
Otken v. Lamkin, 56 M. 758.

School fund. Taxation. Limit.
Foote v. Brown, 60 M. 155.

Public schools. Uniform system.
Wynn v. State, 67 M. 312, 7 So. 353.
See Beck v. Allen, 58 M. 143.

Uniform system of public schools. Municipalities. Separate schools for races.
Chrisman v. Brookhaven, 70 M. 477, 12 So. 458.

Uniform system of public schools. Contravened by Laws 1888, p. 173, ch. 148.
Ellis v. Greaves, 82 M. 36, 34 So. 81.

Article 8, Section 4.

Office. Term. Superintendent of education.
Burnham v. Sumner, 50 M. 517.

Article 8, Section 5.

School fund. Taxation. Limit.
Foote v. Brown, 60 M. 155.

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Article 8, Section 6.

Sale of liquors. Municipality. School fund.
Yazoo City v. State, 48 M. 440.

Suit to recover school funds. County superintendent of education.
Simmons v. Holmes, 49 M. 134.

Mandamus. Municipality. Conversion of school fund.
Board of Education v. West Point, 50 M. 638.
State v. Aberdeen, 56 M. 518.

Fines collected in counties for breaches of penal laws to go into, &c., common school fund. Code 1871, § 2424.
Mobile, &c., R. Co. v. State, 51 M. 137.

Poll tax not among subjects of revenue expressly devoted to common school fund.
Butt v. Montgomery, 62 M. 213.

Devotes all moneys received from liquor licenses, &c., to common school fund. Does not invalidate Laws 1886, p. 35.
Lemon v. Peyton, 64 M. 161, 8 So. 235.

School fund. Fines and forfeitures.
State Board of Education v. Mobile &c. R. Co., 71 M. 500, 14 So. 445.
Mobile &c. R. Co. v. State, 51 M. 137.

School fund. Proceeds of swamp lands, &c. Patent to Pearl River Imp. &c. Co., under Laws 1871, p. 482, ch. 169.
Tynes v. Southern Pine Co., — M. —, 54 So. 885.

Article 8, Section 7.

Poll tax appropriated in general terms to aid school fund.
Butt v. Montgomery County, 62 M. 213.

Article 9, Section 2.

Legislature to pass laws to exclude certain persons from office and suffrage.
Beck v. Allen, 58 M. 143.

Article 9, Section 3.

Duty of legislature to make laws necessary to create effective militia.
Beck v. Allen, 58 M. 143.

Article 9, Section 4.

Legislature to provide for indictment and trial of persons in counties other than those in which offenses were committed.
Beck v. Allen, 58 M. 143.

Article 9, Section 10.

Deductions to be made from salaries of public officers. Legislature to regulate.
Beck v. Allen, 58 M. 143.

Article 9, Section 27.

Legislature to provide for insane, deaf and dumb, &c.
Beck v. Allen, 58 M. 143.

Article 9, Section 28.

Houses of refuge and reformation for juvenile offenders. Legislature to provide.
Beck v. Allen, 58 M. 143.

Article 10, Section 10.

Legislature to provide, from time to time, for levy and collection of taxes required to properly support system of free schools.
Beck v. Allen, 58 M. 143.

Article 12, Section 1.

Political year. Term of officers.
Williams v. State, 49 M. 640.

Article 12, Section 2.

Embezzlement. Pardon. Right to vote.
Jones v. Alcorn County, 56 M. 766, 31 Am. Rep. 385.

Article 12, Section 3.

Denial of existence of Supreme Being. Operates of its own force, disqualification to hold office.
Brady v. Howe, 50 M. 607.

Article 12, Section 4.

Criminal procedure. Change of venue. Prepayment of costs.
Rattray v. State, 61 M. 377.

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Article 12, Section 6.

County, township and precinct officers. Appointment by governor, &c. Tenure of office. Removal.

Newsom v. Cocke, 44 M. 352, 7 Am. Rep. 686.

County, township and precinct officers. Expiration of terms. Circuit judge. "District officers." Validity of judgment.

Cooper v. Moore, 44 M. 386.

Appointment of enumerated officers, &c. Term of office. Of temporary force and effect.

Kimball &c. Co. v. Alcorn, 45 M. 151.

Whether provisions embrace circuit judges, quære.

Leachman v. Musgrove, 45 M. 511.

New county. Appointment of officer. Term.

Brady v. West, 50 M. 68.
Brady v. Howe, 50 M. 607.

Article 12, Section 7.

Officers. Vacancies. Filling.

Kimball &c. Co. v. Alcorn, 45 M. 151.
Brady v. Howe, 50 M. 607.
O'Leary v. Adler, 51 M. 28.

Article 12, Section 8.

Tax deed. Liberal construction.

Virden v. Bowers, 55 M. 1.

Tax title. Assessment, levy and sale.

Gamble v. Witty, 55 M. 26.
Green v. Williams, 58 M. 752.
Wolfe v. Murphy, 60 M. 1.
Capital State Bank v. Lewis, 64 M. 727, 2 So. 243.
Peterson v. Kittridge, 65 M. 33, 3 So. 65, 5 So. 824.
Caston v. Caston, 60 M. 475.
Nelson v. Abernathy, 74 M. 164, 21 So. 150.

Article 12, Section 13.

Taxation. Exemption. Corporation. Constitutional law.

Mississippi Mills v. Cook, 56 M. 40.
Natchez &c. R. Co. v. Lambert, 70 M. 779, 13 So. 33.
Adams v. Tombigbee Mills, 78 M. 676, 29 So. 470.

Property of corporations to be subject to taxation, &c. Does not invalidate Code 1880, §§ 557, 585, as amended, Laws 1888, p. 16, providing that privilege tax to be paid by banks shall be in lieu of other taxes, &c.

Vicksburg Bank v. Worrell, 67 M. 47, 7 So. 219.
See Bank of Oxford v. Oxford, 70 M. 504, 12 So. 203.

Corporation: exemption from taxation.

Adams v. Yazoo &c. R. Co., 77 M. 194, 24 So. 200, 60 L. R. A. 33n.
See Yazoo &c. R. Co. v. Adams, 81 M. 90, 32 So. 937.

Article 12, Section 14.

Constitutional law. Aid to corporations. Public benefit.

Hawkins v. Carroll County, 50 M. 735.

Legislative power. Delegation to municipality.

New Orleans &c. R. Co. v. McDonald, 53 M. 240.

Boards of supervisors: power to tax. Act approved April 4, 1872.

Gamble v. Witty, 55 M. 26.

Municipal bonds. Illegality. Curative legislation.

Sykes v. Columbus, 55 M. 115.

County bonds. Two-thirds vote. Registration.

Madison County v. Brown, 67 M. 684, 7 So. 516.

Article 12, Section 15.

Lotteries. Abrogation of charter.

Moore v. State, 48 M. 147, 12 Am. Rep. 367.

Article 12, Section 16.

Taxation. Power of board of supervisors. Limitation.

Warren County v. Klein, 51 M. 807.
Allgood v. Hill, 54 M. 666.

Counties. Special taxes. Courthouses, jails, bridges, &c.

Jefferson County v. Arrighi, 54 M. 668.
Paxton v. Baum, 59 M. 531.
See Monroe County v. Strong, 78 M. 565, 29 So. 530.

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Taxes levied by county. Legislative power to limit.
Gamble v. Witty, 55 M. 26.
Beck v. Allen, 58 M. 143.

Tax sale. Excessive levy. Jail and bridge tax. Laws 1875, p. 52.
Peterson v. Kittredge, 65 M. 33, 3 So. 65, 5 So. 824.

County. Special tax. Does not invalidate Code 1880, §§ 557, 585, as amended, Laws 1888, p. 16.
Vicksburg Bank v. Worrell, 67 M. 47, 7 So. 219.
See Bank of Oxford v. Oxford, 70 M. 504, 12 So. 203.

Article 12, Section 18.

Chancery sale. Division into tracts, &c.
Bradley v. Villere, 66 M. 399, 6 So. 208.
Person v. Leathers, 67 M. 548, 7 So. 391.
Swofford v. Garmon, 51 M. 348.

Administrator's sale of half section as whole, reserving homestead exemption, and wife's dower, non-judicially ascertained, void. Notice.
Shannon v. Summers, 86 M. 619, 38 So. 345.

Article 12, Section 20.

Taxation. Equality. Uniformity. Power of legislature, &c.
Daily v. Swope, 47 M. 367.
Vasser v. George, 47 M. 713.
Gaines v. Coates, 51 M. 335.
Holberg v. Macon, 55 M. 112.
Macon v. Patty, 57 M. 378, 34 Am. Rep. 451.
State v. Simmons, 70 M. 485, 12 So. 477.
Chrisman v. Brookhaven, 70 M. 477, 12 So. 458.
State v. Tonella, 70 M. 701, 14 So. 17, 22 L. R. A. 346.
Clarksdale Ins. Agency v. Cole, 87 M. 637, 40 So. 228.
Adams v. Kuykendall, 83 M. 571, 35 So. 830.

Taxation to be equal, uniform and in proportion to value of property. Corporation. Legislature's right of selection and exemption.
Mississippi Mills v. Cook, 56 M. 40.

Does not invalidate Code 1880, §§ 557, 585, as amended, Laws 1888, p. 16, providing that privilege tax to be paid by banks shall be in lieu of other taxes, &c.
Vicksburg Bank v. Worrell, 67 M. 47, 7 So. 219.
See Bank of Oxford v. Oxford, 70 M. 504, 12 So. 203.

Assessment, prerequisite to validity of tax according to value.
Thibodeaux v. State, 69 M. 683, 13 So. 352.
See State v. Adler, 68 M. 487, 9 So. 645.

Requires equality and uniformity in taxation, &c. Laws 1894, p. 25, ch. 29, § 3.
Adams v. Mississippi State Bank, 75 M. 701, 23 So. 395.

Corporations: exemption from taxation.
Adams v. Yazoo &c. R. Co., 77 M. 194, 24 So. 200, 60 L. R. A. 33n.
See Yazoo &c. R. Co. v. Adams, 81 M. 90, 32 So. 937.

Taxation to be equal and uniform throughout state. Invalidates Laws 1888, p. 24.
Hawkins v. Mangum, 78 M. 97, 28 So. 872.

Equal and uniform taxation. Classification of property. Laws 1890, p. 8.
Adams v. Bank of Oxford, 78 M. 532, 29 So. 402.

Article 12, Section 22.

Marriages. Legalization.
Dickerson v. Brown, 49 M. 357.
Rundle v. Pegram, 49 M. 751.
Floyd v. Calvert, 53 M. 37.
Kenard v. State, 57 M. 132.

Changed, without new consent or formal ceremonies, cohabitation, originally adulterous but regarded by parties as binding, into marriage.
Adams v. Adams, 57 M. 267.

Did not validate "marriage" of slaves, one of whom died in slavery.
Andrews v. Simmons, 68 M. 732, 10 So. 65.

Validates connection of man and woman cohabiting as husband and wife. Slaves. Operation and effect.
Reed v. Mosely, 76 M. 1, 23 So. 451.
Haines v. Haines, 90 M. 100, 43 So. 465.

Article 13.

Laws 1876, p. 2, enacted as substitute for Const. 1869, art. 6, § 17. Operation and effect.
Bailey v. State, 56 M. 637.

Not violated by failure to submit Const. 1890 to popular vote.

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Sproule v. Fredericks, 69 M. 898, 11 So. 472.

Amendment of constitution. Const. 1890, § 273.
State v. Powell, 77 M. 543, 27 So. 927, 48 L. R. A. 652.

CONSTITUTION 1890.

Preamble.

Validity of Const. 1890, unaffected by failure to submit same to vote of people.
Sproule v. Fredericks, 69 M. 898, 11 So. 472.

Section 1.

Departments of state government, co-ordinate, equal, separate and independent.
State v. Dinkins, 77 M. 874, 27 So. 832.

Section 2.

Justice of peace vacates office by accepting mayoralty.
State v. Armstrong, 91 M. 513, 44 So. 809.

Section 3.

State has "boundaries."
Lindsley v. Coahoma County, 69 M. 815, 11 So. 336.

Section 12.

Right to bear arms. Concealed weapons. Home.
Wilson v. State, 81 M. 404, 33 So. 171.

Section 13.

Libel. Jury, judge of law and facts. Instruction. Reading law books in argument.
Oakes v. State, — M. —, 54 So. 79.

Section 14.

Does not invalidate municipal ordinance which authorizes killing of unmuzzled dogs, running at large.
Julienne v. Jackson, 69 M. 34, 10 So. 43.

Statute requiring conveyance of homestead to be made by husband and wife jointly, not invalid.
Massey v. Womble, 69 M. 347, 11 So. 188.

Void tax-sale to state. Subsequent sale for taxes due. Laws 1890, p. 16.
Marble v. Fife, 69 M. 596, 13 So. 842.

Eminent domain. Laws 1882, p. 920, § 2. Notice to infant.
Louisville &c. R. Co. v. Blythe, 69 M. 939, 11 So. 111.

Due process of law. Penalties. Legislative power.
McBride v. State, 70 M. 716, 12 So. 699.
Clark v. Adams, 80 M. 219, 31 So. 746.

Does not invalidate Code 1892, § 1761.
Illinois Cent. R. Co. v. Sanford, 75 M. 862, 23 So. 355, 942.

Decision or judgment remaining undisturbed, revision of opinion, which expresses but reasons of decision, does not involve "due process of law."
Adams v. Yazoo &c. R. Co., 77 M. 194, 24 So. 200, 317, 28 So. 956.

Legislature cannot deprive plaintiff of sum of money admitted to be due him.
Memphis Machine Works v. Aberdeen, 77 M. 420, 27 So. 608.

Does not invalidate statute providing for assessment of railroads for back taxes by state railroad commission, without appeal.
Yazoo &c. R. Co. v. Adams, 77 M. 764, 25 So. 355.

Invalidates Code 1892, § 4370, in so far as same provides that causes cannot be reversed for jurisdictional defects.
Arbuckle v. State, 80 M. 15, 31 So. 437.

Invalidates statute authorizing employes of corporations to recover where employes of individuals, &c., similarly situated, cannot.
Ballard v. Mississippi Oil Co., 81 M. 507, 34 So. 533.

Does not invalidate Code 1892, § 3555, construing latter as applying to highways laid out after construction of railroad.
Illinois Cent. R. Co. v. Copiah County, 81 M. 685, 33 So. 502.

Does not invalidate Laws 1900, p. 142, ch. 105, for failure of same to provide for notice to one who has appeared and contested case through all courts.
Quin v. State, 82 M. 75, 33 So. 839.

Due process of law. Deprivation of property. Does not invalidate statute regulating and restricting capture of creatures feræ naturæ, not reduced to actual possession.
Ex parte Fritz, 86 M. 210, 38 So. 722, 109 Am. St. 700.

Forbids deprivation of property, &c., except by due process of law. Laws 1908, p. 81, ch. 97.
Bobo v. Yazoo-Mississippi Delta, 92 M. 792, 46 So. 819.

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Does not invalidate Code 1906, § 4851.
Yazoo &c. R. Co. v. Bent, 94 M. 681, 47 So. 805.

Does not invalidate Code 1906, § 4854.
Southern R. Co. v. State, 95 M. 657, 48 So. 236.

Prohibits deprivation of liberty except by due process of law. Does not invalidate Code 1892, § 2835.
Fant v. Buchanan, 17 So. 371.

Section 16.

Obligation of contracts. Exempting life insurance.
Rice v. Smith, 72 M. 42, 16 So. 417.

Ex post facto laws. Code 1892, § 1063.
State v. Gillis, 75 M. 331, 24 So. 25.

Prohibits ex post facto laws. Does not invalidate statute providing that juries in capital cases may fix punishment at imprisonment for life, &c.
McGuire v. State, 76 M. 504, 25 So. 495.

Forbids legislative impairment of obligation of contracts. Levee taxes. Ten-cent board. Laws 1865, p. 51. Laws 1876, p. 174.
Forsdick v. Board of Levee Commissioners, 76 M. 859, 26 So. 637.

Prohibits laws impairing obligation of contracts. Laws 1865, p. 11. Laws 1876, p. 350. Laws 1884, p. 182.
Woodruff v. State, 77 M. 68, 25 So. 483.

Obligation of contracts not to be impaired by legislative enactment. Railroad charter, &c.
Railroad Commission v. Gulf &c. R. Co., 78 M. 750, 29 So. 789.
See Stone v. Yazoo &c. R. Co., 62 M. 607.
Stone v. Natchez &c. R. Co., 62 M. 646.

Prohibits legislative impairment of obligation of contracts. Does not invalidate Code 1892, § 3555, construing latter as applying to highways laid out after construction of railroad.
Illinois Cent. R. Co. v. Copiah County, 81 M. 685.

Prohibits laws impairing obligation of contracts. Invalidates Laws 1898, p. 23, § 66.
Gulf &c. R. Co. v. Adams, 90 M. 559, 45 So. 91.

Section 17.

Assessment of damages proceeding (Laws 1884, p. 163), maintainable by landowner damaged by taking of another's land. Jurisdiction in commissioners.
Richardson v. Board of Mississippi Levee Commissioners, 77 M. 518, 26 So. 963.

Does not authorize courts to determine necessity for taking of private land for public use.
Ham v. Board of Levee Commissioners, 83 M. 534, 35 So. 943.

Private property. Public use. Due compensation. Laws 1902, p. 141.
Yazoo &c. R. Co. v. Southern R. Co. in Mississippi, 83 M. 746, 36 So. 74.

Municipality. Vacation of street. Abutting property owners. Compensation.
Laurel v. Rowell, 84 M. 435, 36 So. 543.

Municipality. Special assessment. Front-foot rule.
Wilzinski v. Greenville, 85 M. 393, 37 So. 807.

Prohibits taking of private property for public use, except on due compensation, &c. Does not invalidate statute regulating and restricting capture of creatures feræ naturæ not reduced to actual possession.
Ex parte Fritz, 86 M. 210, 38 So. 722, 109 Am. St. 700.

Language intended for formal condemnation proceedings. Equally protective of owner of appropriated or damaged, uncondemned private property.
King v. Vicksburg &c. R. Co., 88 M. 456, 42 So. 204, 117 Am. St. 749, 6 L. R. A. (N. S.) 1036.
See Alabama &c. R. Co. v. King, 93 M. 379, 47 So. 857.

Eminent domain. Due compensation. Does not invalidate Code 1892, §§ 3011, 3012. (Code 1906, §§ 3411, 3412).
Edwards House Co. v. Jackson, 91 M. 429, 45 So. 14.

Change of grade of street. Damages recoverable from city by abutting property owner.
Jackson v. Williams, 92 M. 301, 46 So. 551.
Robinson v. Vicksburg, — M. —, 54 So. 858.

Damage to abutting property by construction of causeway along highway. Liability of county.
Rainey v. Hinds County, 78 M. 308, 28 So. 875.

City liable for injuries to lower landowners, caused by discharge of city sewerage into stream.
Thompson v. Winona, — M. —, 51 So. 129.

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Eminent domain. Measure of damages.
Richardson v. Levee Commissioners, 68 M. 539, 9 So. 351.

Eminent domain. Laws 1882, p. 920, § 2. Condemnation unnecessary when guardian and railroad company agree as to damages.
Louisville &c. R. Co. v. Blythe, 69 M. 939, 11 So. 111.

Eminent domain. Damage to private property.
Alabama &c. R. Co. v. Bloom, 71 M. 247, 15 So. 72.
Vicksburg v. Herman, 72 M. 211, 16 So. 434.
See Vinegar Bend Lumber Co. v. Oak Grove &c. R. Co., 89 M. 84, 43 So. 292.
Vinegar Bend Lumber Co. v. Oak Grove &c. R. Co., 89 M. 117, 43 So. 299.

Section 20.

Policeman, an "officer," and must be appointed for specified time.
Thompson v. State, 91 M. 662, 44 So. 989, 124 Am. St. 715.
Monette v. State, 91 M. 662, 44 So. 989, 124 Am. St. 715.

Section 22.

Court may, upon conviction of offender, suspend sentence except as to costs, and at subsequent term, impose fine, &c.
Gibson v. State, 68 M. 241, 8 So. 329.

Former jeopardy. Discharge of juror.
Roberts v. State, 72 M. 728, 18 So. 481.

Legislature can confer, upon municipalities, power to punish by ordinance offense which constitutes crime against state.
Ocean Springs v. Green, 77 M. 472, 27 So. 743.

Prohibits placing person's life or liberty twice in jeopardy. Does not invalidate Code 1892, § 1340.
Huffman v. State, 84 M. 479, 36 So. 395.

Reversal of verdict of manslaughter received in absence of defendant indicted for murder. Former jeopardy. Discharge.
Sherrod v. State, 93 M. 774, 47 So. 554, 20 L. R. A. (N. S.) 509.

Subsequent indictment for same offense not barred by nol. pros. entered with court's consent after commencement of trial.
State v. Kennedy, — M. —, 50 So. 978.

Section 24.

Does not invalidate one-year statute of limitation for recovery of land.
Cameron v. Louisville &c. R. Co., 69 M. 78, 10 So. 554.

Section 25.

Right of litigant to conduct suit in person, &c. Exclusion of witnesses.
French v. Sale, 63 M. 386.
See Smith v. Team, 16 So. 492.

Section 26.

Legislature cannot authorize jury to visit scene of crime unaccompanied by accused and court.
Foster v. State, 70 M. 755, 12 So. 822.

Impartial trial. Opinion of juror.
Green v. State, 72 M. 522, 17 So. 381.

Guarantee of right to confront witnesses, relates primarily to trials as to guilt or innocence. Whether it extends to applications for continuances, quære.
Lipscomb v. State, 76 M. 223, 25 So. 158.

Accused's right "to demand the nature and cause of the accusation," not contravened by Code 1892, § 969.
Washington v. State, 76 M. 270, 24 So. 309.

Does not invalidate Code 1892, § 1397, as to sufficiency of indictment for perjury.
State v. Silverberg, 78 M. 858, 29 So. 761.

Venireman incompetent as juror. Opinion from talk of state's witnesses. Fair and impartial verdict.
Klyce v. State, 79 M. 652, 31 So. 339.

Juror who, on his voir dire, concealed facts, rendering him incompetent, not impartial.
Shepprie v. State, 79 M. 740, 31 So. 416.

Murder trial. Absent witness. Denial of second application for continuance. Reversal.
Whit v. State, 85 M. 208, 37 So. 809.

Guarantee of right to demand nature and cause of accusation extends to all criminal prosecutions before inferior courts.
Telheard v. Bay St. Louis, 87 M. 580, 40 So. 326.

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Requiring defendant, for purpose of identification, to place foot in track near scene of alleged crime does not compel him to give evidence against himself.
Magee v. State, 92 M. 865, 46 So. 529.

Murder trial. Failure, on request, to clear courtroom. Error.
Carter v. State, — M. —, 54 So. 734.

Guarantee of right to be present, extends to trials for misdemeanors as well as felonies. Defendant physically unable to attend.
Corbin v. State, — M. —, 55 So. 43.

Section 27.

Misdemeanors. Inquest of grand jury may be dispensed with.
Coulter v. State, 75 M. 356, 22 So. 872.

Prosecution before mayor. Trial without jury.
Telheard v. Bay St. Louis, 87 M. 580, 40 So. 326.

Section 29.

Habeas corpus. Under facts in evidence, relator, indicted for murder, entitled to bail.
Ex parte Majors, 34 So. 151.

Section 30.

Imprisonment for debt.
State v. Gillis, 75 M. 331, 24 So. 25.

Judgment ordering payment, by father, of money for support and maintenance of bastard child, not debt.
Ex parte Bridgforth, 77 M. 418, 27 So. 622.

"Debt," does not embrace any pecuniary obligation imposed by state as punishment for crime, &c. Does not invalidate Laws 1894, p. 67, ch. 76, as amended, Laws 1896, p. 146, ch. 133.
Ex parte Dig, 86 M. 597, 38 So. 730.

Costs of prosecution, not "debt."
Ex parte McInnis, — M. —, 54 So. 260.

Section 31.

Trial by jury. Chancery. Vacating fraudulent conveyance.
McBride v. State, 70 M. 716, 12 So. 699.

Common law jury guaranteed is jury with power to try issues of fact only.
Natchez &c. R. Co. v. Crawford, — M. —, 55 So. 596.

Section 33.

Vests lawmaking power of state in legislature. Does not invalidate Code 1892, §§ 2055–2059.
Ormond v. White, 85 M. 276, 37 So. 834.

Sections 59, 60.

Legislation. How bills shall originate. Adoption of Code 1892.
Hunt v. Wright, 70 M. 298, 11 So. 608.

Section 61.

Reviving or amending law. Reference to title. Not applicable to code.
Hunt v. Wright, 70 M. 298, 11 So. 608.

Section amended to be inserted at length in amendment. "Double damages" clause of Code 1892, § 1068, repealed by Laws 1900, p. 140.
Nations v. Lovejoy, 80 M. 401, 31 So. 811.

Section 63.

Forbids appropriation bill not fixing definitely maximum sum thereby authorized to be drawn from treasury.
State v. Cole, 81 M. 174, 32 So. 314.
Colbert v. State, 86 M. 769, 39 So. 65.

Section 64.

Appropriation bill. Length of life. Votes required to pass.
State v. Cole, 81 M. 174, 32 So. 314.
Colbert v. State, 86 M. 769, 39 So. 65.

Section 66.

Donation. Judicial question. Laws 1910, p. 109, ch. 120.
Turner v. Hattiesburg, 53 So. 681.

Section 63.

Revenue and appropriation bills: when to be passed.
Hunt v. Wright, 70 M. 298, 11 So. 608.

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Appropriation and revenue bills. Precedence, at regular sessions, over other business. Not to be passed during last five days.
Colbert v. State, 86 M. 769, 39 So. 65.

Section 69.
Special appropriation bill. Veto of part which contains conditions on which money may be drawn, nullity.
State v. Holder, 76 M. 158, 23 So. 643.

General and separate appropriation bills. Contents. Ingraftment of legislation. Prescription of conditions, &c.
Colbert v. State, 86 M. 769, 39 So. 65.

Section 70.
Revenue bills. Three-fifths vote. Review by courts.
Hunt v. Wright, 70 M. 298, 11 So. 608.

Section 71.
Bill. Title. Laws 1908, p. 81, ch. 97.
Bobo v. Yazoo-Mississippi Delta, 92 M. 792, 46 So. 819.

Requires title of act to indicate clearly subject-matter of proposed legislation. Mandatory.
Sample v. Verona, 94 M. 264, 48 So. 2.
See Board of Levee Commissioners v. Royal Ins. Co., 96 M. 832, 51 So. 2.

Section 72.
Special appropriation bill. Void veto of part. Adjournment of legislature.
State v. Holder, 76 M. 158, 23 So. 643.

Bills. Approval by governor. Adjournment of legislature.
Carter v. Henry, 87 M. 411, 39 So. 690.
See Henry v. Carter, 88 M. 21, 40 So. 995.

Section 73.
Does not authorize veto of part of special appropriation bill which contains conditions on which money may be drawn.
State v. Holder, 76 M. 158, 23 So. 643.

Empowers governor to veto parts of appropriation bill and approve parts of same, &c.
Colbert v. State, 86 M. 769, 39 So. 65.

Section 78.
Deductions from salaries. Does not invalidate Laws 1898, p. 77, ch. 58.
Cole v. Humphries, 78 M. 163, 28 So. 808.

Section 79.
Tax sale. Redemption.
Judah v. Brothers, 71 M. 414, 14 So. 455.
LeBlanc v. Illinois Cent. R. Co., 72 M. 669, 18 So. 381.

Does not cure tax sale, void under Code 1892, § 3813.
Nelson v. Abernathy, 74 M. 164, 21 So. 150.

Section 80.
General laws. Abuse of taxing power. Municipalities.
Lum v. Vicksburg, 72 M. 950, 18 So. 476.

Legislature to provide by general laws against abuse by municipal corporations of powers of assessment, &c.
Monroe County v. Strong, 78 M. 565, 29 So. 530.

Not self-executing. Does not invalidate Laws 1910, chapters 119 and 120.
Turner v. Hattiesburg, — M. —, 53, So. 681.

Section 81.
Riparian owner may not, without legislative consent, maintain boom for stoppage of logs.
Pascagoula Boom Co. v. Dixon, 77 M. 587, 28 So. 724, 78 Am. St. 537.

Section 82.
Requires legislature to fix penalties of official bonds. Does not apply where office is of statutory creation.
Gloster v. Harrell, 77 M. 793, 23 So. 520, 941; 27 So. 609.

Section 85.
Working of public roads. Does not invalidate Laws 1910, p. 145, ch. 150.
Weston v. Hancock County, — M. —, 54 So. 307.

Section 87.
Local legislation. Suspension of general law. Railroad corporation as "private corporation." Laws 1902, p. 141.

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Yazoo &c. R. Co. v. Southern R. Co., 83 M. 746, 36 So. 74.

Suspension of general law, &c. Consolidation or purchase of competing lines of railroads.

State v. Mobile &c. R. Co., 86 M. 172, 38 So. 732.

Act providing for creation of Jefferson Davis county.

Conner v. Gray, 88 M. 489, 41 So. 186.

Section 88.

General laws for incorporating municipalities.

Lum v. Vicksburg, 72 M. 950, 18 So. 476.

Does not require that general laws shall contain entire contents of charters and amendments. Code 1892, § 3039, as amended, Laws 1900, p. 79, ch. 69.

Yazoo City v. Lightcap, 82 M. 148, 33 So. 949.

Does not deprive legislature of power to control exercise of right of taxation previously delegated to municipal corporation by special charter.

Adams v. Kuykendall, 83 M. 571, 35 So. 830.

General laws. Laws 1902, p. 141.

Yazoo &c. R. Co. v. Southern R. Co., 83 M. 746, 36 So. 74.

Does not invalidate Code 1892, § 2921, amended, Laws 1898, p. 90.

Jackson v. Whiting, 84 M. 163, 36 So. 611.

Amendment of municipal charters. General laws. Invalidates Laws 1900, p. 173, ch. 134.

Thompson v. State, 91 M. 662, 44 So. 989, 124 Am. St. 715.

Monette v. State, 91 M. 662, 44 So. 989, 124 Am. St. 715.

Section 89.

Standing committees on local and private legislation. Laws 1902, p. 141.

Yazoo &c. R. Co. v. Southern R. Co., 83 M. 746, 36 So. 74.

Section 90.

Local laws. Exemption from public duty.

Chidsey v. Scranton, 70 M. 449, 12 So. 545.

Prohibits local legislation creating fees of officer. Does not invalidate Code 1892, § 301, amended, Laws 1898, p. 59, nor Code 1892, § 1991w.

Yazoo &c. R. Co. v. Edwards, 78 M. 950, 29 So. 770.

Forbids passage of any "local, private or special laws" under certain headings. Laws 1902, p. 141.

Yazoo &c. R. Co. v. Southern R. Co., 83 M. 746, 36 So. 74.

Prohibits private, or special, &c., laws, granting lands under state's control to person or corporation. Invalidates, Laws 1908, p. 130, ch. 121.

Winton v. Day, 96 M. 1, 49 So. 264.

Section 90d.

Regards usury laws, as of general public interest and concern.

Mississippi Bldg. &c. Assn. v. McElveen, — M. —, 56 So. 187.

Section 90n.

Invalidates Laws 1892, p. 392, ch. 116, if latter was intended as local or special law.

Burt v. State, 86 M. 280, 38 So. 233.

Section 90p.

Prohibits local law for management or support of private or common school. Does not invalidate Laws 1910, ch. 119.

Turner v. Hattiesburg, — M. —, 53 So. 681.

Section 90q.

Watercourses. Local, private or special laws. Invalidates Laws 1910, ch. 183. "All natural drains."

Belzoni Drainage Commission v. Winn, 53 So. 778.

Provides that legislature shall not pass local, private or special laws relating to watercourses. Deals with natural, and not artificial, watercourses. Code 1906, § 1727; Laws 1906, ch. 132, § 46.

Haley v. Drainage Commissioners, — M. —, 55 So. 353.

Section 90r.

Determination of right of railroad company to condemn land. Special court of eminent domain, Code 1892, ch. 40. Injunction in chancery court.

Vinegar Bend Lumber Co. v. Oak Grove &c. R. Co., 89 M. 84, 43 So. 292; 89 M. 117, 43 So. 299.

Section 94.

Wife's contract, on sufficient consideration, relinquishing all claim to husband's estate, enforceable.

Wyatt v. Wyatt, 81 M. 219, 32 So. 317.

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Declares complete emancipation from all disability on account of coverture.
Johnson v. Jones, 82 M. 483, 34 So. 83.

Renders inoperative Code 1871, § 2323.
Southworth v. Brownlow, 84 M. 405, 36 So. 522.

Section 95.

Lands belonging to state, &c., not to be donated to individuals, &c. Invalidates Laws 1908, p. 130, ch. 121.
Winton v. Day, 96 M. 1, 49 So. 264.

Section 97.

Relates wholly to such limitation for bringing suits, as is recognized by our law.
North British & Mercantile Ins. Co. v. Edwards, 85 M. 322, 37 So. 748.

Section 100.

Debt to state or municipality not to be compromised or remitted.
State v. Fragiacomo, 71 M. 417, 15 So. 798.
Morris Ice Co. v. Adams, 75 M. 410, 22 So. 944.

Municipality cannot refund money deposited with it, and forfeited, by public contractor.
Jackson Electric &c. Co. v. Adams, 79 M. 408, 30 So. 694.

Section 103.

County district office. Filling vacancies.
State v. Lovell, 70 M. 309, 12 So. 341.

Section 104.

Limitations do not run against Yazoo-Mississippi Delta Levee District.
State v. Illinois Cent. R., 71 M. 752, 15 So. 640.

Stopped running of statute against counties on pending contracts, where bar was not complete, as well as on future contracts.
Wayne County v. Helton, 79 M. 122, 29 So. 820.

Two years, allowed for redemption from tax sale by Code 1906, § 4338, do not constitute statute of limitations.
Tallahatchie County v. Little, 93 M. 88, 46 So. 257.

Right of city to open street unaffected by adverse possession of land dedicated as part of same.
Lexington v. Hoskins, 96 M. 163, 50 So. 561.

Section 109.

Alderman. Contract with city. Injunction. Complainant in pari delicto with defendant.
Noxubee County Hardware Co. v. Macon, 90 M. 636, 43 So. 304.

Board of levee commissioners, agency created by state, &c. Employment of member as attorney, void.
State v. Board of Levee Commissioners, 96 M. 677, 51 So. 211.

Section 111.

Deed of trust. Sale.
McClusky v. Trussel, 90 M. 544, 44 So. 69.

Sale under decree or execution. "Single tract."
Provine v. Thornton, 92 M. 395, 46 So. 950.
See Baldwin v. Dreyfus, 92 M. 94, 45 So. 428.

Section 112.

Assessment, prerequisite to validity of tax according to value.
Thibodeaux v. State, 69 M. 683, 13 So. 352.
See State v. Adler, 68 M. 487, 9 So. 645.

Taxation. Assessment. Banks.
State v. Vicksburg Bank, 69 M. 99, 10 So. 102.

Does not invalidate Laws 1900, p. 16.
Marble v. Fife, 69 M. 596, 13 So. 842.

Taxation. Equality and uniformity. Assessment.
Brennan v. Mississippi Home Ins. Co., 70 M. 531, 13 So. 228.
State v. Tonella, 70 M. 701, 14 So. 17, 22 L. R. A. 346.
Nugent v. Jackson, 72 M. 1040, 18 So. 493.
Adams v. Kuykendall, 83 M. 571, 35 So. 830.
Gerard v. Duncan, 84 M. 731, 36 So. 1034, 66 L. R. A. 461.
Turner v. Cochran, 89 M. 206, 42 So. 876.
See Vicksburg Bank v. Worrell, 67 M. 47, 7 So. 219.
Bank of Oxford v. Oxford, 70 M. 504, 12 So. 203.
People's Warehouse Co. v. Yazoo City, — M. —, 52 So. 481.

Invalidates concluding clause of Laws 1894, p. 25, ch. 29, § 3.
Adams v. Mississippi State Bank, 75 M. 701, 23 So. 395.

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Does not invalidate Code 1892, §§ 3875-3886, nor Laws 1894, p. 29.
Yazoo &c. R. Co. v. Adams, 77 M. 764, 25 So. 355.

Equal and uniform taxation. Classification of property. Laws 1890, p. 8.
Adams v. Bank of Oxford, 78 M. 532, 29 So. 402.

Constitutionality of statute exempting property owner from liability for taxes, question which tax collector as merely ministerial officer, cannot determine, &c. Injunction.
Yazoo &c. R. Co. v. West, 78 M. 789, 29 So. 475.

Railroad commission, as assessor of railroad property, cannot determine questions of exemption, so as to render them res adjudicata.
Yazoo &c. R. Co. v. Adams, 81 M. 90, 32 So. 937.

Does not invalidate Code 1892, § 3804, authorizing tax collector to assess such persons and personal property as he may find unassessed.
Powell v. McKee, 81 M. 229, 32 So. 919.

Invalidates Laws 1900, p. 43, ch. 43, § 8, which imposes privilege tax "on each land timber mill company," &c., but excepts sawmill operators who do not ship timber or lumber out of the state.
Adams v. Lumber Co., 84 M. 23, 36 So. 68.

Taxation. Equality. Uniformity. Does not invalidate Laws 1904, p. 69, § 49.
Clarksdale Ins. Agency v. Cole, 87 M. 637, 40 So. 228.

Invalidates Laws 1898, p. 23, § 66, when latter is regarded as an ad valorem tax.
Gulf &c. R. Co. v. Adams, 90 M. 559, 45 So. 91.

Does not invalidate Code 1892, § 3011, 3012 (Code 1906, §§ 3411, 3412).
Edwards House Co. v. Jackson, 91 M. 429, 45 So. 14.

Section 116.
Chief executive power of state to be vested in governor.
Colbert v. State, 86 M. 769, 39 So. 65.

Sections 116-143.
Governor cannot institute suit for, and in name of, state.
Henry v. State, 87 M. 1, 39 So. 856.
Henry v. State, 88 M. 843, 39 So. 856.

Section 123.
Governor to see that laws are faithfully executed.
Colbert v. State, 86 M. 769, 39 So. 65.

Section 124.
Vests power to pardon, exclusively in governor. Invalidates Laws 1908, p. 105, § 3.
State v. Kirby, — M. —, 51 So. 811.

Section 134.
Provides for state treasurer and auditor of public accounts. Duties left to legislature.
State v. Cole, 81 M. 174, 32 So. 314.

Section 135.
Sheriff, ineligible, immediately, to succeed himself. Does not apply when election was for statutory term of eighteen months.
Bozeman v. Laird, 91 M. 719, 45 So. 722.

Section 136.
Terms of public officers. Applicable only to officers under Constitution 1890.
Andrews v. Covington, 69 M. 740, 13 So. 853.

Section 137.
State treasurer. Semi-annual statements. Governor's certificate. Does not invalidate Laws 1908, p. 77, ch. 96.
State v. Edwards, 93 M. 704, 46 So. 964.

Section 138.
Assessor, constitutional officer. Revenue agent.
State v. Tonella, 70 M. 701, 14 So. 17, 22 L. R. A. 346.

Section 140.
Election of governor. Majority of popular and "electoral votes."
Ratliff v. Beale, 74 M. 247, 20 So. 865, 34 L. R. A. 472.

Section 141.
House of representatives to choose governor when, &c. Election.
Ratliff v. Beale, 74 M. 247, 20 So. 865, 34 L. R. A. 472.

Sections 144-177.
Judicial power of state. Laws 1910, p. 125, ch. 135.
Natchez &c. R. Co. v. Crawford, — M. —, 55 So. 596.

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Section 146.

Jurisdiction of Supreme Court.

Yazoo & M. V. R. Co. v. Adams, 81 M. 90, 32 So. 937.

Section 147.

Law and equity. Action in wrong court. No reversal of judgment.

Barrett v. Carter, 69 M. 593, 13 So. 625.
Tribette v. Illinois Cent. R. Co., 70 M. 182, 12 So. 32, 35 Am. St. 642, 19 L. R. A. 660.
Cazeneuve v. Curell, 70 M. 521, 13 So. 32.
Goyer Cold Storage Co. v. Wildberger, 71 M. 438, 15 So. 235.
Whitney v. Hanover Nat. Bank, 71 M. 1009, 15 So. 33, 23 L. R. A. 531.
Adams v. Capital State Bank, 74 M. 307, 20 So. 881.
Day v. Hartman, 74 M. 489, 21 So. 302.
Illinois Cent. R. Co. v. LeBlanc, 74 M. 650, 21 So. 760.
Hancock v. Dodge, 85 M. 228, 37 So. 711.
See Lewis v. McCracken, 89 M. 229, 42 So. 671.

Suit of which chancery court was without jurisdiction will be dismissed on reversal of final decree, when it appears that complainant has no grounds of action.

Griffin v. Byrd, 74 M. 32, 19 So. 717.

Chancery court may dismiss cause, jurisdiction of which belongs to court of law.

Carbolineum &c. Co. v. Meyer, 76 M. 586, 25 So. 297.

Non-curative of want of jurisdiction of condemnation proceedings.

Board of Levee Com'rs v. Brooks, 76 M. 635, 25 So. 358.

Supreme Court cannot reverse decree overruling demurrer to cross-bill, because of error or mistake as to whether matters therein propounded were of equity or common-law jurisdiction.

Irion v. Cole, 78 M. 132, 28 So. 803.

Decree of court of equity which took jurisdiction of proceeding to compel accounting by agent, will not be disturbed on appeal, on ground that complainant had complete remedy at law.

Decell v. Oil Mill, 83 M. 346, 35 So. 761.

Personal judgment for firm debt against members of firm, in suit to set aside their fraudulent conveyance, harmless error.

Holmes Bros. v. Ferguson-McKinney Dry Goods Co., 86 M. 782, 39 So. 70.

Chancery decree non-reversible for erroneous assumption of jurisdiction.

Mississippi Fire Ass'n v. Stein, 88 M. 499, 41 So. 66.

Bringing action to recover balance due under contract in chancery court, not ground for reversal.

Woodville v. Jenks, 94 M. 210, 48 So. 620.

Law and equity. Suit in wrong court, not reversible error. Action for penalty under Code 1906, § 5004, "civil cause."

Grenada Lumber Co. v. State, — M. —, 54 So. 8.

Inapplicable where chancery court declined jurisdiction.

Mitchell v. Bank, — M. —, 54 So. 87.

Section 152.

State to be divided into convenient court districts. Laws 1902, p. 172, ch. 123.

Hinton v. Perry County, 84 M. 536, 36 So. 565.

Section 156.

Jurisdiction of circuit court. "Matters civil." Ejectment.

Illinois Cent. R. Co. v. Le Blanc, 74 M. 650, 21 So. 760.

Circuit courts. Original jurisdiction.

Rich v. Calhoun, 12 So. 707.

Section 158.

Failure of this and all other constitutional sections to provide for interchange of chancellors does not invalidate Code 1892, § 458.

First Nat. Bank v. Bloch, 82 M. 197, 33 So. 849.

Section 159.

Chancery jurisdiction. Vacating fraudulent conveyance.

McBride v. State, 70 M. 716, 12 So. 699.

Sections 159, 160.

Jurisdiction of chancery court. Injunction. Waste.

Woods v. Riley, 72 M. 73, 18 So. 384.

Section 160.

Jurisdiction of chancery court: how enlarged.

Whitney v. Hanover Nat. Bank, 71 M. 1009, 15 So. 33, 23 L. R. A. 531.

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Jurisdiction. Circuit court. Ejectment.
Illinois Cent. R. Co. v. LeBlanc, 74 M. 650, 21 So. 760.

Suit in ejectment may be enjoined when by so doing multiplicity of suits at law will be avoided.
Butler v. Scottish-American Mortg. Co., 93 M. 215, 46 So. 829.

Full relief grantable by chancery court taking jurisdiction for discovery.
Keystone Lumber Yard v. Yazoo &c. R. Co., 50 So. 445.

Section 161.

Chancery jurisdiction. Suits on bonds of public officers. Action of damages for trespass.
Cazeneuve v. Curell, 70 M. 521, 13 So. 32.

Jurisdiction of chancery court. Bonds of fiduciaries. Mutual accounts.
Barnard v. Sykes, 72 M. 297, 18 So. 450.

Section 165.

Special judge to sign bill of exceptions.
Illinois Cent. R. Co. v. Bowles, 71 M. 994, 16 So. 235.

Disqualification of judges.
Ferguson v. Brown, 75 M. 214, 21 So. 603.

Stenographer's notes may be approved by special judge.
Lopez v. Jackson, 79 M. 460, 31 So. 206.

Justice of peace disqualified when first cousin is president and director of corporation party.
Nimecks v. McGehee, — M. —, 52 So. 626.

Section 166.

Invalidates Laws 1899, p. 78, directing deductions from salaries of judges and chancellors of amounts paid substitutes.
Holder v. Sykes, 77 M. 64, 24 So. 261.

Section 169.

See Love v. State, 8 So. 465, construing similar provision, Const. 1869, art. 6, § 18.

Affidavit charging crime. Conclusion.
State v. Morgan, 79 M. 659, 31 So. 338.

Conclusion of affidavit for misdemeanor.
Miller v. State, 81 M. 162, 32 So. 951.

Each count in indictment need not conclude "against the peace and dignity of the state."
Starling v. State, 90 M. 255, 43 So. 952.

Section 170.

Vests in supervisors full jurisdiction over roads, ferries, and bridges. Exercise.
Monroe County v. Strong, 78 M. 565, 29 So. 530.

County is not liable for negligent or tortious acts of road overseer.
Rainey v. Hinds County, 79 M. 238, 30 So. 636.

Supervisors in proceeding to establish stock law district do not act under power conferred.
Garner v. Webster County, 79 M. 565, 31 So. 210.

Does not invalidate Laws 1910, p. 140, ch. 149, § 5, as to commissioners to supervise construction and maintenance of roads.
Thomas v. Lee County, — M. —, 53 So. 585.

Supervisors. Jurisdiction. Roads. Invalidates Code 1906, § 1721.
Holmes County v. Black Creek Drainage Dist., — M. —, 55 So. 963.

Section 171.

Justices of the peace. Jurisdiction.
Riley v. James, 73 M. 1, 18 So. 930.
Waters v. Mobile &c. R. Co., 74 M. 534, 21 So. 240.
See Ex parte Fritz, 86 M. 210, 38 So. 722, 109 Am. St. 700.
Rich v. Calhoun, 12 So. 707.

Justices of peace. Jurisdiction. "The principal amount in controversy."
Illinois Cent. R. Co. v. Brookhaven Machine Co., 71 M. 663, 16 So. 252.

Courts established under this section, independent of those authorized by Const. 1890, § 172.
Hughes v. State, 79 M. 77, 29 So. 786.

Bias or prejudice on part of justice of peace, not disqualifying fact.
Evans v. State, 92 M. 34, 45 So. 706.

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Section 172.

Courts established under this section, independent of those authorized by Const. 1890, § 171.

Hughes v. State, 79 M. 77, 29 So. 786.

Section 174.

Compensation of district attorneys. Does not invalidate Laws 1898, p. 77, ch. 58.

Cole v. Humphries, 78 M. 163, 28 So. 808.

Section 175.

Removal of sheriff from office cannot be effected by justice of peace.

Moore v. State, 45 So. 866.

City marshal is "public officer." Void municipal ordinance.

Lizano v. Pass Christian, — M. —, 50 So. 981.

Section 178.

Corporations: formation, assessment, &c. Laws 1902, p. 141.

Yazoo &c. R. Co. v. Southern R. Co. in Mississippi, 83 M. 746, 36 So. 74.

Taxation. Exclusive right of corporation to maintain, &c., system of waterworks.

Adams v. Bullock, 94 M. 27, 47 So. 527.

Legislature to have power to alter, amend, or repeal any charter of incorporation, &c. Absolute extinguishment of corporate existence.

State v. Louisville &c. R. Co., — M. —, 51 So. 918.

Legislature may alter, amend, or repeal charter, &c. Building and loan association. Right to charge usurious interest. "Public interest."

Mississippi Bldg. &c. Assn. v. McElveen, — M. —, 56 So. 187.

Section 179.

General or special law for benefit of corporation, &c. Invalidates Laws 1902, p. 141.

Yazoo &c. R. Co. v. Southern R. Co., 83 M. 746, 36 So. 74.

Section 180.

Corporations. "Corporate franchise." "Grant of." Right to exist. Power to consolidate. Exemption from taxation.

Adams v. Yazoo &c. R. Co., 77 M. 194, 24 So. 200, 60 L. R. A. 33n.

Section 181.

Taxation. Corporations. Does not affect exemption of Yazoo &c. R. Co.

Natchez &c. R. Co. v. Lambert, 70 M. 779, 13 So. 32.
See Vicksburg Bank v. Worrell, 67 M. 47, 7 So. 219.
Bank of Oxford v. Oxford, 70 M. 504, 12 So. 203.

Domestic insurance companies. Taxation.

Brennan v. Mississippi Home Ins. Co., 70 M. 531, 13 So. 228.

Corporation. Exemption from taxation. Consolidation.

Adams v. Yazoo &c. R. Co., 77 M. 194, 24 So. 200, 60 L. R. A. 33n.

Taxation. Exclusive right of corporation to maintain, &c., system of waterworks.

Adams v. Bullock, 94 M. 27, 47 So. 527.

Section 182.

Exemptions from taxation in encouragement of manufactures, &c. Does not invalidate Laws 1900, p. 50, ch. 48.

Adams v. Winona Cotton Mills, 92 M. 743, 46 So. 401.

Section 183.

Does not forbid municipality to contract with corporation for electric street lights.

Reid v. Trowbridge, 78 M. 542, 29 So. 167.

Municipality. Appropriation in aid of corporation. Proceeds of forfeiture.

Adams v. Jackson Electric &c. Co., 78 M. 887, 30 So. 58.

Municipality cannot donate amount forfeited by public contractor, to corporation, completing work.

Jackson Electric &c. Co. v. Adams, 79 M. 408, 30 So. 694.

Prohibits counties, municipal corporations, &c., making grants of aid or credit to railroads, &c.

State v. Mobile &c. R. Co., 86 M. 172, 38 So. 732.

Section 184.

Railroads. Duty to transport foreign cars. Liability.

Illinois Cent. R. Co. v. Price, 72 M. 862, 18 So. 415.

All railroads carrying persons or property for hire, "public highways." Laws 1902, p. 141.

Yazoo &c. R. Co. v. Southern R. Co., 83 M. 746, 36 So. 74.

Determination of right of railroad company to condemn land. Special court of eminent domain, Code 1892, ch. 40. Injunction in chancery court.

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Vinegar Bend Lumber Co. v. Oak Grove &c. R. Co., 89 M. 84, 43 So. 292; 89 M. 117, 43 So. 299.

Non-limitive of state's constitutionally conferred power to repeal charters, declare franchises forfeited, and control admission of foreign corporations.
State v. Louisville &c. R. Co., — M. —, 51 So. 918.

Section 187.

Construction of railroads. "County seat." "Natural obstacles."
State v. Mobile &c. R. Co., 86 M. 172, 38 So. 732, 122 Am. St. 277.

Section 190.

Eminent domain. Police powers. Corporations. Laws 1902, p. 141.
Yazoo &c. R. Co. v. Southern R. Co., 83 M. 746, 36 So. 74.

Protects from encroachments of corporations.
Yazoo &c. R. Co. v. Searles, 85 M. 520, 37 So. 939, 68 L. R. A. 715.

Section 193.

Railroads. Injury to employe. Fellow servants. Superior officer. Defective appliances. Departments of labor.
Short v. New Orleans &c. R. Co., 69 M. 848, 13 So. 826.
Welsh v. Alabama &c. R. Co., 70 M. 20, 11 So. 723.
Illinois Cent. R. Co. v. Cathey, 70 M. 332, 12 So. 253.
Illinois Cent. R. Co. v. Hunter. 70 M. 471, 12 So. 482.
Evans v. Louisville &c. R. Co., 70 M. 527, 12 So. 581.
Richmond &c. R. Co. v. Rush, 71 M. 987, 15 So. 133.
Illinois Cent. R. Co. v. Bowles, 71 M. 1003, 15 So. 138.
White v. Louisville &c. R. Co., 72 M. 12, 16 So. 248.
Buckner v. Richmond &c. R. Co., 72 M. 873, 18 So. 449.
Illinois Cent. R. Co. v. Guess, 74 M. 170, 21 So. 50.
Illinois Cent. R. Co. v. Wooley, 77 M. 927, 28 So. 26.
See Brooks v. Mississippi Cotton Oil Co., 76 M. 874, 25 So. 479.
Farquhar v. Alabama &c. R. Co., 78 M. 193, 28 So. 850.
Yazoo &c. R. Co. v. Schraag, 84 M. 125, 36 So. 193.
Illinois Cent. R. Co. v. Abrams, 84 M. 456, 36 So. 542.
Yazoo &c. R. Co. v. Wallace, 90 M. 609, 43 So. 469.
Yazoo &c. R. Co. v. Scott, 95 M. 43, 48 So. 239.
Yazoo &c. R. Co. v. Woodruff, — M. —, 53 So. 687.

Survival of actions. Instantaneous death. Railroad employe.
McVey v. Illinois Cent. R. Co., 73 M. 487, 19 So. 209.

Fellow-servants. Injuries. Liability. Business of inherently dangerous nature. Special classification of railroad employes. "Class." Rescribed, Code 1892, § 3559.
Ballard v. Mississippi Cotton Oil Co., 81 M. 507, 34 So. 533, 95 Am. St. 476, 62 L. R. A. 407.

Fireman injured through negligence of his engineer, may recover from railroad company, &c.
Cheaves v. Southern R. Co., 82 M. 48, 33 So. 649, 34 So. 385.
See Southern R. Co. v. Cheaves, 84 M. 565, 36 So. 691.

Has no application to action based on negligence of railroad company itself, in failing to provide safe roadbed.
Gulf &c. R. Co. v. Bussey, 82 M. 616, 35 So. 166.

Fireman. Personal injuries. Collision. Jumping from engine. Contributory negligence.
Yazoo &c. R. Co. v. Block, 86 M. 426, 38 So. 372.

Railroad company not liable in damages to fireman receiving accidental injury while executing order of engineer.
Gulf &c. R. Co. v. Blockman, 87 M. 192, 39 So. 479.

Section foreman in charge of defective handcar. Contributory negligence. Question for jury.
Yazoo &c. R. Co. v. Parker, 88 M. 193, 40 So. 746.

"Railroad corporation." Remedy, limited to employes whom inherent danger attending actual operation of railroad trains, imperils.
Bradford Construction Co. v. Heflin, 88 M. 314, 42 So. 174.

Conductor. Contributory negligence. Defective engine.
Illinois Cent. R. Co. v. Emerson, 88 M. 598, 40 So. 818.

Self-executing.
Mobile &c. R. Co. v. Hicks, 91 M. 273, 46 So. 360, 124 Am. St. 679.

"Legal or personal representatives" embraces not only executor or administrator but heirs or next of kin.
Yazoo &c. R. Co. v. Washington, 92 M. 129, 45 So. 614.

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Handcars. Constitutionality.
Givens v. Southern R. Co., 94 M. 830, 49 So. 180, 22 L. R. A. (N. S.) 971.

Section 195.
Telegraph company. Discontinuance of office. Findings of railroad commission not conclusive.
Western Union Tel. Co. v. Mississippi Railroad Commission, 74 M. 80, 21 So. 15.

Telegraph company cannot limit liability for negligence in sending telegram by stipulating against same in case of unrepeated or cipher message.
Postal Tel. &c. Co. v. Wells, 82 M. 733, 35 So. 190.

Sleeping car company must notify passenger when destination is reached and afford reasonable opportunity for alighting.
Pullman Co. v. Kelly, 86 M. 87, 38 So. 317.

Telephone and telegraph companies, common carriers. Trust. Code 1906, §§ 4826–4899.
Cumberland Telephone &c. Co. v. State, — M. —, 54 So. 446.
See Alabama &c. R. Co. v. Cumberland Tel. &c. Co., 88 M. 438, 41 So. 258.

Section 198.
Legislature to enact laws to prevent trusts, combinations, or contracts and agreements inimical to public welfare.
Yazoo &c. R. Co. v. Southern R. Co., 83 M. 746, 36 So. 74.

Legislature to enact laws to prevent trusts, &c. Car service association.
Yazoo &c. R. Co. v. Searles, 85 M. 520, 37 So. 939, 68 L. R. A. 715.
See Cumberland Telephone &c. Co. v. State, — M. —, 54 So. 670.

Power of legislature to prohibit trusts, &c., neither derived from nor dependent on this section.
State v. Jackson Cotton Oil Co., 95 M. 6, 48 So. 300.

Section 201.
Uniform system of free public schools. Trustees. Laws 1888, p. 173, ch. 148.
Ellis v. Greaves, 82 M. 36, 34 So. 81.

Section 211.
Sixteenth sections. "Lands." Sale of timber. Code 1906, § 4702.
Dantzler Lumber Co. v. State, — M. —, 53 So. 1.

Section 212.
Not self-executing. Issuance of warrant to pay interest not compellable, in absence of legislative appropriation for such purpose.
State v. Cole, 81 M. 174, 32 So. 314.
See Colbert v. State, 86 M. 769, 39 So. 65.

Sections 223–226.
Do not invalidate Code 1892, § 3201. Contract by board of control of penitentiary to work plantation by convict labor, &c.
State v. Henry, 87 M. 125, 40 So. 152.

Sections 227–239.
Yazoo-Mississippi Delta Levee District, "subdivision" of state within Const. 1890, § 104.
Adams v. Illinois Cent. R. Co., 71 M. 752, 15 So. 640.

Section 228.
Recognizes "Mississippi levee district" as created by legislature. Land actually damaged, subject to taxes.
Smith v. Willis, 78 M. 243, 28 So. 878.
See Holder v. Bond, 29 So. 769.

Section 233.
Assessment of damages proceeding (Laws 1884, p. 163), maintainable by landowner damaged by taking of another's land. Jurisdiction in commissioners.
Richardson v. Board of Mississippi Levee Commissioners, 77 M. 518, 26 So. 963.

Section 234.
Change of levee district. Publication of proposed bill, &c.
Smith v. Willis, 78 M. 243, 28 So. 878.
See Holder v. Bond, 29 So. 769.

Bill affecting taxation, &c., of Yazoo-Mississippi Delta Levee District, &c., to be published, &c. Laws 1908, p. 81, ch. 97.
Bobo v. Yazoo-Mississippi Delta, 92 M. 792, 46 So. 819.

Taxation or revenue of Yazoo-Mississippi Delta Levee District: bill affecting. Publication. Laws 1908, p. 59, § 7.
Royal Ins. Co. v. Board of Levee Commissioners, 95 M. 168, 48 So. 183.

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Section 238.

Eminent domain. Damages. Land outside of levee. Taxes.
Duncan v. Levee Commissioners, 74 M. 125, 20 So. 838.

Levee taxes. Exemption. Land, actually damaged, within district recognized by Const. 1890, § 228.
Smith v. Willis, 78 M. 243, 28 So. 878.
See Holder v. Bond, 29 So. 769.

Levee taxes: what property exempt. Privilege tax.
Board of Levee Commissioners v. Houston, 81 M. 619, 33 So. 491.

Section 241.

Does not violate federal act, approved February 23, 1870, admitting state to representation in congress.
Sproule v. Fredericks, 69 M. 898, 11 So. 472.

Qualification of electors. Suspension of operation.
Nail v. State, 70 M. 32, 11 So. 793.

Qualifications of voters. Failure to register. Nonpayment of taxes.
Bew v. State, 71 M. 1, 13 So. 868.
Ferguson v. Monroe County, 71 M. 524, 14 So. 81.

Franchise. Electors.
Ratliff v. Beale, 74 M. 247, 20 So. 865, 34 L. R. A. 472.

Sections 241, 242, 244.

Jurors. Qualifications. Fourteenth amendment of Const. United States.
Dixon v. State, 74 M. 271, 20 So. 839.

Sections 241, 250.

Eligibility to hold office. Payment of taxes.
Roane v. Matthews, 75 M. 94, 21 So. 665.
Ferguson v. Brown, 75 M. 214, 21 So. 603.

Sections 241, 242.

Invalidate Code 1892, § 3028.
State v. Kelly, 81 M. 1, 32 So. 909.

Section 242.

Not repugnant to act of congress, approved February 23, 1870, conferring upon state right to federal representation.
Sproule v. Fredericks, 69 M. 898, 11 So. 472.

Electors: who may register and how.
Bew v. State, 71 M. 1, 13 So. 868.

Section 243.

Does not violate federal act, approved February 23, 1870, admitting state to representation in congress.
Sproule v. Fredericks, 69 M. 898, 11 So. 472.

Poll tax. Exempt property cannot be distrained to coerce payment.
Ratliff v. Beale, 74 M. 247, 20 So. 865, 34 L. R. A. 472.

Poll tax only tax imposed by constitution.
State v. Cole, 81 M. 174, 32 So. 314.
See Colbert v. State, 86 M. 769, 39 So. 65.

Section 244.

Not repugnant to act of congress, approved February 23, 1870, conferring upon state right to federal representation.
Sproule v. Fredericks, 69 M. 898, 11 So. 472.

Qualification of electors. Ability to read.
Mabry v. State, 71 M. 716, 14 So. 267.

Section 245.

Qualifications of municipal electors. Authorizes Code 1892, § 3028, rendered void by Const. 1890, §§ 241, 242.
State v. Kelly, 81 M. 1, 32 So. 909.

Section 249.

Electors must be registered.
Bew v. State, 71 M. 1, 13 So. 868.

Section 250.

Eligibility to public office. Failure to register.
Andrews v. Covington, 69 M. 740, 13 So. 853.

Eligibility to office. Nonpayment of taxes.
Roane v. Matthews, 75 M. 94, 21 So. 665.

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Section 251.

Registration of electors: time. Local option election.
Bew v. State, 71 M. 1, 13 So. 868.

Applies to all elections. Registration of electors.
State v. Kelly, 81 M. 1, 32 So. 909.

Section 254.

Representatives in lower house of legislature. Apportionment.
Ratliff v. Beale, 74 M. 247, 20 So. 865, 34 L. R. A. 472.

Section 255.

Legislature. Senators. Apportionment.
Ratliff v. Beale, 74 M. 247, 20 So. 865, 34 L. R. A. 472.

Act providing for creation of Jefferson Davis county.
Conner v. Gray, 88 M. 489, 41 So. 186.

Section 256.

Legislature. New apportionment of senators and representatives. Reduction in number. Counties arranged in three groups.
Ratliff v. Beale, 74 M. 247, 20 So. 865, 34 L. R. A. 472.

Section 259.

Removal of county seat. Right of citizen and taxpayer. Proceeding in chancery.
Simpson County v. Buckley, 81 M. 474, 33 So. 650.
See Native Lumber Co. v. Harrison County, 89 M. 171, 42 So. 665.

Removal of county seat. Laws 1902, p. 172, ch. 123.
Hinton v. Perry County, 84 M. 536, 36 So. 565.

Section 260.

Purpose of clause "nor shall the boundary," &c. "Boundary." "Judicial district."
Lindsley v. Coahoma County, 69 M. 815, 11 So. 336.
See Donnelly v. Scarborough, 91 M. 584, 46 So. 404.

New counties. Extent. Does not invalidate Laws 1902, p. 172, ch. 123.
Hinton v. Perry County, 84 M. 536, 36 So. 565.

Constitutionality of act in accordance with this section, unassailable on ground that officers are deprived of right to complete terms.
Conner v. Gray, 88 M. 489, 41 So. 186.

Section 261.

Not suspended by Const. 1890, § 274. Effective November 1, 1890. Does not invalidate Code 1880, §§ 2168, 2172, 2173, 2230.
State v. Stone, 69 M. 375, 11 So. 4.

Expenses of criminal prosecutions. Fines and forfeitures.
State Board of Education v. Mobile &c. R. Co., 71 M. 500, 14 So. 445.

Section 264.

Qualifications of jurors. Failure to register. Nonpayment of taxes.
Nail v. State, 70 M. 32, 11 So. 793.
See Dixon v. State, 74 M. 271, 20 So. 839.

Qualification of jurors. Ability to read and write.
Tolbert v. State, 71 M. 179, 14 So. 462, 42 Am. St. 454.
Mabry v. State, 71 M. 716, 14 So. 267.

Alien juror. Objection after verdict.
Fulcher v. State, 82 M. 630, 35 So. 170.

Qualifications of grand jurors. Effect of want of qualification on indictment. Legislature to provide for procuring and drawing.
Posey v. State, 86 M. 141, 38 So. 324.

Section 266.

Prohibits actual holding of two incompatible offices at same time. "Rights" of office. City assessor's office is one held under "authority of this state."
State v. Kelly, 80 M. 803, 31 So. 901.

Section 267.

Summer contract of physician-superintendent of blind institution to render medical services, actionable.
Fairley v. Western Union Tel. Co., 73 M. 6, 18 So. 796.

Sections 269, 270.

Charitable devise. Mortmain.
Blackbourn v. Tucker, 72 M. 735, 17 So. 737.

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Section 274.

Laws continued in force.
LeBlanc v. Illinois Cent. R. Co., 72 M. 669, 18 So. 381.
Rich v. Calhoun, 12 So. 707.

Did not suspend Const. 1890, § 261.
State v. Stone, 69 M. 375, 11 So. 4.

Suspended operation of Const. 1890, § 264.
Nail v. State, 70 M. 32, 11 So. 793.

Repeal of statutes. Repugnancy.
Judah v. Brothers, 71 M. 414, 14 So. 455.
Illinois Cent. R. Co. v. Brookhaven Machine Co. 71 M. 663, 16 So. 252.
Adams v. Illinois Cent. R. Co., 71 M. 752, 15 So. 640.

Provisions of Code 1880 as to duties of state treasurer and auditor, continued in force.
State v. Cole, 81 M. 174, 32 So. 314.

Section 276.

Suspended operation of Const. 1890, § 241.
Nail v. State, 70 M. 32, 11 So. 793.

Section 279.

Existing causes of action to continue.
State Board of Education v. Mobile &c. R. Co., 71 M. 500, 14 So. 445.

Corporation. Exemption from taxation. Consolidation.
Adams v. Yazoo &c. R. Co., 77 M. 194, 24 So. 200, 60 L. R. A. 33n.

Section 280.

Power and jurisdiction of courts.
Rich v. Calhoun, 12 So. 707.

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TOULMIN'S DIGEST.

Page 118, Section 33.
Right of defendant to plead several matters, &c.
State v. Morgan, 59 M. 349.

Page 146, Section 7.
Gives, to resident creditor, attachment at law against non-resident debtor having effects in this state.
Freeman v. Guion, 11 S. & M. 58.

Page 153, Section 16.
Proceedings in equity against absent defendants.
Freeman v. Guion, 11 S. & M. 58.

Page 243.
Deed. Acknowledgment before judge of superior court. Certificate.
Sessions v. Reynolds, 7 S. & M. 130.

TURNER'S DIGEST.

Page 108.
Gives, to resident creditor, attachment at law against non-resident debtor having effects in this state.
Freeman v. Guion, 11 S. & M. 58.

Page 186, Section 142.
Ejectment, joinder of issue on title only. Exception to form or substance of declaration.
Winn v. Cole, W. 119.

Page 448.
Administrator's sale.
Cable v. Martin, 1 H. 558.

POINDEXTER'S CODE.

Chapter 16.
Amended, H. C., p. 823, art. 17. Foreign attachments. Jurisdiction of chancery court.
Freeman v. Guion, 11 S. & M. 58.

Chapter 47.
Created office of notary public. As not unconstitutional.
Dennistoun v. Potts, 26 M. 13.

Page 8, Sections 7, 8.
Laws of public nature. &c., continued in force. Repealing clause.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

Pages 29, 30, Sections 7, 8, 9.
Probate court has power to enforce obedience to its orders and decrees by attachment.
Moore v. Probate Judge, W. 310.

Page 40, Section 42.
Probate court. Attachment to enforce obedience to orders and decrees.
Moore v. Probate Judge, W. 310.

Page 41, Section 50.
Distribution. Half brother of unmarried intestate, leaving no descendants nor brothers of whole blood, inherits estate, real and personal.
Fatheree v. Fatheree, W. 311.

Page 49, Section 75.
Attachment to enforce orders and decrees of probate court.
Moore v. Probate Judge, W. 310.

Page 56, Section 95.
Probate court. Power to enforce obedience to orders and decrees by attachment.
Moore v. Probate Judge, W. 310.

Page 58, Section 103.
Suit or action can be neither commenced nor sustained against administrator after estate is reported insolvent, except, &c.
Parker v. Whiting, 6 H. 352.
See Nutt v. Brandon, 85 M. 702, 38 So. 104.

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Page 68, Section 135.
Attachment to enforce orders and decrees of probate court.
Moore v. Probate Judge, W. 310.

Page 76, Section 16.
Change of venue to county of defendant's freehold and residence.
Spain v. Winter, W. 152.

Page 93, Section 37.
Interlocutory decrees. Appeal.
Linn v. Kyle, W. 315.

Page 95, Section 44.
Injunction bond. Indorsement on writ.
Davis v. Dixon, 1 H. 64, 26 Am. Dec. 695.

Page 107.
Writ to compel appearance. Indorsement as to nature of action. Surplusage.
Walker v. Tunstall, 3 H. 259.

Page 114, Section 45.
Application for continuance is addressed to sound discretion of court. Replevin.
Marshall v. Fulgham, 4 H. 216.

Page 118, Section 58.
Plea of payment confined to actions of debt, &c.
Barnes v. Lloyd, 1 H. 584.

Page 120.
Judgment by default, not set aside at entry term, final on last day of same. Execution.
Smith v. Ship, 1 H. 234.

Page 120, Section 67.
Upon judgment by default, taken by indorsee of note against indorser, judgment becomes final without intervention of jury.
Owen v. Little, W. 326.

Calculation of interest on acknowledged debt, mere clerical act.
Planters' Bank v. Coulson, 6 H. 395.

Page 122, Section 82.
Instrument: when of "sealed" character.
Bohannon v. Hough, W. 461.
McRaven v. McGuire, 9 S. & M. 34.

Page 124, Section 91.
Demurrable declaration. Judgment by default.
Irwin v. Williams, W. 314.

Page 141, Sections 156, 159.
Circuit court. Clerk to record proceedings in all suits and prosecutions. Minutes, &c.
Smith v. Ship, 1 H. 234.

Page 142, Section 160.
Principal and surety. Motion by latter for judgment against former. Record.
Brown v. Oldham, W. 493.

Gives surety right to move for judgment against principal for money paid by former for latter. Constitutionality.
Smith v. Smith, 1 H. 102.
Woodward v. May, 4 H. 389.
See Peck v. Critchlow, 7 H. 243; Scott v. Nichols, 27 M. 94, 61 Am. Dec. 503n.

Pages 157–168, Sections 1–31.
Amended, H. C., p. 823, art. 17. Foreign attachments. Jurisdiction of chancery court.
Freeman v. Guion, 11 S. & M. 58.

Page 165, Section 20.
Attachment before maturity of debt. Judgment. Stay of execution.
Berry v. Anderson, 2 H. 649.

Page 167, Section 26.
Attachment. Judgment against non-resident. Security to be found by plaintiff before sale. Garnishee.
Oldham v. Ledbetter, 1 H. 43, 26 Am. Dec. 690.
Berry v. Anderson, 2 H. 649.

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Page 170, Sections 7, 8.
Attachment for rent.
Bradley v. Piggott, W. 348.

Page 173, Section 17.
Replevin. Return term to be trial term. Continuance.
Marshall v. Fulgham, 4 H. 216.

Page 184, Section 4.
Exception from limitation of six years, of "such actions as concern the trade of merchandise," &c., confined to open and current accounts, &c.
Davis v. Tiernan, 2 H. 786.

Page 185, Section 9.
Limitation of actions. Judgments.
McCoy v. Nichols, 4 H. 31.

Page 186, Section 12.
Limitations. "Absence from state." Non-residents embraced by provisions.
Estis v. Rawlins, 5 H. 258.

Page 192, Section 2.
Conveyance of goods or chattels: when fraudulent.
Marshall v. Fulgham, 4 H. 216.

Page 210, Section 49.
Sheriff, retaining money collected. Motion for judgment.
Governor v. Gridley, W. 328.

Pages 263–264, Sections 1–6.
Created office of notary public. As not unconstitutional.
Dennistoun v. Potts, 26 M. 13.

Page 313, Section 9.
Actionable words. Plea of justification should traverse allegation that words were spoken in manner to insult, &c.
Crawford v. Melton, 12 S. & M. 328.

Actionable words. Declaration. Demurrer. Answer. General issue. Defenses and evidence. Instructions. "Excessive damages."
Lewis v. Black, 27 M. 425.

Page 326, Section 22.
Courts of equity. Jurisdiction in cases of gambling consideration to sustain bill for discovery or enjoin judgments at law.
McAuley v. Mardis, W. 307.

Page 461.
Rate of interest.
Eastin v. Vandorn, W. 214.

Page 464, Section 9.
Promissory notes not payable to order. Assignment by indorsement. Suit. Plaintiff.
Oldham v. Ledbetter, 1 H. 43, 26 Am. Dec. 690.

HOWARD AND HUTCHINSON'S CODE.

Page 70, Section 1.
Estate. Representation of insolvency. Suit pending against administrator prosecutable to judgment without execution.
Parker v. Whiting, 6 H. 352
Nutt v. Brandon, 85 M. 702, 38 So. 104.

Page 162, Section 28.
Penalizes infliction of cruel or unusual punishment on slave.
Kelly v. State, 3 S. & M. 518, 1 Mor. St. Cas. 235.
See Scott v. State, 31 M. 473, 1 Mor. St. Cas. 886.

Pages 164, 165.
Larceny by slave. Accessory. Punishment. Master, employer or overseer. Restoration of, or payment for, property. Liability for costs.
Dowell v. Boyd, 3 S. & M. 592.

Page 166.
Free person of color, coming here from foreign state. Apprehension and sale.
Leech v. Cooley, 6 S. & M. 93.

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Page 166, Section 48.
Remedy of negro conceiving himself illegally detained in slavery.
Thornton v. Demoss, 5 S. & M. 609.
Sam v. Fore, 12 S. & M. 413.

Page 296, Section 25.
Sheriff. Execution. Omission to make money, &c. Liability. Interest. Demand.
Collins v. Terrall, 2 S. & M. 383.
See Garrett v. Hamblin, 11 S. & M. 219, 49 Am. Dec. 53.

Pages 298, 299.
Authorize circuit court in absence of district attorney to appoint substitute. Constitutional.
Keithler v. State, 10 S. & M. 192, 1 Mor. St. Cas. 403.

Page 332, Sections 22-26.
See H. C., p. 496, art. 4.
Secures to wife specific property. Proceeds and profits of same, and other property purchased therewith, liable to creditors of husband.
Grand Gulf Bank v. Barnes, 2 S. & M. 165.
Proceeds of separate property of wife belong to husband and are subject to executions against him.
Beatty v. Smith, 2 S. & M. 567.

Page 337.
Guardian of infant. Inventory. Annual account. Suit on bond.
Burrus v. Thomas, 13 S. & M. 459.

Page 340, Section 18.
Foreign guardian to record letters here, &c. Prosecution in this state, of action accrued in state of original appointment.
Hines v. State, 10 S. & M. 529.

Page 343.
Deed of trust of personal property. Attestation. Record.
Wilkins v. Wells, 9 S. & M. 325.
See Morris v. Rucks, 62 M. 76.

Page 344, Section 4.
Deed to personalty: where to be recorded. Removal of property from county by permission, &c. "Creditor," marriage settlement, &c.
Dixon v. Lacoste, 1 S. & M. 70.
Palmer v. Cross, 1 S. & M. 48.
Moss v. Davidson, 1 S. & M. 112.
Pickett v. Banks, 11 S. & M. 445.

Page 347, Section 19.
Seems to give sanction to conveyances made by married women under requisite ceremonies.
Surget v. Little, 24 M. 118.

Page 348, Section 21.
Written instrument lost, &c. Record or copy of record, certified by clerk, to be received in evidence.
Haydon v. Moore, 1 S. & M. 605.
Chaplain v. Briscoe, 5 S. & M. 198.
Harmon v. James, 7 S. & M. 111, 45 Am. Dec. 296.

Page 349.
Where whole purchase money has been paid, vendee by title bond has title and interest vendible under execution at law.
Wolfe v. Dowell, 13 S. & M. 103, 51 Am. Dec. 147.

Page 349, Section 29.
Estate of vendee by title bond who has paid all of purchase money, vendible under execution.
Thompson v. Wheatley, 5 S. & M. 499.
See Adams v. Harris, 47 M. 144; Lockhart v. Camfield, 48 M. 470.

Page 349, Section 32.
Applies only where parties have omitted to insert covenants.
Weems v. McCaughan, 7 S. & M. 422, 45 Am. Dec. 314.

Page 352, Section 43.
Regulates form of petition for dower.
Caillaret v. Bernard, 7 S. & M. 316.

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Page 352, Section 44.
Defective petition for dower in personalty. Summary proceedings. Amendment.
Caillaret v. Bernard, 7 S. & M. 316.

Page 353, Section 45.
Widow may retain possession of dwelling house and plantation, free from molestation and rent, until dower is assigned.
Wallis v. Smith, 2 S. & M. 220.
Caillaret v. Bernard, 7 S. & M. 319.

Page 353, Section 47.
Wife endowable out of trust estate held for use and to pay debts of husband.
Caillaret v. Bernard, 7 S. & M. 319.

Page 368, Section 99.
Probate clerk may take and certify acknowledgment of married woman to conveyance of her separate property.
James v. Fisk, 9 S. & M. 144, 47 Am. Dec. 111.

Page 373, Section 12.
Common law inhibition on assignments of choses in action removed in specified cases. Judgments not embraced by provisions.
Wilson v. McElroy, 2 S. & M. 241.

Promissory notes. Negotiability. Three days' grace.
Wiggle v. Thomason, 11 S. & M. 452.
See Winston v. Miller, 12 S. & M. 550.

Set-offs. Does not apply when indorser takes up note pursuant to contract.
Maury v. Jeffers, 4 S. & M. 87.

Paper constituting promissory note.
Besancon v. Shirley, 9 S. & M. 457.

Note. Assignment. Defense. Code 1892, § 3503.
Brown v. McGraw, 12 S. & M. 267.
Millsaps v. Merchants' &c. Bank, 71 M. 361, 13 So. 903.

Page 374.
Contract. False consideration. Usury. Resort to equity for relief. Forfeiture of interest.
Parchman v. McKinney, 12 S. & M. 631.
See American &c. Mortgage Co. v. Jefferson, 69 M. 770, 12 So. 464, 30 Am. St. 587.

Page 395, Section 35.
Letters of administration: jurisdiction to grant.
Wright v. Beck, 10 S. & M. 277.

Page 398, Section 46.
New bond of executor or administrator. Absolute discharge from liability for default before release, of sureties on old bond.
Russell v. McDougall, 3 S. & M. 234.

Page 406, Section 70.
Rule to distribute. Administrator, indispensable party. Plenary proceedings. Chancery practice.
Porter v. Porter, 7 H. 106, 40 Am. Dec. 55.

Page 406, Section 71.
Legatee entitled to receive legacy after twelve months, on giving bond to refund.
Magee v. Gregg, 11 S. & M. 70.

Page 409, Section 79.
Sale of deceased's land, incapable of division.
Smith v. Craig, 10 S. & M. 447.

Page 409, Section 80.
Insolvent estate. Proceedings.
Saunders v. Planters' Bank, 2 S. & M. 287.

Page 409, Section 80.
Insolvent estate. Individual and partnership debts. Distribution.
Dahlgren v. Duncan, 7 S. & M. 280.

Page 409, Section 80.
Provision for appointment of referees. Invocation by creditor.
Smith v. Berry, 1 S. & M. 321.
Regan v. Stone, 4 S. & M. 691.
See Regan v. Stone, 7 S. & M. 104.

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Page 411, Section 86.
Sale by executor or administrator to be made to highest bidder at public auction.
Worten v. Howard, 2 S. & M. 527, 41 Am. Dec. 607.

Page 411, Section 87.
Assent of executor to specific legacy, as unnecessary to enable legatee to maintain suit for same at law.
Worten v. Howard, 2 S. & M. 527, 41 Am. Dec. 607.
See Magee v. Gregg, 11 S. & M. 70.

Page 412, Section 88.
Action of detinue survives to executor or administrator.
Worten v. Howard, 2 S. & M. 527, 41 Am. Dec. 607.

Page 412, Section 89.
Division of land of deceased among heirs.
Smith v. Craig, 10 S. & M. 447.

Page 413, Section 90.
Sale and conveyance of lands devised to be sold.
Bodley v. McKinney, 9 S. & M. 339.

Page 413, Section 92.
Limitation. Presentation of claims against estates of deceased persons. Publication, condition precedent to attachment of bar.
Dowell v. Webber, 2 S. & M. 452.
Pearl v. Conley, 7 S. & M. 356.
Branch Bank v. Windham, 31 M. 317.

Page 414, Section 95.
Action of detinue may, on death of plaintiff, be revived in executor's name.
Worten v. Howard, 2 S. & M. 527, 41 Am. Dec. 607.

Page 421, Section 123.
Treats interest of widow in personal estate of deceased husband as dower. Assignment.
Caillaret v. Bernard, 7 S. & M. 316.
Year's provision may, if absolutely necessary, be set aside in money. Presentation of widow's claim. Insolvent estate.
McNulty v. Lewis, 8 S. & M. 520.

Page 445, Section 3.
Boards of police. Jurisdiction.
Monet v. Jones, 10 S. & M. 237.

Page 450, Section 29.
Action by overseer of roads before justice of peace, for obstructing highway. Judgment of board of police condition precedent.
Hairston v. Francher, 7 S. & M. 249.

Page 453.
Rejection by county board of claim of alleged creditor as appealable judgment.
Yalabusha County v. Carbry, 3 S. & M. 529.

Page 453, Section 41.
Obstructing highway. Action before justice of peace by overseer of roads. Judgment of board of police condition precedent.
Hairston v. Francher, 7 S. & M. 249.
Judgment of board of police. Appeal. Expense of defense in circuit court.
Taylor v. Marion County, 51 M. 731.

Page 465.
Levee. Proprietor to pay for work let out. Conclusive proof of claim. Lien.
Skipwith v. Dodd, 24 M. 487.

Page 471.
Probate clerks may appoint deputies. Authority of latter equal to that of former. Acknowledgment to deed.
McCraven v. McGuire, 23 M. 100.

Page 472, Sections 17, 18.
Account of administrator. Contest by distributee. Case for jury. Agreement by parties to trial by court.
Price v. Mitchell, 10 S. & M. 179.

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Page 472, Section 18.
Issue made up in probate court and sent to circuit court for jury trial. Verdict. Judgment.
Wallace v. Wingate, 6 S. & M. 151.

Page 473, Section 20.
Appeal. Bond. Execution by third person.
Hardaway v. Biles, 1 S. & M. 657.

Page 481, Section 8.
Motion to quash forthcoming bond, taken under advisement and not decided within four months.
Puckett v. Graves, 6 S. & M. 384.
Motion for new trial, taken under advisement, sustained in writing within time limit. Striking case at next term, error.
McClure v. Houston, 10 S. & M. 392.

Page 482, Section 9.
Circuit judges. Charging juries. Requests in writing. Modifications.
Keithler v. State, 10 S. & M. 192, 1 Mor. St. Cas. 403.

Page 493, Section 53.
Prohibits circuit judges from charging jury unless counsel differ as to law and request charge on distinctly specified point.
Keithler v. State, 10 S. & M. 192, 1 Mor. St. Cas. 403.

Page 498, Section 68.
Grand jury. Special venire facias.
Dowling v. State, 5 S. & M. 664, 1 Mor. St. Cas. 280.
Johnston v. State, 7 S. & M. 58, 1 Mor. St. Cas. 297.

Page 513.
Order of chancellor appointing receiver appealable.
Wade v. Amer. Colonization Society, 4 S. & M. 670.

Page 514, Sections 40, 41.
Injunction. Dissolution. Damages.
Tyler v. McCardle, 9 S. & M. 230.

Page 520, Section 63.
Foreign attachments. Creditor, with or without judgment, who can bring himself within statute, may file bill and obtain relief.
Comstock v. Rayford, 1 S. & M. 423, 40 Am. Dec. 102.
Foreign attachment. Security by resident defendant having in his hands property of non-resident debtor. Injunction.
Trotter v. White, 10 S. & M. 607.

Page 522.
Chancery. Non-resident defendant. Publication. Affidavit.
McKiernan v. Massingill, 6 S. & M. 375.

Page 525, Section 76.
Chancery. Foreclosure. Sale of land. Bond with surety to be taken from purchaser. Erroneous decree.
Cook v. Fultz, 10 S. & M. 369.

Page 533, Section 12.
Dismissal in high court for failure of plaintiff in error to file record on first day of return term. Unrepealed by H. & H., p. 542, §§ 55, 56.
McGehe v. Caruthers, 2 S. & M. 443.

Page 538, Section 40.
Final judgment prerequisite to writ of error. Latter allowable only on fiat of competent officer.
Loftin v. State, 11 S. & M. 358, 1 Mor. St. Cas. 420.

Page 540.
Writ of error, writ of right. No conditions annexed to emanation.
Hardaway v. Biles, 1 S. & M. 657.

Page 541, Section 50.
Forthcoming bond, given and forfeited by maker of promissory note, sued jointly with indorser. Writ of error by latter.
Dorsey v. Merritt, 6 H. 390.

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Page 542, Sections 55, 56.
Do not repeal H. & H., p. 533, § 12. High court. Separate docket in each of three districts. Dismissal for failure of plaintiff in error to file record on first day of return term.
McGehe v. Caruthers, 2 S. & M. 443.

Page 547, Section 6.
Actionable words. Declaration. Plea. Justification. Evidence to establish good character, unimpeached, in aggravation of damages.
Scott v. Peebles, 2 S. & M. 546.

Actionable words. Plea of justification should traverse allegation that words were spoken in manner to insult, &c.
Crawford v. Melton, 12 S. & M. 328.

Actionable words. Declaration. Demurrer. Answer. General issue. Defenses and evidence. Instructions. "Excessive damages."
Lewis v. Black, 27 M. 425.

Page 551, Section 19.
Bond in attachment must pursue statutory form. Condition.
Amos v. Allnutt, 2 S. & M. 215.

Page 553, Section 24.
Proceedings when garnishee fails to appear.
Matheny v. Galloway, 12 S. & M. 475.

Page 558, Section 42.
When answer of garnishee is contested, statute authorizes trial by jury and dispenses with formality of pleading.
O'Brien v. Liddell, 10 S. & M. 371.

Pages 558, 559, Sections 46-48.
Distress for rent. Replevy bond. Payee. Execution on motion. As constitutional.
Peck v. Critchlow, 7 H. 243.

Page 559, Section 43.
Replevin bond after distress for rent. Lodgment in office of clerk of court.
Tifft v. Virden, 7 S. & M. 91.

Page 571, Section 99.
Limitations. Absence from state.
Dowell v. Webber, 2 S. & M. 452.

Page 571, Section 101.
Second suit not barred by general statute of limitations, not required to be brought within one year after arrest or reversal.
Lang v. Fatheree, 7 S. & M. 404.

Page 572, Section 108.
Action of assumpsit, not action on case.
Fletcher v. Benbrook, 5 S. & M. 619.

Page 577, Section 5.
Peremptorily requires, in indorsement of writ, explicit statement of amount demanded by suit.
Foster v. Collins, 5 S. & M. 259.

Page 584.
Pending suit, not abated by death of nominal plaintiff.
Humphreys v. Irvine, 6 S. & M. 205.

Page 585.
Suit by partners. Suggestion, during progress of cause, of death of one of plaintiffs. Former judgment of abatement.
Sprawles v. Barnes, 1 S. & M. 629.

Page 590, Section 6.
Bill of particulars. Applies only to actions of assumpsit.
Williams v. Williams, 11 S. & M. 393.

Page 590, Section 7.
Authorizes defendant to prove any payment or set-off, provided, &c.
Alliston v. Lindsey, 12 S. & M. 656.

Page 591.
Jeofails. Discontinuance. Failure to demur.
Tucker v. Zollicoffer, 12 S. & M. 591.

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No judgment after verdict, to be reversed for any mistake or misconception of form of action.

Cartwright v. Carpenter, 7 H. 328, 40 Am. Dec. 66.
Kellogg v. Budlong, 7 H. 340.
See Breck v. Smith, 44 M. 690.

Page 591, Section 12.

Faulty count. Verdict giving entire damages, to be good.
Scott v. Peebles, 2 S. & M. 546.

Page 591, Section 13.

Modifies common law action of detinue.
Gilliam v. Moore, 10 S. & M. 130.

Page 594, Section 25.

Paper constituting promissory note.
Besancon v. Shirley, 9 S. & M. 457.

Page 594, Section 28.

One or more of makers of unindorsed note may be sued in same action.
Thompson v. Planters' Bank, 2 S. & M. 476.
See Crump v. Wooten, 41 M. 611.

Page 595, Section 29.

Insolvent estate. Individual and partnership debts. Distribution.
Dahlgren v. Duncan, 7 S. & M. 280.

Page 595, Section 32.

Pleas to actions to be deemed and adjudged as admitting parties and character of parties suing. Applies to corporations.
Reed v. Benton &c. Banking Co., 4 H. 257.

Plea to action admits conclusively, character in which defendant is sued.
Wade v. Staunton, 5 H. 631.

Pleas. Nul tiel corporation, attested by oath. Non assumpsit, verified.
Vicksburg Waterworks &c. Co. v. Washington, 1 S. & M. 536.

Page 595, Section 33.

Drawers and indorsers of note, &c., to be sued in one action. Does not apply to makers of unindorsed note.
Thompson v. Planters' Bank, 2 S. & M. 476.

Suit on certain paper properly brought against makers and indorsers, jointly.
Besancon v. Shirley, 9 S. & M. 457.

Page 596, Section 38.

Note. Affidavit as to insolvency of first indorser not required as condition precedent to levy on property of second. Presumption.
Hamblin v. Foster, 4 S. & M. 139.

Page 597, Section 43.

Defendant may plead as many pleas in bar of action as he shall choose. Includes pleas in abatement.
James v. Dowell, 7 S. & M. 333.

Personal plea to jurisdiction of court unpleadable after plea to action.
Peters v. Finney, 12 S. & M. 449.

Page 599.

Certificate of land office is evidence of title.
Robinson v. Parker, 3 S. & M. 114, 41 Am. Dec. 614.

Page 603, Section 17.

Deposition. Sufficient certification.
Stone v. Cannon, 9 S. & M. 595.

Page 605, Section 24.

Copies of land office records, duly authenticated, &c., as evidence.
Sessions v. Reynolds, 7 S. & M. 130,

Land office records. Transcripts: when admissible as evidence. Ejectment by Indian claiming under Chickasaw treaty. Certificate of register, &c.
Wray v. Doe, 10 S. & M. 452.
Hardin v. Ho-yo-po-nubby, 27 M. 567.

Page 609, Section 33.

Certified record of notary, reciting manner of giving notice of protest, admitted in evidence, may be impeached and contradicted.
Wood v. American Life Ins. Co., 7 H. 609.

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Relates exclusively to acts of domestic notaries.
White v. Englehard, 2 S. & M. 38.

Page 610, Section 34.
Certified copies of recorded instruments to be available as evidence without accounting for absence of originals. Repealed.
Haydon v. Moore, 1 S. & M. 605.

Page 610, Section 37.
Continuance in prosecution for murder. Application. Affidavit.
McDaniel v. State, 8 S. & M. 401, 1 Mor. St. Cas. 336, 47 Am. Dec. 93.

Page 615.
Requires defects in pleading to be specially pointed out by demurrer, unless, &c. Action of assumpsit on note. Plea.
Ray v. Woolfolk, 1 S. & M. 523.

Page 615, Section 5.
Authorizes plea of payment, when, &c.
Alliston v. Lindsey, 12 S. & M. 656.

Page 615, Section 8.
Judgment upon sustaining demurrer to plea puis darrein continuance should be respondeat ouster.
McDugald v. Mississippi Union Bank, 6 S. & M. 333.

Page 616, Section 9.
Demurrer to plea, overruled. Judgment by default. Right to reply before end of term.
Shields v. Taylor, 13 S. & M. 127.

Page 617.
Scroll representing seal sufficient, alone, to give "sealed" character to instrument.
McRaven v. McGuire, 9 S. & M. 34.

Page 618, Section 25.
Excess in bond taken by virtue of execution. Release.
Jones v. Mississippi &c. R. Co., 5 H. 407.

Page 619, Section 27.
Error for court to compel trial of case on day prior to one set by clerk.
Fall v. Commissioners of Sinking Fund, 3 S. & M. 127.

Page 621.
Judgment is lien on all property of defendant.
Planters' Bank v. Walker, 3 S. & M. 409.
Cayce v. Stovall, 50 M. 396.

Page 621, Section 43.
Judgments. Liens. Priority. After-acquired property.
Moody v. Harper, 25 M. 484.

Page 629, Section 2.
Levy and sale under second execution, before return of first, legal.
Alexander v. Polk, 39 M. 737.

Page 633, Section 17.
Execution sales. Place. Time.
Jones v. Rogers, 85 M. 802, 38 So. 742.

Page 634, Section 20.
Execution. Claimant's affidavit. Bond. Issue.
Ellis v. Abercrombie, 10 S. & M. 474.

Page 642, Section 42.
Motion against sheriff. Not violative of Const. 1832, art. 1, § 28.
Lewis v. Garrett, 5 H. 434.
Sheriff. Execution. Return. "Omission to levy." Liability.
Garrett v. Hamblin, 11 S. & M. 219, 49 Am. Dec. 53.

Page 644.
Where whole purchase money has been paid, vendee by title bond has title and interest vendible under execution at law.
Wolfe v. Dowell, 13 S. & M. 103, 51 Am. Dec. 147.

Page 653, Section 73.
Forthcoming bond. Forfeiture, and effect of same. Constitutional.

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Wanzer v. Barker, 4 H. 363.
Jones v. Mississippi &c. R. Co., 5 H. 407.

Page 654, Section 75.
Issues for trial of right of property triable by same rules as issues in "detinue," meaning "detinue" of H. & H., p. 591, § 13.
Gilliam v. Moore, 10 S. & M. 130.

Page 690, Section 5.
No second indictment for murder following reversal of conviction of manslaughter and quashal of indictment.
Hurt v. State, 25 M. 378, 1 Mor. St. Cas. 645, 59 Am. Dec. 225.

Page 694, Section 3.
Homicide: when justifiable.
McDaniel v. State, 8 S. & M. 401, 1 Mor. St. Cas. 336, 47 Am. Dec. 93.

Page 722, Section 2.
Insanity as excuse for crime.
Kelly v. State, 3 S. & M. 518, 1 Mor. St. Cas. 235.

Page 725, Section 18.
Condemned principal. Competency as witness on trial of accessory. Weight and credibility of testimony, question for jury.
Keithler v. State, 10 S. & M. 192, 1 Mor. St. Cas. 403.

Page 725, Section 20.
No second indictment for murder following reversal of conviction of manslaughter and quashal of indictment.
Hurt v. State, 25 M. 378, 1 Mor. St. Cas. 645, 59 Am. Dec. 225.

HUTCHINSON'S CODE.

Hutchinson's Code not a revision. Statutes of a general nature not repealed thereby.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

Page 66, Sections 7, 8.
Poindexter's Code. Laws of public nature, &c., continued in force. Repealing clause.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

Page 69, Section 5.
Committee to examine "Hutchinson's Code" &c.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

Page 125, Article 19, Section 6.
Treaty of Dancing Rabbit Creek. Reservation of quarter sections. Selection. Title. Adverse possession. Statute of limitations.
Bates v. Aven, 60 M. 955.

Page 136, Article 14, Sections 1-6.
Extends laws of state over persons and property of resident Indians. Chickasaws. Marriage. Property of wife. Debts of husband.
Fisher v. Allen, 2 H. 611.

Page 172, Section 15.
Allowing minors and insane persons, one year after removal of disabilities, to redeem land sold for taxes, in force.
Richards v. Patterson, 30 M. 583.

Page 186.
County assessor. Compensation. Did not repeal Laws 1841, p. 56, § 11.
Holmes County v. Morton, 24 M. 240.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

Page 190, Section 27.
Does not expressly repeal H. C., p. 172, § 15, as to time allowed persons formerly under disabilities, to redeem lands sold for taxes.
Richards v. Patterson, 30 M. 583.

Page 196.
Rule for taxation of bank stock. Code 1857, p. 77, art. 24.
Bank v. Oxford, 70 M. 504, 12 So. 203.

Page 213, Article 12, Section 1.
School lands. Insufficient number of residents within township to form board of trustees.

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Brown v. Issaquena County, 54 M. 230.
See Lauderdale County v. East Miss. Mills Co., 16 So. 210.

Page 213, Article 12, Section 2.
Sixteenth section. Lease. Payment necessary to validity.
Sexton v. Coahoma County, 86 M. 380, 38 So. 636.

Page 214.
Does not make void or illegal mortgage or other security for loan of school funds.
Littlewort v. Davis, 50 M. 403.

Page 222.
School land. Lease.
Jones v. Madison County, 72 M. 777, 18 So. 87.
See Lauderdale County v. East Miss. Mills, 18 So. 94.

Page 223, Article 26, Section 5.
Sixteenth section. Payment necessary to validity of lease.
Sexton v. Coahoma County, 86 M. 380, 38 So. 636.

Page 224, Section 6.
Execution on judgment against surety cannot be levied on property of principal against whom there is no judgment.
Smith v. State, 13 S. & M. 140.

Page 232, Section 6.
Dower in unpaid for land, bought by husband from United States government. Payment of balance by administrator. Insolvent estate.
Torrence v. Carbry, 27 M. 697.

Page 239, Section 6.
School land. Notes to be filed before they become due. Presumption of payment. Execution quashable on motion.
Matthews v. Parker, 27 M. 642.

Page 252, Articles 7-10.
"Public" roads. Boards of police.
Tegarden v. McBean, 33 M. 283.

Page 267, Section 18.
Inn-keepers. Spirituous liquors. Sale on credit. Does not apply to retail grocers.
Brittain v. Bethany, 31 M. 331.

Page 280, Section 7.
Debt, proper remedy to recover penalty for cutting trees.
Ware v. Collins, 35 M. 223, 72 Am. Dec. 122.
Elder v. Hilzheim, 35 M. 231.

Page 288, Article 6, Sections 1-5.
Attachment against steamboat. Remedial. Liberal construction to advance remedy. Affidavit.
Auter v. The James Jacobs, 34 M. 269.

Attachment against steamboat. In pari materia with H. C., p. 801, art. 4. Service of process by constable.
Wallace v. Seales, 36 M. 53.

Page 290, Article 8.
Attachment against steamboat. Affidavit.
Lum v. Steamboat Buckeye, 24 M. 564.

Page 290, Article 8, Sections 1, 2.
Attachment against steamboat. Extension of remedy. Affidavit.
Auter v. The James Jacobs, 34 M. 269.

Page 296, Section 2.
Warrant to physician as evidence.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

Pages 324-328.
See Laws 1840, pp. 13-22.

Page 325, Section 5.
Banks. Right to purchase real estate.
Ingraham v. Speed, 30 M. 410.

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Page 325, Section 7.
Prohibits transfer by banks, by indorsement or otherwise, of notes, bills receivable, or other evidences of debt.
Montgomery v. Commercial Bank, Sm. & M. Ch. 632.
Bacon v. Ventress, 32 M. 158.

Page 326, Section 10.
Bank whose charter has been declared forfeited may sue for and recover debts due.
Campbell v. Mississippi Union Bank, 6 H. 625.

Pages 328–329.
See Laws 1840, pp. 22-24.

Page 328, Article 20, Section 2.
Compels banks to receive their own notes, at par, in liquidation of bills receivable and other claims owing.
Robson v. Benton &c. Banking Co., 7 S. & M. 724.
See Railey v. Bacon, 26 M. 455.

Pages 328, 329, Article 21, Sections 1-7.
Prohibit issuance of notes to circulate as money, unless same be authorized by law. Bond of agent of foreign bank.
Bank of Newberry v. Stegall, 41 M. 142.

Page 329, Article 22.
Unauthorized banking. Quo warranto, &c.
Commercial Bank v. State, 4 S. & M. 439.

Page 331, Section 8.
Quo warranto. Does not give right to have suits pending in name of bank revived in name of trustees.
Torry v. Robertson, 24 M. 192.

Page 332, Article 23.
Amendatory, H. C., p. 329, art. 22. Unconstitutional and void.
Commercial Bank v. Chambers, 8 S. & M. 9.
Bingaman v. Robertson, 25 M. 390.

Page 409, Article 4.
Suit against state. Assistant counsel, employed by attorney-general. Contract for payment of fee.
State v. Mayes, 28 M. 706.

Page 433, Section 158.
Circuit clerk cannot take affidavit to complaint, under Laws 1850, p. 59, § 6.
Ayres v. Taylor, 25 M. 200.

Page 442, Section 6.
Deputy sheriff. Appointment. Failure to take oath. Effect.
Pickens v. McNutt, 12 S. & M. 651.

Page 443, Section 7.
Process. Sheriff required to "make due return thereof to the proper court."
Merritt v. White, 37 M. 438.

Page 496, Article 4.
See H. & H., p. 332, §§ 22-26; Laws 1839, p. 72, ch. 46.
Does not alter common law rule that husband may, during coverture, execute valid lease of wife's realty.
Baynton v. Finnall, 4 S. & M. 193.

Married woman. Power to contract, &c. Joinder with husband in execution of note.
Davis v. Foy, 7 S. & M. 64.

Separate estate of wife. Slaves. Sale. Promissory note executed by husband and wife.
Frost v. Doyle, 7 S. & M. 68.

Debts of wife contracted dum sola. Bankruptcy of husband. Effect.
Dickson v. Miller, 11 S. & M. 594, 49 Am. Dec. 71.

Property, inherited by wife, held to inure to her separate benefit, &c.
Clarke v. McCreary, 12 S. & M. 347.
Duncan v. Johnson, 23 M. 130.
Kilcrease v. Shelby, 23 M. 161.
See Tinnin v. Price, 27 M. 619.

Separate estate of wife. Adultery of latter. Slaves. Rights of husband.
Carter v. Carter, 14 S. & M. 59.

Gift of slave by married woman.
Curll v. Compton, 14 S. & M. 56.

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Married woman. Separate property. Children. Vested right.
Marshall v. King, 24 M. 85.
Bates v. Cotton, 32 M. 266.

Contract by wife as agent for husband. Declaration.
McKee v. Kent, 24 M. 131.

Enabling statute. Gifts from husband to wife.
Ratcliffe v. Dougherty, 24 M. 181.
See Butterfield v. Stanton, 44 M. 15.

Promissory note, payable directly to wife, prima facie her separate property. Suit for recovery should be in joint name of husband and wife.
Bodgett v. Ebbing, 24 M. 245.

No action at law can be maintained against married woman for purpose of charging separate estate.
Swett v. Penrice, 24 M. 416.

Separate property of married woman. Slave. Legal title in wife; use in husband.
Harvey v. Edington, 25 M. 22.

Enabling statute. Feme covert. Acknowledgment. Advancements by husband. Purchases of property, voluntarily made in name of wife.
Warren v. Brown, 25 M. 66, 57 Am. Dec. 191n.

Title to slaves of married woman vests, at her death, in her personal representatives.
May v. Rockett, 25 M. 233.
Parr v. Gibbons, 27 M. 375.

Wife. Separate estate. Slaves. Interest and rights of husband, &c.
Lyon v. Knott, 26 M. 548.
Cameron v. Cameron, 29 M. 112.
Walton v. Olive, 29 M. 270.

Married woman. Acquisition of property. Sale of same. Slaves.
Garrison v. Fisher, 26 M. 352.

Recognizes absolute property of wife in her slaves. Rights of husband.
Wells v. Treadwell, 28 M. 717.

Enabling statute. Femes covert. Contracts. Conflict of laws.
Dalton v. Murphy, 30 M. 59.

Wife. Right to sue to protect title.
Pennington v. Acker, 30 M. 161.

Enabling statute. Feme covert. Disposition of separate estate. Right to make will.
Lee v. Bennett, 31 M. 119.

Slaves of wife. Contract by husband to part with possession binding on wife during coverture, &c.
Friley v. White, 31 M. 442.

Wife. Separate estate. Descent.
Olive v. Walton, 33 M. 103.
Richmond v. Delay, 34 M. 83.

Judgment against husband and wife. Separate estate of latter. Decease. Right of husband, as against administrator, to possession of slaves.
Steadman v. Holman, 33 M. 550.

Promissory note payable to husband and wife. Presumption. Indorsement.
Work v. Glaskins, 33 M. 539.

Slaves of wife. Sale.
Clark v. Slaughter, 34 M. 65.

Married woman. Separate estate. Money as "property." Action at law, upon death of husband, against latter's executor.
Mitchell v. Mitchell, 35 M. 108.

Slave of wife. Sale by husband.
Smith v. Williams, 36 M. 545.

Wife. Slaves. Decree of divorce.
Clark v. Slaughter, 38 M. 64.

Husband and wife. Provision for separation ceases on reconciliation.
Weathersby v. Weathersby, 39 M. 652.

Enabling statute. Feme covert subject to common law disabilities except as to class and subjects of contracts enumerated, &c.
Whitworth v. Carter, 43 M. 61.
Dunbar v. Meyer &c. Co., 43 M. 679.

Married woman. Separate estate. Money. Repayment.
Willis v. Gattman, 53 M. 721.

Married woman. Separate estate. "Distribution."
Robinson v. Payne, 58 M. 690.

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Page 496, Section 7.

Divorce. Equity of wife to reclaim personal property, vested by marriage in husband.
Lawson v. Shotwell, 27 M. 630.

Page 496, Section 10.

Divorce. Non-resident defendant. Publication for three months. Repealed by Laws 1848, p. 148.
Plummer v. Plummer, 37 M. 185.

Page 498, Article 7.

See Laws 1846, p. 152, ch. 13.

Proceeds and income of separate property of wife liable on contracts for supplies for her plantation and slaves, &c.
Robertson v. Ward, 12 S. & M. 490.
See Dibrell v. Carlisle, 48 M. 691.

Married woman. Contract with mechanic to build or repair house on separate estate.
Self v. Howland, 23 M. 264.

Married woman. Separate estate. Descent to children of first and second marriages. Impairment of vested right.
Marshall v. King, 24 M. 85.
See Bates v. Cotton, 32 M. 266.

Married women. Contracts, &c. Not retroactive in operation.
McKee v. Kent, 24 M. 131.
Swett v. Penrice, 24 M. 416.
See Carter v. Carter, 14 S. & M. 59.

Promissory note, payable directly to wife, prima facie her separate property. Suit for recovery should be in joint name of husband and wife.
Bodgett v. Ebbing, 24 M. 245.

Wife. Realty inherited from father. Rights of surviving husband as to separate estate.
Rabb v. Griffin, 26 M. 579.

Trover by husband to recover slave held by wife, dying without issue.
Varner v. Gregg, 26 M. 590.

Married woman. Failure to record schedule of separate estate does not work forfeiture of property.
Wells v. Treadwell, 28 M. 717.

Wife. Separate estate. Slaves. Interest and rights of husband, &c.
Walton v. Olive, 29 M. 270.
See Lyon v. Knott, 26 M. 548.

Enabling statute. Femes covert. Contracts. Conflict of laws.
Dalton v. Murphy, 30 M. 59.

Enabling statute. Feme covert. Disposition of separate estate. Right to make will.
Lee v. Bennett, 31 M. 119.

Wife. Separate estate. Descent.
Olive v. Walton, 33 M. 103.
Richmond v. Delay, 34 M. 83.

Promissory note payable to husband and wife, executed after passage of H. C., p. 496, art. 4, and prior to Laws 1846, p. 152, ch. 13. Presumption. Indorsement.
Work v. Glaskins, 33 M. 539.

Slaves of wife. Sale.
Clark v. Slaughter, 34 M. 65.

Married woman. Separate estate. Injurious agreements with husband. Presumption.
Allen v. Miles, 36 M. 640.
Burks v. Loggins, 39 M. 462.

Enabling statute. Feme covert subject to common law disabilities except as to class and subjects of contracts enumerated, &c.
Whitworth v. Carter, 43 M. 61.
Dunbar v. Meyer &c. Co., 43 M. 679.

Page 498, Article 7, Section 2.

Married women. Realty, acquired by descent. Rents, issues, and profits.
Robinson v. Payne, 58 M. 690.

Page 498, Article 7, Section 4.

Married woman may contract jointly with husband, &c. "Acknowledgment." Bill of sale of slave, executed by infant feme covert.
Cason v. Hubbard, 38 M. 35.

Page 501.

Legitimate daughter cannot inherit from illegitimate son.
Irvine v. Newlin, 63 M. 192.

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Page 501, Section 4.
Legitimate children of bastard, dying prior to act, cannot inherit from illegitimate uncle or aunt dying subsequently to same.
Edwards v. Gaulding, 38 M. 118.

Page 504, Section 125.
Guardian for minor. Appointment. Preference to natural guardian or next of kin, if, &c.
Allen v. Peete, 25 M. 29.
Farrer v. Clark, 29 M. 195.
Orphans' court. Guardian. Choice. Appointment. "Fatherless child."
Stewart v. Morrison, 38 M. 417.

Page 505, Section 128.
Guardian to deliver inventory and exhibit annual account.
Brown v. Mullins, 24 M. 204.
See Austin v. Lamar, 23 M. 189.

Page 505, Section 131.
Orphans' court. Expenditures for ward. Exceeding income.
Austin v. Lamar, 23 M. 189.
Guardian, unauthorized by probate court, cannot exceed income of ward in education and maintenance of latter.
Brown v. Mullins, 24 M. 204.

Page 506, Section 132.
Sale by guardian. Validity. Report.
Hoel v. Coursery, 26 M. 511.
See Learned v. Matthews, 40 M. 210.

Page 506, Section 133.
Guardian. Account. "Balance." Interest.
Hendricks v. Huddleston, 5 S. & M. 422.
Reynolds v. Walker, 29 M. 250.
Johnson v. Miller, 33 M. 553.
Roach v. Jelks, 40 M. 754.
Crump v. Gerock, 40 M. 765.
Coffin v. Bramlitt, 42 M. 194, 97 Am. Dec. 449n.
Guardian not allowed to exceed income of ward except by order of court.
Austin v. Lamar, 23 M. 189.
Guardian. Interest. "Balance."
Brown v. Mullins, 24 M. 204.

Page 506, Section 135.
Final account of guardian when ward marries or becomes of age.
Austin v. Lamar, 23 M. 189.

Page 513.
Slave. Introduction into state for sale as merchandise. Evidence.
Holman v. Murdock, 34 M. 275.

Page 519, Section 44.
Penalizes infliction on slave by overseer, of cruel or unusual punishment.
Scott v. State, 31 M. 473, 1 Mor. St. Cas. 886.
See Kelly v. State, 3 S. & M. 518, 1 Mor. St. Cas. 235.

Page 521, Section 55.
Slave. Arson. Indictment.
Jesse v. State, 28 M. 100, 1 Mor. St. Cas. 739.
See Finch v. State, 64 M. 461, 1 So. 630.
Sullivan v. State, 67 M. 346, 7 So. 275.

Page 523, Section 76.
Remedy of negro conceiving himself illegally detained in slavery.
Sam v. Fore, 12 S. & M. 413.

Page 539, Section 11.
Slaves. Testamentary emancipation.
Mahorner v. Hooe, 9 S. & M. 247, 48 Am. Dec. 706.
Weathersby v. Weathersby, 13 S. & M. 685.
Read v. Manning, 30 M. 308.
Lusk v. Lewis, 32 M. 297.
Mitchell v. Wells, 37 M. 235.

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Page 555, Article 11.

Release of one of several joint debtors. Liability of others, individually, for pro rata share of whole debt, only.

Work v. Harper, 24 M. 517.

Page 600, Section 24.

Proviso. Did not abrogate rule in Shelley's case.

Harris v. McCann, 75 M. 805, 23 So. 631.

Page 605, Section 1.

Mortgage. Deposit of title deed.

Gothard v. Flynn, 25 M. 58.

Freehold, incapable of transfer except by written conveyance, sealed and delivered.

New Orleans &c. R. Co. v. Hemphill, 35 M. 17.

Deed of conveyance of lands. Acknowledgment by justice of peace.

Hughes v. Wilkinson, 37 M. 482.

Page 605, Section 3.

Deeds of trust and mortgages to be void as to creditors, &c., unless proved or acknowledged, &c.

Tillman v. Cowand, 12 S. & M. 262.

Justice of peace may take and certify acknowledgment to deed conveying land situated out of his county.

Love v. Taylor, 26 M. 567.

See Hughes v. Wilkinson, 37 M. 482.

Authorizes recording of deeds of settlement upon marriage, for "slaves, money, or other personal thing," all mortgages whatsoever, &c.

Cogan v. Frisby, 36 M. 178.

Page 605, Section 4.

Applies to "deeds respecting the title of personal property, which by law ought to be recorded."

Cogan v. Frisby, 36 M. 178.

Page 606, Section 5.

Unrecorded deed of trust. Creditor without notice at time of rendition of judgment. "Subsequent purchasers."

Henderson v. Downing, 24 M. 106.

Page 606, Section 6.

Power of attorney to sell and convey land is "contract in relation to land," may be recorded, &c.

Hughes v. Wilkinson, 37 M. 482.

Page 606, Sections 8, 9.

Manner of recording deeds, &c.

Cogan v. Frisby, 36 M. 178.

Page 608, Section 13.

Foreign deed of trust not entitled to be placed of record in county in this state where property is located.

Tillman v. Cowand, 12 S. & M. 262.

Page 608, Section 19.

Conveyance of lands by feme covert. "Previous acknowledgment on private examination" must be shown positively and distinctly.

Garrison v. Fisher, 26 M. 352.

Married woman. Deed. Acknowledgment.

Bernard v. Elder, 50 M. 336.

Page 609, Section 24.

Proviso. Limitation may be to specified class of heirs of body of remainderman.

Cannon v. Barry, 59 M. 289.

Provided that every estate thereafter created in fee-tail should be estate in fee simple. Will.

Davenport v. Collins, 95 M. 358, 48 So. 733.

Page 610.

Where whole purchase money has been paid, vendee by title bond has title and interest vendible under execution at law. Ejectment by purchaser.

Wolfe v. Dowell, 13 S. & M. 103, 51 Am. Dec. 147.

Page 610, Section 26.

Conditional limitations. "Dying without children." Construction.

Caldwell v. Willis, 57 M. 555.

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Page 610, Section 29.
Does not authorize levy of execution on trust estate for debts of cestui que trust, except, &c.
Presley v. Rodgers, 24 M. 520.

Page 611, Section 33.
Deed of trust. Entry of satisfaction on margin of record. Effect.
Wolfe v. Dowell, 13 S. & M. 103, 51 Am. Dec. 147.
Smith v. Otley, 26 M. 291.

Mortgage or deed of trust. Mode of entering satisfaction.
Heard v. Baird, 40 M. 793.

Page 614, Section 12.
Joint tenancy. Survivorship abolished.
Day v. Davis, 64 M. 253, 8 So. 203.

Page 615.
Discontinuance of interest of wife in lands unaccomplished by deed of deceased husband, &c.
Day v. Cochran, 24 M. 261.

Page 617, Article 5, Section 3.
Deed to land: before whom proof or acknowledgment may be made.
Tillman v. Cowand, 12 S. & M. 262.

Justice of peace may take and certify acknowledgment to deed conveying land situated out of his county.
Dennistoun v. Potts, 26 M. 13.
See Love v. Taylor, 26 M. 567.

Authorizes notary public to take acknowledgments out of county of residence.
Hughes v. Wilkinson, 37 M. 482.

Page 617, Article 6.
Foreign authentication, &c., entitling deed to land in this state, to record here. Not retroactive in operation.
Tillman v. Cowand, 12 S. & M. 262.

Page 621, Article 2, Section 1.
Dower. Childless husband. Life estate of widow in one-half of realty.
Quin v. Coleman, 42 M. 386.

Page 622, Article 3, Section 81.
Insolvent estate: widow to have one-third.
Quin v. Coleman, 42 M. 386.

Page 627.
Mechanic's lien. Priority, &c.
McLaughlin v. Green, 48 M. 175.

Page 637, Section 1.
Mortgage. Deposit of title deed.
Gothard v. Fynn, 25 M. 58.

Page 637, Section 2.
Statute of frauds. Does not affect validity of gift of chattels as between donor and donee.
McWillie v. Van Vacter, 35 M. 428, 72 Am. Dec. 127.

Page 638.
Fraud in conveyance. Subsequent creditors.
Bullitt v. Taylor, 34 M. 708, 69 Am. Dec. 412.
See Hilliard v. Cagle, 46 M. 309.

Page 638, Section 2.
Statute of frauds. Certified copy of deed of gift of personalty, duly proven or acknowledged, and recorded, competent evidence.
Cogan v. Frisby, 36 M. 178.

Statute of frauds. Unrecorded deed. Remainderman. Sale by tenant in possession. Notice.
Gibson v. Jayne, 37 M. 164.

Page 639, Sections 4, 5.
"Domestic bill." Residence of drawer and drawee, determining factor.
Ragsdale v. Franklin, 25 M. 143.

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Page 640, Section 9.
Common law inhibition on assignments of choses in action removed in specified cases. Judgments not embraced by provisions.
Wilson v. McElroy, 2 S. & M. 241.

Page 642, Article 2, Section 3.
Judgments and decrees. Interest.
Hamer v. Kirkwood, 25 M. 95.
See Illinois Cent. R. Co. v. Adams, 78 M. 895, 29 So. 996.

Page 643, Article 6, Section 3.
Fixes rate of interest on bona fide contracts for loaned money at eight per cent. per annum.
Effinger v. Richards, 35 M. 540.

Page 643, Article 7, Section 57.
Debts due by judgment, sentence, or decree. Interest.
Hamer v. Kirkwood, 25 M. 95.
See Illinois Cent. R. Co. v. Adams, 78 M. 895, 29 So. 996.
Interest on open accounts.
Houston v. Crutcher, 31 M. 51.
See Thompson v. Matthews, 56 M. 368.

Page 649, Section 15.
Wills. Applies to acts of direct and express revocation, only.
Garrett v. Dabney, 27 M. 335.
Hoy v. Hoy, 93 M. 732, 48 So. 903.
Wills. "Revocation." Cancellation or obliteration, &c.
Hairston v. Hairston, 30 M. 276.

Page 651, Section 27.
Executor, who is principal legatee and devisee under will, competent witness to sustain same.
Kelly v. Miller, 39 M. 17.

Page 651, Section 29.
Will. Right to contest. "Any person interested."
Edwards v. Gaulding, 38 M. 118.

Page 654, Section 37.
Probate court. Jurisdiction to appoint collectors. Intestacy. Validity of appointment.
Boyd v. Swing, 38 M. 182.

Page 658, Sections 65-68.
Sureties of executor or administrator. Petition for relief. Summons for principal.
Hardaway v. Parham, 27 M. 103.

Page 661, Section 77.
Suit by or against executor or administrator. Inventory as prima facie evidence, only.
McWillie v. Van Vacter, 35 M. 428, 72 Am. Dec. 127.

Page 663, Section 87.
Probate court. Executors and administrators. Auditors to restate accounts.
Crowder v. Shackelford, 35 M. 321.

Page 664, Section 90.
Judgment as "claim."
Robertson v. Demoss, 23 M. 298.
Probate of claim not condition precedent to suit against executor or administrator.
Rawlins v. Poindexter, 26 M. 654.
Branch Bank v. Rhew, 37 M. 110.

Page 665, Section 93.
Executor or administrator. Removal of property beyond limits of state. Widow as usee in action.
Bridges v. Maxwell, 34 M. 309.

Pages 666-667, Sections 98-101.
Orphans' court. Personal estate of deceased, insufficient to pay debts. Allegations and proofs. Sale of land.
Turner v. Ellis, 24 M. 173.

Page 666, Section 98.
Requires probate court when personalty of deceased is insufficient to pay debts, to direct sale of lands.

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Lee v. Gardiner, 26 M. 521.

Sale of lands of deceased for payment of debts. Requirements as to petition.
Learned v. Matthews, 40 M. 210.

Pages 666, 667, Sections 98, 100.

Proceedings to sell lands to pay debts of deceased. Petition. Failure to make account. &c. Confirmation.
Eldridge v. McMackin, 37 M. 72.

Page 667.

Action or suit can be neither commenced nor sustained against executor or administrator after estate be represented insolvent. Amended, H. C., p. 673.
Pool v. Ellis, 64 M. 555, 1 So. 725.

Page 667, Section 3.

Guardian and ward. Removal of guardianship. Liability of guardian on second bond for assets wasted before its execution.
State v. Stewart, 36 M. 652.

Page 667, Section 100.

Administrator's application to sell land. Non-resident heir. Publication. Repealed by Laws 1854, p. 65, § 1.
Sellers v. Talby, 33 M. 582.

Page 667, Section 102.

Sale for division, of land of deceased, can be made on application of heir only.
Washington v. McCaughan, 34 M. 304.

Guardian. Sale of land. Citation.
Kennedy v. Gaines, 51 M. 625.

Probate court. Sale for partition of lands of intestate. Minor heirs. Amended, H. C., p. 677.
Lum v. Reed, 53 M. 73.

Page 668.

Forbids, by express terms, actions against executor or administrator of insolvent estate, after declaration of insolvency, except, &c.
Nutt v. Brandon, 85 M. 702, 38 So. 104.

Page 668, Section 103.

Provision for appointment of referees. Invocation by creditor.
Smith v. Berry, 1 S. & M. 321.
Regan v. Stone, 4 S. & M. 691.
See Regan v. Stone, 7 S. & M. 104.

"If any creditor shall not make out his claim with the commissioners, within the time," &c., is statute of limitations.
Allen v. Keith, 26 M. 232.

Page 670, Section 111.

Judgment against executor or administrator for costs should be de bonis propriis.
Williamson v. Childress, 26 M. 328.

Page 670, Section 112.

Will. Same commissioners to divide realty and personalty. Division of both not required to be made and reported simultaneously.
Calhoun v. Rail, 26 M. 414.

Object, to have partition made to, and among heirs of intestate, ascertaining share of each separately.
Wildy v. Bonney, 28 M. 710.

Probate court. Practice. Distribution.
Pringle v. Hunt, 31 M. 351.

Page 671, Section 113.

Executor or executors qualifying, or survivor of them, may make valid sale of lands devised to be sold.
Bartlett v. Sutherland, 24 M. 395.

Power confided to executor virtute officii executable by administrator c. t. a.
Cohea v. Johnson, 69 M. 46, 13 So. 40.

Page 671, Section 114.

Probate court. Decree directing conveyance, by administrator, of lands sold by deceased by title bond. Constitutionality.
Servis v. Beatty, 32 M. 52.

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Page 671, Section 115.
Not change of principles, but only of period of time within which claims must be presented, intended by H. C., p. 681, § 5. Presumption.
Robertson v. Demoss, 23 M. 298.

Page 672, Section 119.
Revivor. Does not embrace suit against administrator in chief who dies before judgment.
Portevant v. Pendleton, 23 M. 25.

Page 673.
Amendatory, H. C., p. 667. Non-abatement of suits pending against executor or administrator at time of representation of estate's insolvency. Execution.
Pool v. Ellis, 64 M. 555, 1 So. 725.

Page 673, Article 2, Section 1.
Appointment of commissioners of insolvency for estate of deceased. Presentation of claim, pending in suit at law.
Trezevant v. McQueen, 12 S. & M. 575.

Estate. Representation of insolvency. Suits pending against executor or administrator permitted to proceed to trial and judgment.
Nutt v. Brandon, 85 M. 702, 38 So. 104.

Page 673, Article 2, Section 2.
Probate court. Distribution of personal estate. Practice.
Pringle v. Hunt, 31 M. 351.

Page 673, Section 2.
Division of realty and personalty, according to will, to be made by same commissioners but not, of necessity, simultaneously.
Calhoun v. Rail, 26 M. 414.

Page 675, Article 8, Section 2.
Homestead. Sale to pay debts.
Johnson v. Cooper, 56 M. 608.

Page 677.
Execution by administrator of bond for application of proceeds, necessary to validity of order of sale.
Currie v. Stewart, 26 M. 646.

Page 677, Section 1.
Probate court. Proceedings to sell lands of intestate "for the interest" of heirs. Publication. Non-resident defendants.
Lum v. Reed, 53 M. 73.

Page 677, Section 2.
Sale for benefit of heirs, of land of deceased. Administrator must execute bond.
Washington v. McCaughan, 34 M. 304.

Page 677, Section 3.
Administrator. New grant of letters on removal.
Watkins v. Adams, 32 M. 333.

Page 679.
Partition. Evidently applies only where by death of joint tenant, &c., his land may descend to his minor heirs.
Smith v. Craig, 10 S. & M. 447.
See Currie v. Stewart, 26 M. 646.

Page 679, Article 16, Sections 1, 2.
Allows damages only in suit at law or in equity to recover legacy or ascertained amount due from guardian.
Austin v. Lamar, 23 M. 189.

Suit by distributee on bond of administrator. Ten per cent. damages. Prospective in operation.
Steen v. Finley, 25 M. 535.

Page 680.
Sheriff as administrator. Repealed as to Kemper county by Laws 1852, p. 232.
Hull v. Neal, 27 M. 424.

Page 680, Article 17, Section 1.
Widow. Year's allowance may be in money.
Nelson v. Smith, 12 S. & M. 662.

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Page 680, Article 17, Section 2.

Exempt personal property of husband descends to widow and in latter's hands continues free from execution.

Loury v. Herbert, 25 M. 101.

Exempt property of husband descends to widow. Testamentary disposition.

Turner v. Turner, 30 M. 428.

Page 680, Article 18, Section 1.

Widow to hold exempt personalty of husband free from execution.

Loury v. Herbert, 25 M. 101.

Widow "shall be allowed and entitled" to deceased husband's exempt personal estate. Testamentary disposition.

Turner v. Turner, 30 M. 428.

Page 681, Section 5.

Not intended to change principles of H. C., p. 671, § 115, but only period of time within which claims must be presented. Presumption.

Robertson v. Demoss, 23 M. 298.

Does not embrace administrations granted previous to passage. Non-resident creditor.

Wilkinson v. Barringer, 23 M. 319.

Probate of claim not condition precedent to suit against executor or administrator.

Rawlins v. Poindexter, 26 M. 654.

Branch Bank v. Rhew, 37 M. 110.

Page 682, Section 12.

Executor. Final settlement. Non-resident minor distributee. Citation.

Cason v. Cason, 31 M. 578.

Page 682, Section 13.

Order of probate court awarding publication of citation against non-resident distributee. Affidavit.

Cason v. Cason, 31 M. 578.

Page 683, Section 3.

Distributee residing in county where estate is administered is entitled to personal service of notice of final settlement.

Roberts v. Roberts, 34 M. 322.

Page 703, Article 11.

Boards of police. Special taxes: power to levy and collect "sufficient to build or repair" county buildings.

Odineal v. Barry, 24 M. 9.

Page 704, Article 15.

Justice of peace may take and certify acknowledgment to deed conveying land situated out of his county.

Dennistoun v. Potts, 26 M. 13.

See Love v. Taylor, 26 M. 567.

Page 704, Article 15, Section 1-5.

Authorized justices of peace to exercise all powers previously belonging to notaries public. Acknowledgments.

Hughes v. Wilkinson, 37 M. 482.

Page 705.

Repealed act authorizing appeal from justice of peace to jury of five men.

Pollard v. Parish, 23 M. 573.

Page 708, Article 3.

County tax levy.

State v. Hathorn, 36 M. 491.

Page 708, Article 4, Sections 35, 36, 37.

Board of police. Court house and jail to be erected and kept in repair, &c. Tax levy.

State v. Hathorn, 36 M. 491.

Page 710, Section 3.

Gives boards of police general power to levy special tax on respective counties, whenever, &c.

State v. Hathorn, 36 M. 491.

Page 710, Section 5.

Sale of land for county tax, levied at special meeting of board of police, called without notice, void.

Jones v. Burford, 26 M. 194.

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Page 712.
Warrant for attorney's fees, as evidence.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

Page 712, Section 49.
County warrant for services as election clerk.
Taylor v. Chickasaw County, 16 So. 907.

Page 713, Article 11, Section 1.
Boards of police. Special tax. Amount of levy, for purpose specified, unrestricted.
State v. Hathorn, 36 M. 491.

Page 714.
Does not impliedly repeal Laws 1842, p. 213, making registration of county warrants essential to legal validity of same.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

Page 714, Article 11, Section 3.
Tax collector. In absence of special bond, sureties in general bond liable for special tax.
State v. Hathorn, 36 M. 491.

Page 714, Article 15.
Does not impliedly repeal Laws 1842, p. 213.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

Page 727, Article 34.
Probate court. Fieri facias. Imprisonment of administrator for contempt in disobeying decree. Code 1857, p. 431, art. 31.
Powell v. Cooper, 42 M. 221.

Page 727, Article 34, Section 2.
Probate court. Decree. Enforcement. Attachment, old remedy; fieri facias, as new one.
Vertner v. Martin, 10 S. & M. 103.

Fieri facias to enforce judgment or decree of probate court. Prospective in operation.
Caruth v. Anderson, 24 M. 60.

Page 728, Section 3.
Probate court. Bill of review to open, surcharge and falsify account of executor, administrator or guardian. As not unconstitutional.
McCullom v. Box, 8 S. & M. 619.

Bills of review in probate court. Prospective in operation.
Stewart v. Davidson, 10 S. & M. 351.
Hooker v. Hooker, 10 S. & M. 599.
Pendleton v. Prestridge, 12 S. & M. 302.
Hardy v. Gholson, 26 M. 70.

Allows damages only in suit at law, or in equity, to recover legacy or ascertained amount due from guardian.
Austin v. Lamar, 23 M. 189.

Bill of review maintainable within two years for error unapparent on face of account, and without showing discovery of new matter.
Gadberry v. Perry, 27 M. 119.

Probate court. Bills of review. Interlocutory decrees.
West Feliciana R. Co. v. Stockett, 27 M. 739.

Page 728, Section 4.
Introduced into probate court legal requirement to appoint guardians ad litem for infants.
Burrus v. Burrus, 56 M. 92.

Page 736, Section 177.
Contempt of court. Newspaper article, accusing judge of abetting crime, charged against prisoner on trial. Libel.
Ex parte Hickey, 4 S. & M. 751.
Ex parte Adams, 25 M. 883, 59 Am. Dec. 234.

Page 740.
Special term continuable until completion of pending business.
Dees v. State, 78 M. 250, 28 So. 849.

Page 759.
Special appeal from chancellor's order setting aside interlocutory decree. Reversal. Appellate practice.
Hunter v. Carmichael, 12 S. & M. 726.

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Page 760, Section 4.
Injunction not per se release of errors in judgment. Dissolution for failure to file release.
Moody v. Harper, 28 M. 615.

Page 761, Section 45.
Chancery court. Insane, or infant defendant. Guardian ad litem. Service of process.
Johnson v. Cooper, 56 M. 608.

Page 765, Section 4.
Chancery. Practice. Non-resident defendant. Rehearing.
Head v. Wash, 31 M. 358.

Page 767, Section 2.
Chancery court. Pro confesso. Right and refusal to set aside. Code 1857, p. 546, art. 39.
McGowan v. James, 12 S. & M. 445.
See Pittman v. McClellan, 55 M. 299.

Page 769, Sections 1-3.
Suits against state, involving matters either of law or equity, may be brought in superior court of chancery.
Farish v. State, 4 H. 170.
Swann v. Buck, 40 M. 268.

Page 770, Article 12, Section 1.
Chancery. Cross-bill answer. New parties.
Ladner v. Ogden, 31 M. 332.

Page 772, Article 14, Sections 1-3.
Authorizes selection of member of bar to try and determine causes in which chancellor may be interested, &c. Constitutionality.
Grinstead v. Buckley, 32 M. 148.

Page 776, Section 2.
District chancery courts. Process. Return.
Trotter v. Erwin, 27 M. 772.

Page 777, Section 9.
Defendant sued in foreign chancery district. Removal of cause to superior court of chancery, etc.
Trotter v. Erwin, 27 M. 772.

Page 801, Article 3, Section 9.
Actionable words. Plea of justification should traverse allegation that words were spoken in manner to insult, &c.
Crawford v. Melton, 12 S. & M. 328.

Actionable words. Declaration. Demurrer. Answer. General issue. Defenses and evidence. Instructions. "Excessive damages."
Lewis v. Black, 27 M. 425.

Page 801, Article 4.
Amended, H. C., p. 823, art. 17. Foreign attachments. Jurisdiction of chancery court.
Freeman v. Guion, 11 S. & M. 58.

Attachment against steamboat. Service of process by constable.
Wallace v. Seales, 36 M. 53.

Page 802, Section 7.
Attachment. Affidavit by agent of absent creditor. Record.
Linder v. Aaron, 5 H. 581.

Attachment by non-resident. Affidavit by attorney must show fact of foreign residence.
Beer v. Hooper, 32 M. 246.

Page 802, Section 8.
Attorney may make bond and affidavit in attachment by resident or non-resident creditor.
Beer v. Hooper, 32 M. 246.

Page 802, Section 11.
Attachment against non-resident. Notice, &c.
Ridley v. Ridley, 24 M. 648.

Page 803, Section 13.
Attachment before justice of peace, &c. Affidavit.
Hopkins v. Grissom, 26 M. 143.

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Page 804.
Absconding debtors. Notice. Publication.
Ridley v. Ridley, 24 M. 648.

Page 804, Section 14.
Joint action against principal and sureties on attachment bond: when maintainable.
Holcomb v. Foxworth, 34 M. 265.

Page 807, Section 25.
Attachment. Judgment by default against estate of defendant. Execution. Personal judgment.
Holman v. Fisher, 49 M. 472.

Page 808, Section 28.
Attachment. Service. Defendant's death. Abatement. Judgment and sale, or final process against garnishee and property attached. Code 1871, § 1486.
Holman v. Fisher, 49 M. 472.

Page 810, Section 9.
Authorizes agent to obtain and prosecute attachment for rent, in name of landlord or lessor.
Parker v. Stovall, 31 M. 446.

Page 812, Section 22.
Gives to landlord, by express terms, right to distress for rent against executor or administrator of tenant for years.
Smith v. Bobb, 12 S. & M. 322.

Page 813, Section 4.
Plaintiff in unlawful detainer will not be entitled to recover rent, unless he demands it in his complaint.
Johnson v. Tuggle, 27 M. 836.

Page 817, Article 11, Section 1.
Replevin. "Immediate right of possession."
Carter v. Carter, 14 S. & M. 59.

Page 818, Section 5.
Replevin. Verdict for plaintiff. Judgment.
Windham v. Williams, 27 M. 313.

Page 819, Article 14, Section 1.
Defendant's execution of forthcoming bond does not destroy attachment lien. Priority of latter.
Gray v. Perkins, 12 S. & M. 622.
See Phillips v. Hines, 33 M. 163.
Montague v. Gaddis, 37 M. 453.

Page 819, Section 3.
Gave right to garnishees of bank to pay in issues of same.
Robson v. Benton &c. Banking Co., 7 S. & M. 724.

Page 820.
Extends remedy by attachment and garnishment. Lien not established by appearance of defendant. Affidavit.
Wharton v. Conger, 9 S. & M. 510.

Law in force relative to claimants of execution property extended to claimants of attached property.
Mandel v. McClure, 14 S. & M. 11.

Page 820, Section 4.
Appearance of defendant not to affect any lien created by attachment.
Gray v. Perkins, 12 S. & M. 622.
See Phillips v. Hines, 33 M. 163.

Page 821.
Unlawful detainer. Complaint. Demand for rent necessary to recovery of same.
Johnson v. Tuggle, 27 M. 836.

Page 823.
Service by publication for one month. Suit for divorce. Repealed H. C., p. 496, § 10.
Plummer v. Plummer, 37 M. 185.

Page 823, Article 17.
Amendatory, H. C., p. 801, art. 4. Foreign attachments. Jurisdiction of chancery court.

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Freeman v. Guion, 11 S. & M. 58.
Non-resident creditors may attach non-resident debtors.
Barrow v. Burbridge, 41 M. 622.

Page 824, Section 1.
Limitation. "Real" action. Writ of right.
Ellis v. Murray, 28 M. 129.

Page 825, Section 3.
Limitation. As not fixing bar to writ of right.
Ellis v. Murray, 28 M. 129.

Page 827, Section 13.
Limitation of actions. Applies to judgments rendered against intestates or testators, only.
Bingaman v. Robertson, 25 M. 501.

Page 827, Section 14.
New action within one year after arrest or reversal must be by original plaintiff.
Ross v. Sims, 27 M. 359.
Does not save suit brought within one year after abatement by death of defendant, &c.
Crane v. French, 38 M. 503.

Page 829, Article 6, Section 1.
Intended to fix period of limitation for bringing action after right of property is disturbed. Applies only to defendants.
Ellis v. Murray, 28 M. 129.

Page 829, Article 6, Sections 1, 2.
Apply to mortgages forfeited before passage, &c.
Benson v. Stewart, 30 M. 49.
Limitations. Husband and wife.
Merrit v. Doss, 31 M. 275.
Period within which ejectment may be brought extended to ten years by Laws 1854, p. 134, § 3.
Harper v. Tapley, 35 M. 506.

Page 829, Article 6, Sections 1-19.
Limitation of actions. Chancery.
Mitchell v. Woodson, 37 M. 567.

Page 829, Article 6, Section 3.
Intended to secure right of property by ten years' possession. Applies to parties suing.
Ellis v. Murray, 28 M. 129.
Shearer v. Winston, 33 M. 149.
Ford v. Wilson, 35 M. 490, 72 Am. Dec. 137.
Ten years' continuous, actual, adverse possession of land under claim of ownership, vests title in occupant.
Davis v. Bowmar, 55 M. 671.

Page 830, Section 4.
Limitations. Instant case not action of debt "founded on a contract not under seal."
Lee v. Gardiner, 26 M. 521.

Page 830, Section 8.
Limitations. Execution. Prospective in operation.
Brown v. Wilcox, 14 S. & M. 127.
Limitations. Judgments. Executions ineffectual to save bar.
Harris v. West, 25 M. 156.
Limitations. Action of debt on judgment.
Lee v. Gardiner, 26 M. 521.
Limitation of actions. Applies to judgment and decrees of probate court.
Byrd v. Byrd, 28 M. 144.
Bars bill in equity to recover amount of judgment at law, filed after expiration of seven years.
Mandevill v. Lane, 28 M. 312.
Limitations. Judgments. Chancery.
Goff v. Robins, 33 M. 153.
See Mitchell v. Woodson, 37 M. 567.

Page 831, Article 6, Section 11.
Absence of intended defendant from state. Effect upon running of limitations.
Trotter v. Erwin, 27 M. 772.

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Fisher v. Fisher, 43 M. 212.
See Bower v. Henshaw, 56 M. 619.

Page 831, Section 9.

Limitation. Suits against surety on bond of public officer. Applies exclusively to actions brought by individuals or third persons.
State v. Joiner, 23 M. 500.

Page 831, Section 10.

Limitations. Action on account. Insufficient acknowledgment.
Westbrook v. Beverly, 11 S. & M. 419.

Limitation of actions. Extension by reason of death of debtor or creditor.
Jennings v. Love, 24 M. 249.

Page 831, Section 11.

Limitation of actions. Time of absence not to be computed.
Fisher v. Fisher, 43 M. 212.

Page 831, Section 12.

Limitation of actions against executor or administrator. Prospective in operation, &c.
West Feliciana R. Co. v. Stockett, 13 S. & M. 395.
See Turner v. Ellis, 24 M. 173.

Limitation does not apply to scire facias to revive judgment against heir when no administration has ever been granted.
Ferguson v. Crowson, 25 M. 430.

Limitation applies only to claims upon which plaintiff had cause of action at or before death of deceased.
Bingaman v. Robertson, 25 M. 501.
Pope v. Bowman, 27 M. 194.
French v. Davis, 38 M. 218.

Limitation. Executor or administrator. Action, suit, or scire facias.
Branch Bank v. Windham, 31 M. 317.

Page 832, Article 7.

Saved H. C., p. 832, § 13, as to limitations upon judgment liens, from repeal by H. C., p. 892, § 11.
Planters' Bank v. Black, 11 S. & M. 43.

Page 832, Section 13.

Limitations. Judgment liens. Unrepealed, by reason of H. C., p. 832, art. 7, by H. C., p. 892, § 11.
Planters' Bank v. Black, 11 S. & M. 43.

Expiration of judgment liens, &c.
Emanuel v. Jones, 12 S. & M. 473.
Rupert v. Dantzler, 12 S. & M. 697.
Kilpatrick v. Byrne, 25 M. 571.

Page 832, Section 14.

Limitation. Actions on foreign judgments, obtained prior to passing of law.
McClintock v. Rogers, 12 S. & M. 702.

Death of judgment defendant extends limitation nine months.
Barringer v. Boyd, 27 M. 473.

Limitation. Action on foreign judgment or decree. Proviso.
Branch Bank v. Windham, 31 M. 317.

Page 832, Section 16.

Action on account. Avoidance of bar of limitations. Insufficient acknowledgment.
Westbrook v. Beverly, 11 S. & M. 419.

Several joint debtors. Promise or acknowledgment of one, ineffective to bind others.
Foute v. Bacon, 24 M. 156.
Briscoe v. Anketell, 28 M. 361, 61 Am. Dec. 553.

Page 832, Section 17.

Limitation of actions. Cumulative and additional disabilities unallowable to persons for whose benefit savings in statute were inserted.
Crane v. French, 38 M. 503.

Page 832, Section 18.

Limitations prescribed, run from date of act's passage. Latter not to stop running of limitations already in motion.
Brown v. Wilcox, 14 S. & M. 127.

Limitations established by Act of February 24, 1844, to commence running from date of passage of same. Proviso.
Branch Bank v. Windham, 31 M. 317.

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Page 833, Article 8, Section 1.

Limitation. Foreign judgment. Resident creditor. Prospective in operation.
Boyd v. Barringer, 23 M. 269.
Garrett v. Beaumont, 24 M. 377.
See Clements v. Brown, 31 M. 93.

Page 835.

Writ of assumpsit. Teste. Indorsement of day of issuance.
Winston v. Miller, 12 S. & M. 550.

Page 836, Section 25.

Administrator. Suit by distributee on bond.
Steen v. Finley, 25 M. 535.

Page 837, Section 26.

Abolishes all distinction in remedies upon joint, or joint and several obligations.
Steen v. Finley, 25 M. 535.

Every joint bond, bill or promissory note to be deemed in law, joint and several.
Mhoon v. Colment, 51 M. 60.

Page 841, Section 44.

Process. Service by copy.
Merritt v. White, 37 M. 438.

Page 841, Section 47.

Scire facias. Does not embrace suit against administrator in chief who dies before judgment.
Portevant v. Pendleton, 23 M. 25.

Revivor. Applies to natural persons, not to corporations.
Torry v. Robertson, 24 M. 192.

Revivor impossible where defendant dies after suit commenced, but before service of process.
Allen v. Mandeville, 26 M. 397.

Suit depending. Death of either party before final judgment. Survival.
Crane v. French, 38 M. 503.

Page 842.

Discontinuance. Applies to natural persons, not to corporations.
Torry v. Robertson, 24 M. 192.

Suit commenced in name of one for use of another. Death of nominal plaintiff or of usee. Revivor. Judgment.
Lee v. Gardiner, 26 M. 521.

Page 845.

Attorney may make bond and affidavit in attachment by resident or non-resident creditor.
Beer v. Hooper, 32 M. 246.

Page 847.

Defects cured after verdict or nil dicit. Commencement of suit before accrual of cause of action.
Winston v. Miller, 12 S. & M. 550.

Page 852, Article 6.

Defendant, pleading to merits, without verified denial of execution of note in suit, admits same.
Green v. Robinson, 3 H. 105.

Note. Defendant's admission by pleading to merits, without verified denial of execution.
Lake v. Hastings, 24 M. 490.

Page 854.

Suits, prosecutable and defendable without aid of attorney. Promissory note filed with circuit clerk, as declaration.
Wiggle v. Thomason, 11 S. & M. 452.

Pages 854, 855.

Action, without aid of attorney, on writing obligatory for sum certain. Record. Presumption.
Grinstead v. Foute, 26 M. 476.

Page 856.

Nominal damages only, recoverable in ejectment. Mesne profits.
Davis v. Delpit, 25 M. 445.

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Page 857.
Ejectment. Allowance for improvements. Notice.
Abbey v. Merrick, 27 M. 320.

Page 858, Section 87.
Grantee in land certificate, and assignee. Title. Ejectment, execution, &c.
Lindsey v. Henderson, 27 M. 502.
Martin v. Nash, 31 M. 324.
Huntingdon v. Grantland, 33 M. 453.
See Johnson v. Davis, 91 M. 708, 45 So. 979.

Page 859.
Certificate of entry to be taken and received as vesting full, complete and legal title, so far as, &c.
Hester v. Kembrough, 12 S. & M. 659.

Page 861, Section 113.
Notice of taking deposition de bene esse. Waiver of service on attorney.
Hunt v. Crane, 33 M. 669, 69 Am. Dec. 381.

Page 861, Sections 113, 114.
Deposition de bene esse. Notice, affidavit, and commission. Waiver.
Ragan v. Cargill, 24 M. 540.

Page 862, Section 116.
Deposition of witness beyond jurisdiction of court.
Brewer v. Beckwith, 35 M. 467.

Page 862, Sections 117, 118.
Require depositions to be certified according to lex loci where taken.
Coopwood v. Foster, 12 S. & M. 718.
Henderson v. Cargill, 31 M. 367.

Page 864, Article 3.
Evidence. List of swamp and overflowed lands as record. Certified copy.
Fore v. Williams, 35 M. 533.

Page 865, Article 6, Section 2.
Bill of discovery at law. Discretion of court. Diligence on part of applicant.
Dillahunty v. Smith, 7 H. 673.

Page 867, Article 9.
Certificate and record of notary, protesting promissory note, admissible to establish fact that notice was given.
Fleming v. Fulton, 6 H. 473.
Wood v. American Life Ins. &c. Co., 7 H. 609.
Grimball v. Marshall, 3 S. & M. 359.
Booth v. Watson, 5 S. & M. 295.

Promissory note. Protest. Notary public. Notice.
Bowling v. Arthur, 34 M. 41.

Page 867, Article 12.
Relates exclusively to acts of domestic notaries.
White v. Englehard, 2 S. & M. 38.

Making of record at time of protest, not required.
Grimball v. Marshall, 3 S. & M. 359.

Page 875, Section 64.
Action on note for land sold by administrator. Defective plea. Failure of consideration. General demurrer.
Ray v. Woolfolk, 1 S. & M. 523.

Defect in form of plea not "specially alleged in the demurrer," &c., unavailable in high court.
Mobley v. Keyes, 13 S. & M. 677.

Page 876.
No more than two new trials to be granted in same cause to same party.
Stamps v. Bush, 7 H. 255.
Munn v. Perkins, 1 S. & M. 412.
Ray v. McCary, 26 M. 404.
Field v. Weir, 28 M. 56.
Thornton v. West Feliciana R. Co., 29 M. 143.
Garnett v. Kirkman, 33 M. 389.

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Page 876, Section 84.
Ejectment. Process.
Davis v. Delpit, 25 M. 445.

Page 877, Section 96.
Amendment of judgment or decree. Inapplicable in instant case.
Ralph v. Prester, 28 M. 744.

Page 881, Section 12.
Judgment. Property of defendant bound and liable "from the time of entering such judgment."
Reed v. Haviland, 38 M. 323.

Judgments. Liens. Priorities, &c.
Pickett v. Planters' Bank, 5 S. & M. 470, 43 Am. Dec. 523.

Judgment or decree, legally enrolled, lien on after-acquired property of defendant.
Jenkins v. Gowen, 37 M. 444.

Page 882, Article 4, Sections 5, 6.
Compensation of grand and petit jurors.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

Page 885.
New trial ruling reviewable only after disposition of cause on final trial.
Brown v. Carraway, 47 M. 668.

Page 885, Article 7, Section 1.
Exception, indispensable prerequisite to revision of judgment on motion for new trial.
Scott v. State, 31 M. 473, 1 Mor. St. Cas. 886.

Page 886.
New trial ruling reviewable only after disposition of cause on final trial.
Brown v. Carraway, 47 M. 668.

Page 888, Article 9, Section 14.
Restricts authority of circuit judges to charge juries, in criminal trials, except under specified conditions.
Williams v. State, 32 M. 389, 66 Am. Dec. 615, 1 Mor. St. Cas. 933.

Page 888, Article 10, Section 1.
Circuit court. Challenge to array. Quashal of venire facias.
Baker v. State, 23 M. 243, 1 Mor. St. Cas. 523.

Page 888, Article 10, Section 2.
Circuit court. Special venire. Regular venireman in attendance.
Baker v. State, 23 M. 243, 1 Mor. St. Cas. 523.

Page 889, Article 12.
Clerk to permit plaintiff, &c., in any pending cause, to dismiss same out of term time upon payment, &c.
Ladner v. Ogden, 31 M. 332.

Page 890, Article 13.
Bill of exceptions. Signing and sealing by two attorneys. Constitutional.
Van Buren v. State, 24 M. 512, 1 Mor. St. Cas. 604.

Page 890, Article 14.
Liens of judgments and decrees. As constitutional. Judgments of federal courts.
Tarpley v. Hamer, 9 S. & M. 310.
See Brown v. Bacon, 27 M. 589.

Page 891, Article 15.
Grand and petit jurors. Compensation.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

Page 891, Article 16.
Enrolment of judgments, &c.
Planters' Bank v. Conger, 12 S. & M. 527.

Page 891, Article 16, Section 1.
Enrolment statute. Judgments and decrees of federal courts.
Brown v. Bacon, 27 M. 589.

Page 892, Section 6.
Judgment to operate as lien from enrolment on "judgment roll," &c.
Wyatt v. Beaty, 10 S. & M. 463.

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Page 892, Section 8.
Enrolment statute. Lien of judgment does not bind property of defendant where there has been resale of same to sub-, or remote purchaser.
Stevens v. Mangum, 27 M. 481.

Page 892, Section 9.
Enrolment statute. Priority of lien, &c.
Bonaffee v. Fisk, 13 S. & M. 682.
Brown v. Bacon, 27 M. 589.

Page 892, Section 11.
Judgment, decree, &c. Enrolment. Lien. Limitation. Did not, by reason of H. C., p. 832, art. 7, repeal H. C., p. 832, § 13.
Planters' Bank v. Black, 11 S. & M. 43.

Enrolment statute. Liens of judgments, decrees, &c. Limitation in favor of "purchasers" or creditors of debtors.
Fowler v. McCartney, 27 M. 509.

Page 893.
Instructions as part of record. Inapplicable to criminal cases.
Stoughton v. State, 13 S. & M. 255, 1 Mor. St. Cas. 460.
Cain v. State, 13 S. & M. 456, 1 Mor. St. Cas. 481.
See Van Buren v. State, 24 M. 512, 1 Mor. St. Cas. 604.

Page 893, Sections 1, 2.
Civil suits in circuit courts. Indorsed instructions part of record without bill of exceptions.
Haynie v. State, 32 M. 400, 1 Mor. St. Cas. 943.

Page 893, Section 14.
Enrolment statute. Time of taking effect. Prior and subsequent judgments.
Wyatt v. Beaty, 10 S. & M. 463.

Page 895, Article 21.
Pending cause. Dismissal, before clerk, out of term time. Payment of costs, &c.
Ladner v. Ogden, 31 M. 332.

Page 900.
Execution. Sheriff. Indemnifying bond.
Forniquet v. Tegarden, 24 M. 96.

Execution. Sheriff may take bond of indemnity after seizure of property.
Dabney v. Stackhouse, 49 M. 513.

Page 904, Section 27.
Chancery. Jurisdiction. Fraudulent conveyance.
Abbey v. Commercial Bank, 31 M. 434.

Page 910, Article 6.
Forthcoming bonds. Forfeiture, and effect of same. Constitutional.
Wanzer v. Barker, 4 H. 363.
Jones v. Mississippi &c. R. Co., 5 H. 407.

Page 911, Section 2.
Failure of garnishee to appear and answer. Conditional judgment. Scire facias.
Jefferies v. Harvie, 38 M. 97.

Page 915, Article 14.
Judgment. Execution. Levy on personal property. Delivery bond. Forfeiture, &c.
Smith v. Brown, 28 M. 810.

Page 917, Article 17.
Property exempt from execution. Applies only to contracts made after passage. Delivery bond.
Smith v. Brown, 28 M. 810.

Page 918, Article 20.
Execution sale. Right of redemption dependant on tender to purchaser of amount bid and ten per cent. interest.
Walker v. Brown, 45 M. 615.

Page 918, Article 20, Section 1.
Execution. Redemption. Vendee of judgment debtor.
Watson v. Hannum, 10 S. & M. 521.

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Page 921, Section 3.
Execution. Sale to vest title in purchaser.
Harmon v. Barstow, 23 M. 276.

Page 929, Article 2, Section 149.
Entire affirmance on appeal of judgment or decree against defendant. Interest.
Hamer v. Kirkwood, 25 M. 95.
See Illinois Cent. R. Co. v. Adams, 78 M. 895, 29 So. 996.

Page 931.
Writ of error. Three-year limitation. Equitable exception.
Butler v. Craig, 27 M. 628, 61 Am. Dec. 527.

Page 932.
Writ of error. Petition. Bond. Failure or refusal of clerk to issue writ within three years.
Butler v. Craig, 27 M. 628.

Page 944, Section 12.
Amenability of person leasing rooms used for gaming purposes. Knowledge.
Mount v. State, 7 S. & M. 277, 1 Mor. St. Cas. 300.
See Diebel v. State, 68 M. 725, 9 So. 354.

Page 946, Section 4.
Promissory note executed on Sunday, &c., void.
Miller v. Lynch, 38 M. 344.

Page 951, Article 11.
Betting of "money" on election. "Accessoryship," not defense. Parol evidence. Issue and proof.
Williams v. State, 12 S. & M. 58, 1 Mor. St. Cas. 422.

Page 954.
Murder defined. "Premeditated design." Presumption as to malice.
Hawthorne v. State, 58 M. 778.

Page 961, Article 36.
Assault with intent to commit manslaughter. Punishment.
Bedell v. State, 50 M. 492.

Page 977, Section 2.
Bigamy. Husband or wife absent for five successive years and not known by spouse to be living. Presumption.
Gibson v. State, 38 M. 313, 2 Mor. St. Cas. 1351.

Page 981, Section 4.
Both larceny in another state or country, and bringing of property into this state, necessary to constitute offense. Indictment.
Norris v. State, 33 M. 373, 2 Mor. St. Cas. 1059.

Page 981, Section 5.
Plea of former conviction or acquittal in another state or country by person prosecuted under H. C., p. 981, § 4.
Norris v. State, 33 M. 373, 2 Mor. St. Cas. 1059.

Page 983, Section 21.
Does not apply to case of slave indicted for conspiring and plotting with other slaves to murder free white person.
Laura v. State, 26 M. 174, 1 Mor. St. Cas. 700.

Page 983, Section 22.
Indictment. Graduated offense. Assault with intent to murder. Verdict of common assault and battery. Joinder of counts.
Brantley v. State, 13 S. & M. 468, 1 Mor. St. Cas. 484.

Page 985, Section 1.
Penitentiary. Officers. Election. Term of office. Governor to fill vacancy in superintendency.
McAffee v. Russell, 29 M. 84.

Page 1007, Article 7, Section 1.
Special venire in capital case.
Boles v. State, 24 M. 445.
See Hale v. State, 72 M. 140, 16 So. 387.

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Page 1009, Article 12.

Bail in criminal cases. Does not refer to commitments under process issued from circuit court.

State v. Brown, 32 M. 275, 1 Mor. St. Cas. 926.

CODE 1857.

Chapter 15.

County cannot open public road across private property without first paying damages.

Cameron v. Washington County, 47 M. 264.

Chapter 20.

Vinous and spirituous liquors. Druggist. Indictment for unlawful retailing.

Riley v. State, 43 M. 397, 2 Mor. St. Cas. 1632.

See Surratt v. State, 45 M. 601.

Chapter 24.

Bastard child. Maintenance. Proceedings.

Anonymous, 37 M. 54.

Chapter 39.

Petition of material-men to enforce lien. Demurrer. Question of law. General judgment.

Hursey v. Hassam, 45 M. 133.

Mechanic working by day at per diem, not entitled to lien.

Myers v. Buchanan, 46 M. 397.

Chapter 52.

Attachment against debtors. Service and return.

Rankin v. Dulaney, 43 M. 197.

Chapter 60.

Chancery court. Jurisdiction. Matters of probate.

Troup v. Rice, 49 M. 248.

Governs probate court proceedings. Process.

Burrus v. Burrus, 56 M. 92.

Chapter 62.

Chancery court. Jurisdiction. Matters of probate.

Troup v. Rice, 49 M. 248.

Page 43, Article 2.

Provisions of code to supersede all prior statutory provisions thereby revised, &c.

Jefferies v. Harvie, 38 M. 97.

Page 43, Articles 2 and 3.

Provision, of charter of Mississippi Cent. R. Co., for punishment of persons placing obstructions on track, repealed by Code 1857, p. 600, art. 164.

McCarty v. State, 37 M. 411, 2 Mor. St. Cas. 1330.

Page 43, Article 3.

Repeals former statutes repugnant to provisions of code, &c.

Jefferies v. Harvie, 38 M. 97.

Page 43, Article 5.

Repeal of statutory provisions. Effect.

Jefferies v. Harvie, 38 M. 97.

Page 44, Article 6.

Retroactive effect of code. Substantial rights of defense under law in force at time of commission of crime.

Josephine v. State, 39 M. 613, 2 Mor. Cas. 1439.

Page 46, Article 170.

Right of dower of widow, who, without fault on her part, obtains nothing by devise, not concluded by acceptance of will.

Collins v. Melton, 40 M. 242.

Page 71, Article 5.

Sheriff to be tax collector. Bond. Whether repealed by Code 1871, § 8, quære.

Byrne v. State, 50 M. 688.

Page 74, Article 13.

Fiscal year to commence on first day of May, &c.

Read v. Beall, 42 M. 472.

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Page 74, Article 14.
Realty lying in part, in each of two counties. Assessment.
Prophet v. Lundy, 63 M. 603.

Page 76, Article 20.
Sixteenth section. Non-taxable until leased. Title of purchaser at sale for taxes.
Sexton v. Coahoma County, 86 M. 380, 3 So. 636.

Page 77, Article 24.
Rule for taxation of bank stock. Code 1871, § 1683.
Bank of Oxford v. Oxford, 70 M. 504, 12 So. 203.

Page 77, Article 25.
Time for completion, and delivery to probate clerk, of assessment rolls, and for objections thereto.
Brigins v. Chandler, 60 M. 862.

Page 79, article 35.
Rule prescribed to be followed in making sales for levee taxes under Laws 1858, p. 33.
Vasser v. George, 47 M. 713.

Tax sale. Requisites. Complainant relying upon tax title. Bill.
Griffin v. Dogan, 48 M. 11.

Page 80, Article 36.
State can acquire title to land sold for taxes, only by deed from sheriff.
Triplet v. Thornton, 1 Miss. Dec. 98.

Ejectment on tax title purchased from state. Evidence. Deed of sheriff to state.
Weathersby v. Thoma, 57 M. 296.

Page 80, Article 39.
Tax deed to be deposited with probate clerk, &c. Land redeemable within two years from date of sale.
Shattuck v. Daniel, 52 M. 834.

Pages 80, 81, Articles 36, 39.
Amended, Laws 1863, p. 111. Tax title. Lodgment of deed with clerk. Acknowledgment.
Edmondson v. Granberry, 73 M. 723, 19 So. 676.

Pages 80, 82, Articles 39, 43.
Confederate taxes. Illegality. Tax deed. Presumptions.
Day v. Smith, 87 M. 395, 39 So. 526.

Pages 81, 82, Articles 42, 44.
Tax collector. "Legal allowances."
Boykin v. State, 50 M. 375.

Page 82, Article 44.
State as purchaser at tax sale. Resale for taxes prior to redemption, &c.
Shattuck v. Daniel, 52 M. 834.

Page 82, Article 45.
Tax sale. Interest of purchaser. Lands acquired by state, unredeemed within two years, "thereafter" subject to entry, &c.
Shattuck v. Daniel, 52 M. 834.

Page 85, Articles 59-61.
Suit maintainable on bond of tax collector, for taxes uncollected as well as for money received and not paid over. Writ of inquiry, &c.
Boykin v. State, 50 M. 375.

Page 108, Article 32.
Auditor. Duty "to grant warrant." Mandamus.
Swann v. Buck, 40 M. 268.

Page 114, Article 74.
Public printer. Appointment by governor, by and with advice and consent of senate. Election. Vacancy during recess of legislature.
Kimball &c. Co. v. Alcorn, 45 M. 151.

Page 122, Article 115.
Sheriffs liable for acts of deputies, &c.
State v. Nichols, 39 M. 318.

Page 123, Article 120.
Non-liability on motion of sheriff and sureties for false return on process by deputy.
State v. Nichols, 39 M. 318, 2 Mor. St. Cas. 1358.

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Page 123, Article 121.
Execution. Failure to return. Payment.
Staples v. Fox, 45 M. 667.

Page 132, Article 161.
County warrant. Alternative writ of mandamus to compel payment. Fraud, misrepresentation, and lack of authoritty, not valid defense.
Hendricks v. Johnston, 45 M. 644.

Non-payment of county warrant. Illegality of allowance as defense.
Files v. McWilliams, 49 M. 578.

Page 136, Article 183.
Term of office. Circuit judges. Holding over.
Leachman v. Musgrove, 45 M. 511.

Page 136, Article 186.
Tax collector. Form of bond, sufficient in substance and properly conditioned, immaterial.
Boykin v. State, 50 M. 375.

Page 137, Article 188.
Suit on bond of public officer. Assignee of judgment.
James v. State, 49 M. 420.

Page 138, Article 194.
Declaratory of common-law validity as to third persons, of official acts of de facto officers.
Cooper v. Moore, 44 M. 386.
See Hill v. Boyland, 40 M. 618.

Swearing of jurors and witnesses in criminal case, by de facto deputy clerk, not ground for new trial.
Mobley v. State, 46 M. 501.

Page 139, Article 201.
Recognizance, not void for mistake as to time of holding court.
Curry v. State, 39 M. 511, 2 Mor. St. Cas. 1362.

Page 140, Article 1.
District attorney. Salary. Mandamus.
Swann v. Buck, 40 M. 268.

Page 142, Article 1.
Sheriff. Commissions. Payment by defendant, after levy of execution, and advertisement of sale, directly to plaintiff.
Wynne v. Mississippi &c. R. Co., 45 M. 569.

Pages 142, 143.
Clerk of chancery court, not entitled to ex officio allowance. "Similar services."
Ex parte Patty, 56 M. 499.

Page 144.
Clerks of probate and police courts. Fees.
Hendricks v. Lowndes County, 49 M. 612.

Page 156, Section 4.
Prohibits sale of liquors within five miles of state university, &c. Indictment. Defense. Representation of purchaser. Instructions.
Haynie v. State, 32 M. 400, 1 Mor. St. Cas. 943.
McGuire v. State, 37 M. 369, 2 Mor. St. Cas. 1291.
See Riley v. State, 43 M. 397, 2 Mor. St. Cas. 1632.

Pages 171-173, Articles 1-11.
County cannot open public road across private property without first paying damages.
Cameron v. Washington County, 47 M. 264.

Page 172, Article 4.
Damages for taking land for public road.
Cage v. Trager, 60 M. 563.

Page 172, Article 6.
Eminent domain. Trespass. Injunction.
Cameron v. Washington County, 47 M. 264.

Page 173, Articles 12-14.
Public roads. Duty of boards of police. Districts. Overseers. Appointment. Penalty for refusal to serve, &c.
Sutton v. Carroll County, 41 M. 236.

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Page 173, Article 13.
Delivery to sheriff by chancery clerk, of copies of appointment by supervisors, of road overseers.
Hendricks v. Lowndes County, 49 M. 612.

Pages 174, 175, Articles 17, 18, 21.
Provide for securing attendance and services of persons subject to work upon roads, for number of days prescribed, at times which overseer may appoint.
Sutton v. Carroll County, 41 M. 236.

Page 176-177, Articles 26-29.
Public roads. Overseers. Mile-posts and guide boards. Penalty for failure to fulfil requirements.
Sutton v. Carroll County, 41 M. 236.

Page 177, Article 31.
Overseer of public roads. Semi-annual report. Penalty for failure to make.
Sutton v. Carroll County, 41 M. 236.

Page 178, Article 38.
Right of board of police to contract for construction and repair of bridge, &c.
Sutton v. Carroll County, 41 M. 236.

Page 191, Article 1.
Debt, proper remedy to recover penalty for cutting trees.
Ware v. Collins, 35 M. 223, 72 Am. Dec. 122.
Elder v. Hilzheim, 35 M. 231.
Cutting trees. Penalty.
Mhoon v. Greenfield, 52 M. 434.

Pages 197-201, Articles 1-23.
Regulate sale of vinous and spirituous liquors. Conviction of violation. Municipal license, &c. Laws 1865, p. 157.
Licks v. State, 42 M. 316, 2 Mor. St. Cas. 1546.
Vinous and spirituous liquors. Druggist. Indictment for unlawful retailing.
Riley v. State, 43 M. 397, 2 Mor. St. Cas. 1632.
See Surratt v. State, 45 M. 601.

Page 197, Article 3.
County license to retail vinous and spirituous liquors.
Coulson v. Harris, 43 M. 728.

Pages 197-198, Articles 3-6.
Vinous and spirituous liquors. License to retail.
Read v. Beall, 42 M. 472.

Page 198, Article 5.
Payment of tax, prerequisite to issuance of license to retail.
McWilliams v. Phillips, 51 M. 196.

Page 199, Article 9.
Illegal retailing. Liability of one partner for act of other. Indictment. Instruction.
Whitton v. State, 37 M. 379, 2 Mor. St. Cas. 1299.
Gathings v. State, 44 M. 343, 2 Mor. St. Cas. 1688.

Page 199, Article 13.
Note for liquors. Illegality of consideration.
Cotton v. McKenzie, 54 M. 418.

Page 210, Article 2.
Authorizes boards of police to assess and cause to be collected, tax, necessary for support of poor, &c.
Coulson v. Harris, 43 M. 728.

Page 216, Articles 1-6.
Bastard child. Maintenance. Proceedings.
Anonymous, 37 M. 54.

Page 236, Article 9.
Slaves. Emancipation.
Mitchell v. Wells, 37 M. 235.

Page 248, Article 59.
Specific intent to kill, is gist of offense, and must be proved. Unlawful use of deadly weapon, prima facie evidence.

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Jeff v. State, 37 M. 321, 2 Mor. St. Cas. 1253.
Jeff v. State, 39 M. 593, 2 Mor. St. Cas. 1422.

Page 250, Article 68.
Circuit court. Jurisdiction to try slaves for capital offenses.
Josephine v. State, 39 M. 613, 2 Mor. St. Cas. 1439.

Page 292, Article 5.
Corporation charters. Right of legislature to repeal.
Shotwell v. Louisville &c. R. Co., 69 M. 541, 11 So. 455.

Corporation. Repeal of charter. Usury.
Columbus &c. Banking Co. v. First Nat. Bank, 73 M. 96, 15 So. 138.

Page 299, Article 43.
Railroads. Liability for negligence. Fellow servants.
New Orleans &c. R. Co. v. Hughes, 49 M. 258.
See Dowell v. Vicksburg &c. R. Co., 61 M. 519.

Pages 302, 303, Articles 55, 56.
Declares devises and bequests to religious societies void. Object. Distribution.
Barton v. King, 41 M. 288.

Void devise. Religious or charitable purpose.
Tatum v. McClellan, 50 M. 1.

Page 303.
Foreign insurance company. Agent. War.
Statham v. New York Life Ins. Co., 45 M. 581, 7 Am. Rep. 737.

Page 303, Article 57.
Foreign insurance company. Summons. Return.
Continental Ins. Co. v. Mansfield, 45 M. 311.

Object. Did not affect rules of pleading and practice.
Georgia Home Ins. Co. v. Holmes, 75 M. 390, 23 So. 183, 65 Am. St. 611.

Page 306, Article 1.
Conveyance of land held adversely.
Cassedy v. Jackson, 45 M. 397.

Page 306, Article 2.
Limitation of estates. Will.
Busby v. Rhodes, 58 M. 237.

Page 307, Article 3.
Estates in fee tail prohibited. Words of limitation.
Dibrell v. Carlisle, 48 M. 691.
Hudson v. Gray, 58 M. 883.
Sudduth v. Sudduth, 60 M. 366.

Page 307, Article 4.
Married woman. Separate estate. Conveyance and incumbrance. Covenants of warranty.
Stephenson v. Osborne, 41 M. 119, 90 Am. Dec. 358n.

Separate estate of wife. Conveyance.
Erwin v. Hill, 47 M. 675.

Conveyance by wife. Acknowledgment.
Lockhart v. Camfield, 48 M. 470.

Page 307, Article 7.
Co-tenants. Conveyance by one.
Williams v. Tucker, 47 M. 678.

Page 308, Article 12.
Equity of redemption vendible under execution.
Carpenter v. Bowen, 42 M. 28.
See Thompson v. Wheatley, 5 S. & M. 499.

Equitable interest of vendee by title bond who has paid part of price, subject to execution.
Adams v. Harris, 47 M. 144.

No one but trustee in deed of trust, or those claiming under him, can prevent recovery on title of grantor.
Freeman v. Cunningham, 57 M. 67.
See Heard v. Baird, 40 M. 793.

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Page 308, Article 14.

Mortgage or deed of trust. Mode of entering satisfaction.
Heard v. Baird, 40 M. 793.

Payment of mortgage debt to administrator of mortgagee of itself revests title in mortgagor.
Griffin v. Lovell, 42 M. 402.

Page 309, Article 18.

Tenancy in common. Conveyance.
Richardson v. Miller, 48 M. 311.

Estate by entirety. Effect of statute.
McDuff v. Beauchamp, 50 M. 531.

Converts joint tenancies into tenancies in common. Expressly excepts trust estates from operation.
McAllister v. Plant, 54 M. 106.

First appearance of exception of conveyances in trust from operation of H. C., p. 614, § 12, abolishing right of survivorship.
Day v. Davis, 64 M. 253, 8 So. 203.

Page 309, Article 19.

Deeds non-recordable unless duly acknowledged or proved by subscribing witness.
Lockhart v. Camfield, 48 M. 470.

Page 309, Articles 19-23.

Conveyances. Registration. Notice.
Claiborne v. Holmes, 51 M. 146.

Page 309, Articles 19-24.

Unrecorded deed. Judgment creditor. Notice.
Humphreys v. Merrill, 52 M. 92.

Page 310, Article 24.

Title bonds or other written contracts in relation to lands, recordable, if proved or acknowledged, like deeds, &c.
Lockhart v. Camfield, 48 M. 470.

Page 313, Article 32.

Right of dower. Relinquishment.
Stephenson v. Osborne, 41 M. 119, 90 Am. Dec. 358n.

Lease by husband, does not bar dower.
Sykes v. Sykes, 49 M. 190.

Deed. Acknowledgment of wife. Statement in certificate.
Robinson v. Noel, 49 M. 253.

Page 314, Article 38.

Husband cannot, by his acts, defeat interest of wife in real estate, unless thereto authorized and sanctioned by her.
Partee v. Stewart, 50 M. 717.

Page 316, Article 48.

Partition. Parties. Administrator.
Foster v. Newton, 46 M. 661.

Page 327, Articles 1, 3.

Mechanic's lien. Sale of land, &c. Effect.
Buchanan v. Smith, 43 M. 90.
See Cochran v. Wimberly, 44 M. 503.

Pages 327-330, Articles 1-15.

Petition of material men to enforce lien. Demurrer. Question of law. General judgment.
Hursey v. Hassam, 45 M. 133.

Mechanic working by day at per diem not entitled to benefit of provisions.
Myers v. Buchanan, 46 M. 397.

Page 328, Article 6.

Mechanic's lien. Filing contract for record. Suit. Limitation. Subsequent purchaser, necessary defendant. Acquittal of land.
Buchanan v. Smith, 43 M. 90.
See Cochran v. Wimberly, 44 M. 503.

Page 328, Articles 6, 8.

Mechanic's lien. Filing of petition, commences suit and stops running of limitation.
Christian v. O'Neal, 46 M. 669.

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Page 329, Article 11.

Petitioner under Code 1857, p. 327, ch. 39, who fails to establish lien, not entitled to general judgment.

Hursey v. Hassam, 45 M. 133.

Page 329, Articles 12, 13.

Mechanic's lien. Sale of land, &c. Effect.

Buchanan v. Smith, 43 M. 90.

See Cochran v. Wimberly, 44 M. 503.

Page 332, Article 6.

Marriage license. Non-resident female under age of eighteen, without consent, &c. Liability of probate clerk.

Detterly v. Yeamans, 39 M. 475.

Bates v. Stokes, 40 M. 56.

Probate clerk. Bond. Marriage license.

State v. Baker, 47 M. 88.

See Holland v. Beard, 59 M. 61.

Page 333.

Married woman. Maintenance. Divorce.

Garland v. Garland, 50 M. 694.

Page 333, Article 11.

Divorce. "Wilful, continued and obstinate desertion." Consent or connivance of complainant.

Fulton v. Fulton, 36 M. 517.

Page 334, Article 13.

Authorizes divorces, &c. Does not affect jurisdiction of chancery court to provide separate maintenance for wife, abandoned by husband.

Garland v. Garland, 50 M. 694.

Page 334, Article 15.

Divorce. Insanity. Ignorance of complainant at time of marriage.

Smith v. Smith, 47 M. 211.

Page 334, Article 17.

Annuls common law paramount right of divorced father to custody of children. Disposition of latter discretionary.

Cocke v. Hannum, 39 M. 423.

Does not affect jurisdiction of chancery court to provide separate maintenance for wife, abandoned by husband.

Garland v. Garland, 50 M. 694.

Page 335.

Divorce. Proceeding to obtain, to be by bill in chancery in circuit court.

Clark v. Slaughter, 38 M. 64.

Page 335, Article 23.

Deed from husband to wife void as against former's then existing creditors. Exempt property.

Smith v. Allen, 39 M. 469.

See Thoms v. Thoms, 45 M. 263.

Married woman. Separate estate. Conveyance and incumbrance. Covenants of warranty.

Stephenson v. Osborne, 41 M. 119, 90 Am. Dec. 358n.

Deed from husband to wife, valid, except as to creditors of former. Repealed, Laws 1867, p. 727, § 6.

Baygents v. Beard, 41 M. 531.

Married woman. Purchases on credit, &c.

Whitworth v. Carter, 43 M. 61.

Proviso has reference to voluntary conveyances, directly from husband to wife.

Butterfield v. Stanton, 44 M. 15.

See Brooks v. Shelton, 54 M. 353.

Wife's separate property not to be sold, conveyed or incumbered by husband, unless wife join in conveyance, &c.

Sellars v. Kelly, 45 M. 323.

Lockhart v. Camfield, 48 M. 470.

Married woman. Separate property.

Apple v. Ganong, 47 M. 189.

See Simmons v. Thomas, 43 M. 31, 5 Am. Rep. 470.

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Wife's separate property. Conveyance for debts of husband.
Erwin v. Hill, 47 M. 675.
Dibrell v. Carlisle, 48 M. 691.
See O'Hara v. Alexander, 56 M. 516.

Page 335, Articles 23-32.
Ownership of proceeds of labor of wife.
Bowden v. Gray, 49 M. 547.

Pages 335-336, Articles 23-25.
Married woman. Contract. Husband's debts.
Viser v. Scruggs, 49 M. 705.

Page 335, Article 23.
Husband and wife. Conveyance.
Kaufman v. Whitney, 50 M. 103.

Pages 335-337, Articles 23-28.
Married woman. Separate estate. Curtesy: defeat of right.
Stewart v. Ross, 50 M. 776.

Page 335, Articles 23-27.
Married woman. Borrowing money.
Shackleford v. Polk, 51 M. 378.

Page 335, Article 23.
Married woman. Separate property. Parol evidence.
Klein v. McNamara, 54 M. 90.

Page 336, Article 24.
Husband, purchasing property in his own name with money of non-consenting wife, trustee for latter.
Gibson v. Foote, 40 M. 788.

Married woman. Purchases on credit, &c.
Whitworth v. Carter, 43 M. 61.

Subjects of contract embraced, have reference to married women who have separate property.
Dunbar v. Meyer &c. Co., 43 M. 679.
See Simmons v. Thomas, 43 M. 31, 5 Am. Rep. 470.

Purchase of property, with money of wife, by husband, in own name. Creditors of latter. To be strictly construed.
Butterfield v. Stanton, 44 M. 15.
See Brooks v. Shelton, 54 M. 353.
Robinson v. Payne, 58 M. 690.

Wife. Separate property. Trust.
Myers v. Little, 60 M. 203.

Resulting trust in favor of wife.
Greaves v. Atkinson, 68 M. 598, 10 So. 73.

Page 336, Articles 24, 25.
Married woman may purchase property with her own money, and may make certain contracts, &c.
Stephenson v. Osborne, 41 M. 119, 90 Am. Dec. 358n.

Page 336, Article 25.
Married woman. Purchases on credit, &c.
Whitworth v. Carter, 43 M. 61.

Subjects of contract embraced, have reference to married women who have separate property. Liabilities. Satisfaction.
Dunbar v. Meyer &c. Co., 43 M. 679.

Married woman. Separate estate. Liability.
Pendleton v. Galbreath, 45 M. 43.

Ante-nuptial debt of wife.
Cannon v. Grantham, 45 M. 88.

Married woman. Suit against. Pleading.
McGavock v. Whitfield, 45 M. 452.

Purchase by husband for separate estate of wife. Liability.
Clopton v. Matheny, 48 M. 285.
Mhoon v. Colment, 51 M. 60.

Married woman. Employment of agent.
Allen v. Johnson, 48 M. 413.

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Husband and wife. Suit against. Liability of husband.
Davis v. Wilkerson, 48 M. 585.

Married woman. Debts of husband.
Dibrell v. Carlisle, 48 M. 691.

Married woman. Power to contract.
Nicholson v. Heiderhoff, 50 M. 56.

Married woman. Equitable estate. Mortgage.
Dibrell v. Carlisle, 51 M. 785.

Enforcement of contract of wife, in nature of proceeding in rem. General judgment.
Mallett v. Parham, 52 M. 921.

Page 336, Article 26.

Confers upon married woman right to loan her own money and take security therefor in her own name.
Thoms v. Thoms, 45 M. 263.

Joinder of husband in action at law against wife.
Mhoon v. Colment, 51 M. 60.

Married woman. Judgment against.
Cary v. Dixon, 51 M. 593.

Page 337, Article 28.

Curtesy. How defeated.
Stewart v. Ross, 50 M. 776.

Rents, profits and income. Liability of husband.
Hill v. Bugg, 52 M. 397.

Rents and income. Accountability of husband.
Thomson v. Hester, 55 M. 656.
See Wyatt v. Wyatt, 81 M. 219, 32 So. 317.

Trust in land bought by husband.
Robinson v. Payne, 58 M. 690.

Page 337, Article 30.

Widow. Separate estate. Distributive share and dower.
Whitley v. Stephenson, 38 M. 113.

Widow owning separate property equal to her otherwise portion of estate of deceased husband, not dowable in realty.
Magee v. Young, 40 M. 164, 90 Am. Dec. 322.

Page 338, Article 17.

Ejectment. Equitable defense. Repeal.
Rice v. Wright, 46 M. 679.

Page 339.

"Attachment" for rent substituted for distress.
Mason v. O'Brien, 42 M. 420.

Page 339, Article 1.

Attachment for rent to issue against goods and chattels of tenant. Officer to distrain same in amount sufficient to satisfy rent and costs.
Marye v. Dyche &c. Co., 42 M. 347.

Page 340, Article 3.

To warrant attachment for rent not due, contemplated removal must be such as would defeat distress.
Stamps v. Gilman, 43 M. 456.

Page 340, Article 5.

Landlord and tenant. Priority of former's claim for rent. Purchaser of cotton produced by demised land.
Cooper v. Baker, 54 M. 637.

Page 341, Article 11.

Attachment for rent. Replevin. Sureties.
McKinney v. Green, 52 M. 70.

Page 342, Article 12.

Attachment for rent. Distress of goods and chattels in which tenant has but limited property or interest.
Marye v. Dyche &c. Co., 42 M. 347.

Pages 349-354, Articles 1-25.

Unlawful detainer. Special court. Jurisdiction. New trial. Appeal.
Warren v. African Baptist Church, 50 M. 223.

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Page 355, Articles 1, 2.
Bill of sale. Proof of signature. Evidence.
Dancey v. Suggs, 46 M. 606.

Page 355, Article 2.
Note. Suit by assignee. Defenses.
Harrison v. Pike, 48 M. 46.

Note. Novation. Consideration. Estoppel.
Adams v. Power, 48 M. 450.

Page 357, Article 10.
Partnership debts, joint and several. Death of partner.
Freeman v. Stewart, 41 M. 138.

Bill or note, unindorsed. One or more of makers may be sued in same action.
Crump v. Wooten, 41 M. 611.
See Thompson v. Planters' Bank, 2 S. & M. 476.

Page 357, Articles 10-16.
Personal judgments against co-defendants are joint and several. Executions issuable against survivors.
Bowen v. Bonner, 45 M. 10.

Page 357, Article 10.
Bill of sale. Proof of signature. Evidence.
Dancey v. Suggs, 46 M. 606.

Indorser. Parties primarily liable.
Hinds v. Miller, 52 M. 845.

Page 357, Articles 10, 12.
Partnership. Liability. Insolvency.
Irby v. Graham, 46 M. 425.

Page 357, Article 11.
Bill of exchange or promissory note. Residents, secondarily liable. Action. Parties defendant. Venue. Attachment.
Crump v. Wooten, 41 M. 611.

Suits on indorsed bills and notes.
Moore v. Knox, 46 M. 602.

Page 357, Article 12.
Partnership debts. Death of partner. Joint suit against survivors and estate of deceased.
Freeman v. Stewart, 41 M. 138.

Page 357, Article 15.
Reversal as to maker, and affirmance as to indorser, of bill single.
Mhoon v. Colment, 51 M. 60.

Page 358, Article 1.
Statute of frauds. Specific performance.
Marqueze v. Caldwell, 48 M. 23.

Statute of frauds. Contract for sale of lands, &c.
Hairston v. Jaudon, 42 M. 380.
Overruled by Washington v. Soria, 73 M. 665, 19 So. 485, 55 Am. St. 555.

Page 358, Article 2.
Statute of frauds. Unrecorded deed. Remainder-man. Sale by tenant in possession. Notice.
Gibson v. Jayne, 37 M. 164.

Voluntary conveyances between husband and wife. Attack by creditors.
Butterfield v. Stanton, 44 M. 15.

Fraudulent conveyances void when made to "deceive those who shall purchase the same lands," &c.
Prestidge v. Cooper, 54 M. 74.

Pages 358, 359.
Voluntary conveyance. Fraud. "Creditors."
Pennington v. Seal, 49 M. 518.

Page 359, Article 3.
Fraud in conveyance. Subsequent purchaser.
Prestidge v. Cooper, 54 M. 74.

Fraudulent conveyance. Subsequent creditors.
Summers v. Ross, 42 M. 749, 2 Am. Rep. 653.
Hilliard v. Cagle, 46 M. 309.

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Page 359, Article 5.
Mortgage. Deed absolute in form. Parol evidence.
Klein v. McNamara, 54 M. 90.

Page 360, Article 8.
Infant. Contract. Ratification.
Edmunds v. Mister, 58 M. 765.

Page 361, Article 1.
Where whole or part of consideration was won at any game or horse race, &c., contract void in toto.
Holman v. Ringo, 36 M. 690.
Crawford v. Storms, 41 M. 540.

Page 362, Article 1.
Surety. Notice to sue. Waiver.
Smith v. Clopton, 48 M. 66.

Page 364, Article 1.
Personal judgments against co-defendants are joint and several. Executions issuable against survivors.
Bowen v. Bonner, 45 M. 10.

Page 366, Article 10.
Habeas corpus. Trial. Disposition of prisoner.
Street v. State, 43 M. 1, 2 Mor. St. Cas. 1591.

Page 370, Article 4.
Interest. Rule for computation.
Breck v. Smith, 44 M. 690.

Page 371.
Wife cannot, without consent of husband, submit to arbitration, title to lands in suit.
Handy v. Cobb, 44 M. 699.

Page 371, Article 3.
Arbitration and award.
Jenkins v. Meagher, 46 M. 84.

Page 372, Article 1.
Attachment against debtors. Remedy does not extend to actions ex delicto.
Fellows v. Brown, 38 M. 541.

Non-resident creditors may attach non-resident debtors.
Barrow v. Burbridge, 41 M. 622.

Pages 372-382, Articles 1-44.
Attachment against debtor. Service and return.
Rankin v. Dulaney, 43 M. 197.

Page 372, Article 2.
Affidavit, in attachment against debtor: before whom to be made.
Griffing v. Mills, 40 M. 611.

Non-resident creditors may attach non-resident debtors.
Barrow v. Burbridge, 41 M. 622.

Oath, in attachment against debtor: before whom to be made, and contents.
Rankin v. Dulaney, 43 M. 197.

Attachment against debtor. "Unfair preference." Code 1871, § 1420.
Eldridge v. Phillipson, 58 M. 270.

Page 373, Article 3.
Attachment against debtor. Issuance of writ by officer other than one taking affidavit.
Griffing v. Mills, 40 M. 611.

Attachment against debtor. Writ, to be leading process in suit, &c.
Rankin v. Dulaney, 43 M. 197.

Page 373, Article 4.
Attached debtor, if to be found, to be summoned.
Richard v. Mooney, 39 M. 357.

Attachment against debtor. Mode of levying upon lands, goods, chattels, debts, &c. Defendant who can be found, to be summoned.
Rankin v. Dulaney, 43 M. 197.

Attachment against debtor. Garnishee. Summons.
Cooper v. Ingraham, 45 M. 198.

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Page 373, Article 5.

Writ of attachment against non-resident debtors. Errors rendering same voidable. Designation of defendants.

Hinds v. Miller, 52 M. 845.

Page 374, Article 7.

Attachment against debtor. Execution of writ. Return.

Rankin v. Dulaney, 43 M. 197.

Saunders v. Columbus Life &c. Co., 43 M. 583.

Garnishee in attachment against debtor. Summons.

Cooper v. Ingraham, 45 M. 198.

Attachment against debtor. Service. Judgment.

Tucker v. Byars, 46 M. 549.

Page 375, Article 8.

Replevin by attached debtor. Effect.

Montague v. Gaddis, 37 M. 453.

See Gray v. Perkins, 12 S. & M. 622.

Phillips v. Hines, 33 M. 163.

Attachment against debtor. Replevin bond.

Richard v. Mooney, 39 M. 357.

Sureties of replevying defendant in attachment are liable only to extent of replevied property's value. Jury to assess such value.

Young v. Pickens, 45 M. 553.

Page 375, Article 9.

Attachment against debtor. Surety. Judgment.

Richard v. Mooney, 39 M. 357.

Page 377, Article 13.

Ancillary attachment. Appearance to, when proceedings void, not appearance to original suit.

Sawyers v. Smith, 41 M. 554.

Ancillary attachment. Bond.

Jeffries v. Dancey, 44 M. 693.

Page 377, Article 14.

Attachment against debtor. Plea in abatement, &c. Replevin by defendant.

Montague v. Gaddis, 37 M. 453.

See Phillips v. Hines, 33 M. 163.

Wrongful attachment. Damages.

Barney v. Scherling, 40 M. 320.

Wrongful attachment. Assessment by jury of "damages against plaintiff."

Marqueze v. Sontheimer, 59 M. 430.

See Fleming v. Bailey, 44 M. 132.

Page 377, Article 15.

Attachment against debtor. New affidavit. Replevin in special court.

Bloom v. Price, 44 M. 73.

Amendment of affidavit in attachment against debtor.

Griffing v. Mills, 40 M. 611.

Page 378, Article 16.

Attachment against debtor. Duplicate writs. Indorsement.

Saunders v. Columbus Life &c. Co., 43 M. 583.

Page 378, Article 19.

Publication in attachment against debtor.

Griffing v. Mills, 40 M. 611.

Attachment against non-resident debtors. Order for publication, &c., unnecessary.

Hinds v. Miller, 52 M. 845.

Page 379.

Executor or administrator, garnishable. Object of statute. Personal judgment on personal service or on appearance and plea. Lien. Proceedings.

Holman v. Fisher, 49 M. 472.

Page 379, Article 23.

Attachment against debtor. Judgment. Refunding bond. Void sale.

Hinds v. Miller, 52 M. 845.

Attachment against non-resident. Judgment by default. Sale of land of garnishee. Failure to give bond. Presumption.

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Hiller v. Lamkin, 54 M. 14.
See Murdock v. Daniel, 58 M. 411.

Page 379, Article 24.
Executor or administrator. Garnishment for debt due by testator or intestate. Debtors of deceased.
Thrasher v. Buckingham, 40 M. 67.

Page 379, Article 25.
Garnishment on judgment. Failure of garnishee to answer at return term. Judgment by default.
Jefferies v. Harvie, 38 M. 97.

Attachment against debtor. Garnishee. Failure to appear and discover. Garnishment on judgment.
Thrasher v. Buckingham, 40 M. 67.

Page 380, Article 26.
Garnishee in attachment against debtor. Answer. Garnishment on judgment.
Thrasher v. Buckingham, 40 M. 67.

Page 380, Article 28.
Attachment against debtor. Answer of garnishee and issue controverting same, to be in writing.
Roberts v. Barry, 42 M. 260.

Page 380, Article 30.
Garnishment. Judgment against resident principal, condition precedent to judgment against surety.
Thrasher v. Buckingham, 40 M. 67.

Page 381, Article 38.
Trial of right to property attached. When same may be had. Effect of determination upon disposition of property.
Melius v. Houston, 41 M. 59.

Page 382, Article 39.
Attachment against debtor. Service. Defendant's death. Abatement. Judgment and sale, or final process against garnishee and property attached. Code 1871, § 1486.
Melius v. Houston, 41 M. 59.
Holman v. Fisher, 49 M. 472.

Page 382, Article 41.
Attachment against debtor, issued by, and returnable before, justice of peace, cannot be levied on real estate.
Plummer v. West, 41 M. 69.

Page 386, Article 3.
Ejectment. General issue, only plea allowed.
Hutto v. Thornton, 44 M. 166.

Ejectment. Judgment by default final, for recovery of land, enterable against non-pleading tenant.
Shirley v. Conway, 44 M. 434.

Confines defendant to plea of not guilty. Special plea allowable only when defendant denies possession.
Bernard v. Elder, 50 M. 336.

Page 387, Article 5.
Ejectment. Plea of general issue to have effect of admission that defendant was in possession at time of commencement of action.
Bernard v. Elder, 50 M. 336.

Page 387, Article 8.
Ejectment. Special plea disputing or denying possession at commencement of action.
Bernard v. Elder, 50 M. 336.

Page 388, Article 14.
Ejectment. Joinder of issue. Appearance of both parties. Question at trial.
Hamilton v. Homer, 46 M. 378.

Page 388, Article 15.
Ejectment. Trial. Expiration of title in plaintiff. Judgment.
Hamilton v. Homer, 46 M. 378.

Page 388, Article 17.
Plaintiff in ejectment not entitled to recover on legal title when defendant has title, superior in equity.

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Heard v. Baird, 40 M. 793.
See Lockhart v. Camfield, 48 M. 470.
Freeman v. Cunningham, 57 M. 67.

Page 389, Article 20.
Ejectment. Mesne profits and damages. Set-off, &c. "Good faith" purchaser.
Learned v. Corley, 43 M. 687.

Pages 391, 392, Articles 25, 34.
Ejectment. Death of plaintiff. Revivor.
Hamilton v. Homer, 46 M. 378.

Page 395, Article 1.
Replevin. Slave, unlawfully seized under attachment.
Mosely v. Anderson, 40 M. 49.

Page 395, Article 3.
Replevin. Bonds.
Weathersby v. Sleeper, 42 M. 732.

Page 396, Article 10.
Replevin. Insufficient bond.
Weathersby v. Sleeper, 42 M. 732.

Page 398, Article 1.
Limitation of actions. Adverse possession.
Dickson v. Cook, 47 M. 220.
Hicks v. Steigleman, 49 M. 377.

Page 399, Article 3.
Limitations. Mortgagee in possession.
Little v. Teague, 60 M. 115.

Page 399, Article 4.
Limitations. Foreclosure of mortgage.
Maddux v. Jones, 51 M. 531.

Limitations. Equitable mortgage.
Green v. Mizelle, 54 M. 220.

Remedy on mortgage or deed of trust to be barred coincidently with debt secured.
Green v. Gaston, 56 M. 748.

Page 399, Article 5.
Limitations. Legacy made express charge on real estate devised. Express trust.
Templeton v. Tompkins, 45 M. 424.

Limitations. Open account.
McCall v. Nave, 52 M. 492.

Page 400, Article 10.
Limitation of actions. Foreign judgment, &c. Pronounced unconstitutional in Christmas v. Russell, 5 Wall. 290. Omitted from Code 1871.
Furlong v. State, 58 M. 717.

Page 400, Article 11.
Limitations. Executor or administrator.
Buckingham v. Walker, 48 M. 609.

Four years' limitation upon action or scire facias against executor or administrator. Suspension by war.
Woods v. Elliott, 49 M. 168.

Action or scire facias against executor or administrator, as such. Limitations. Suspension by petition to declare estate insolvent.
Pool v. Ellis, 64 M. 555, 1 So. 725.

Page 400, Article 13.
Absence of intended defendant from state. Effect upon running of limitations.
Fisher v. Fisher, 43 M. 212.
See Bower v. Henshaw, 56 M. 619.

Limitation of actions. Absence from state. Suit to foreclose mortgage.
Hunt v. Belknap, 78 M. 76, 28 So. 751.

Page 401, Article 18.
Limitation of actions. Note made to guardian of infant. Suit by ward after reaching majority and after death of guardian. "Fraudulent concealment."
Wilson v. Sibley, 54 M. 656.

Limitations. Trust fund, deliverable on marriage of beneficiary. Death of trustee.
North v. James, 61 M. 761.

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Page 401, Article 20.
Limitations. Mutual and open current account. Cause of action accrues at time of true date of last item.
Hursey v. Hassam, 45 M. 133.

Page 402, Article 25.
Limitations to run against actions by state and counties.
Clements v. Anderson, 46 M. 581.
Brown v. Issaquena County, 54 M. 230.
See Madison County v. Powell, 71 M. 618, 15 So. 109.
Lauderdale County v. East Miss. Mills Co., 16 So. 210.

Page 402, Article 26.
Injunction, as suspending running of limitations.
Triplet v. Thornton, 1 Miss. Dec. 98.

Page 402, Article 28.
Trust deed. Limitations.
Green v. Gaston, 56 M. 748.

Page 403, Articles 30, 31.
Limitation. Express trust. Legacy made express charge on real estate devised.
Templeton v. Tompkins, 45 M. 424.

Page 403, Article 31.
Limitation. Trust fund, deliverable on marriage of beneficiary. Death of trustee.
North v. James, 61 M. 761.

Page 405, Article 7.
Justices of peace. Civil jurisdiction.
Bell v. West Point, 51 M. 262.

Page 408, Article 20.
Attachment, against debtor, issued by, and returnable before, justice of peace, cannot be levied on real estate.
Plummer v. West, 41 M. 69.

Page 409, Article 23.
Does not apply to appeals to special court to try replevin.
Bloom v. Price, 44 M. 73.

Page 409, Article 25.
Judgment of circuit court on appeal, &c., from justice's court, final.
Mississippi Cent. R. Co. v. Kennedy, 41 M. 551.

Page 415, Article 6.
Board of police. Times of meeting.
Arthur v. Adam, 49 M. 404.

Page 416, Article 14.
County warrant. Validity.
Clayton v. McWilliams, 49 M. 311.
Board of supervisors. Minutes. Allowances.
Arthur v. Adam, 49 M. 404.
Clerk of board of police. Compensation.
Hendricks v. Lowndes County, 49 M. 612.

Page 416, Article 16.
Boards of police. Taxes, to meet demands of respective counties, upon persons and property subject to state taxes, &c.
Coulson v. Harris, 43 M. 728.
Boards of police. "Further powers."
Arthur v. Adam, 49 M. 404.

Page 417, Article 22.
Authorizes boards of police to levy special tax for specified purposes.
Coulson v. Harris, 43 M. 728.

Page 417, Article 24.
Levy of county taxes: when to be made.
Brigins v. Chandler, 60 M. 862.

Page 418, Article 24.
County taxes: time for making levy. Laws 1870, p. 24.
Brigins v. Chandler, 60 M. 862.

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Page 419, Article 32.
Demands and accounts against county. Audit and allowance. Proceedings.
Arthur v. Adam, 49 M. 404.

Page 419, Article 33.
County funds, &c. Judgment of circuit court on appeal from board of police, final. Constitutionality.
Dismukes v. Stokes, 41 M. 430.
See Crump v. Colfax County, 52 M. 107.

County funds, &c. Judgment or decision of board of police. Right to appeal to circuit court.
Arthur v. Adam, 49 M. 404.

Page 419, Articles 33, 34.
Funds of county, claim against latter, &c. Judgment or decision of board of police. Appeal. Judgment of circuit court, final.
Taylor v. Marion County, 51 M. 731.

Page 419, Article 34.
Suit against county, on "claim" rejected by board of police. Failure to keep highway and bridge in repair.
Sutton v. Carroll County, 41 M. 236.

County suable on claim rejected by board of police.
Beaman v. Leake County, 42 M. 237.

Page 420, Article 35.
Board of police. Employment of counsel.
Arthur v. Adam, 49 M. 404.
Marion County v. Taylor, 55 M. 184.

Pages 421-470, Articles 1-176.
Chancery court. Jurisdiction. Matters of probate.
Troup v. Rice, 49 M. 248.

Govern probate court proceedings. Process.
Burrus v. Burrus, 56 M. 92.

Page 424, Article 3.
County warrant. Salary of probate judge.
Honea v. Monroe County, 63 M. 171.

Page 428, Article 16.
Provides that sheriff execute and return all probate court process.
Burrus v. Burrus, 56 M. 92.
See Bailey v. Fitz-Gerald, 56 M. 578.

Page 428, Article 20.
Probate court. Duty of party summoned, to attend court according to command of process.
Hanks v. Neal, 44 M. 212.

Probate court process. Issuance and service. Attachment.
Burrus v. Burrus, 56 M. 92.
See Bailey v. Fitz-Gerald, 56 M. 578.

Page 429, Article 21.
Issuance and service of probate court process.
Burrus v. Burrus, 56 M. 92.
See Bailey v. Fitz-Gerald, 56 M. 578.

Page 429, Article 22.
Probate court. Publication. Day for appearance.
Foley v. McDonald, 46 M. 238.

Mode of proceeding in probate court against non-resident or absent parties.
Burrus v. Burrus, 56 M. 92.

Page 430, Article 24.
Probate court. Taking depositions.
Burrus v. Burrus, 56 M. 92.

Page 430, Article 27.
Probate court. Trial of issues by jury.
Burrus v. Burrus, 56 M. 92.

Page 430, Article 28.
Appeal from probate court.
Burrus v. Burrus, 56 M. 92.

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Appeals from probate court cannot be granted in open court, but only on petition to clerk.
Ricard v. Smith, 37 M. 644.

Page 431, Article 31.
Probate court. Fieri facias.
Powell v. Cooper, 42 M. 221.
Decree for payment of legacy. Fieri facias.
Packwood v. Elliott, 43 M. 504.
Guardian. Final account. Balance due ward. Execution.
Scott v. Porter, 44 M. 364.
Fieri facias to enforce money decree of probate court.
Burrus v. Burrus, 56 M. 92.

Page 431, Articles 31, 32.
County warrants. Mandamus.
Honea v. Monroe County, 63 M. 171.

Page 431, Article 32.
Probate court. Distribution. Minors. Process.
Mundy v. Calvert, 40 M. 181.
Probate court. Guardian ad litem: when required.
Jack v. Thompson, 41 M. 49.
Probate court. Minor. Service of process on guardian.
Winston v. McLendon, 43 M. 254.
Conclusiveness on minors, of probate court judgments. Conditions.
Burrus v. Burrus, 56 M. 92.
See Billups v. Brander, 56 M. 495.
Guardian. Final settlement with unmarried, minor ward, served with summons. Guardian ad litem. Decree.
Bailey v. Fitz-Gerald, 56 M. 578.
Not found in Code 1880.
Gregory v. Orr, 61 M. 307.

Page 431, Article 33.
Probate court. Bill of review.
Bowen v. Seale, 45 M. 30.

Page 432, Articles 34, 35.
Revoking clause in will, attested by two witnesses, does not revoke former will except so far as same relates to personalty.
Vining v. Hall, 40 M. 83.

Page 433, Article 38.
Nuncupative will. Strictness of proof.
Andrews v. Andrews, 48 M. 220.

Page 434, Article 43.
Will. Petition to set aside for concealed fraud. Allegation, sufficient to bring case within proviso.
Matthews v. Sontheimer, 39 M. 174.

Page 434, Article 45.
Executor, who is principal legatee and devisee under will, competent witness to sustain same.
Kelly v. Miller, 39 M. 17.

Page 435, Article 50.
Failure of husband of executrix to give bond is cause for removal of latter.
Yates v. Clark, 56 M. 212.

Page 436, Article 54.
Executor. Testamentary direction that bond be not required.
Clark v. Niles, 42 M. 460.

Page 437, Article 56.
Jurisdiction of probate court to appoint collectors. Intestacy. Validity of appointment.
Boyd v. Swing, 38 M. 182.

Page 438, Article 61.
Probate court. Jurisdiction to grant letters of administration.
Wright v. Beck, 10 S. & M. 277.

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Deceased non-resident, owning realty but no goods nor choses in action, here. Letters of administration unissuable to applicant.
Partee v. Kortrecht, 54 M. 66.
See Temples v. Cain, 60 M. 478.

Estate. Non-resident. Administration.
Weaver v. Norwood, 59 M. 665.

Page 439, Article 67.
Administratrix. Marriage. Order requiring her to join husband in new bond does not vitiate her original appointment.
Cassedy v. Jackson, 45 M. 397.

Page 440, Article 68.
Sheriff as administrator. Liability. Bond.
Robinson v. State, 47 M. 423.

Deceased non-resident, owning lands but no goods nor choses in action, here. Letters of administration ungrantable to sheriff.
Partee v. Kortrecht, 54 M. 66.
See Temples v. Cain, 60 M. 478.

Page 440, Article 69.
Estate. Administration. Inventory of assets to be appraised, "inventory" referred to in Code 1857, p. 442, art. 78.
Dowdy v. Graham, 42 M. 451.

Page 441, Article 73.
Inventory of money debts, &c., due estate. Not "inventory" referred to in Code 1857, p. 442, art. 78.
Dowdy v. Graham, 42 M. 451.

Page 442, Article 78.
More than one executor, administrator or collector. "Inventory." Refusal to join in return. Code 1857, p. 440, art. 69.
Dowdy v. Graham, 42 M. 451.

Page 443, Article 81.
Requires executor or administrator, within two months after grant of letters, to publish notice to creditors, &c.
Woods v. Elliott, 49 M. 168.

Page 443, Article 82.
Refers to payment of judgment creditors of estate by executor or administrator by private transaction between them.
Haralson v. White, 38 M. 178.

Page 444, Article 83.
Claims against estate of deceased. Registration within two years after first publication of notice to creditors.
Woods v. Elliott, 49 M. 168.

Page 445, Article 86.
Ejectment unmaintainable by heirs against administrator who has indirectly purchased at his own confirmed sale.
Temples v. Cain, 60 M. 478.

Page 445, Article 88.
Sale of land to pay debts of deceased. One month to elapse from filing of petition to order of sale.
Heard v. Whitehead, 41 M. 404.

Personal property insufficient to pay debts. Sale of realty. Minor party. Service of process. Guardian ad litem.
Burrus v. Burrus, 56 M. 92.

Pages 445, 446.
Lunatic. Judgment against guardian. Sale of lands under execution.
Saunders v. Mitchell, 61 M. 321.

Page 446, Article 90.
Probate court. Insolvent estate. Execution of decree of sale.
Yerger v. Ferguson, 55 M. 190.

Page 447, Article 91.
Control of probate court over execution of decree, ordering sale of insolvent estate. Report.
Yerger v. Ferguson, 55 M. 190.

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Page 448, Article 96.

Administrator. Cultivating farm. Advances.
Farley &c. Co. v. Hord, 45 M. 96.

Executor. Expenses of crop.
Hardee v. Cheatham, 52 M. 41.

Page 448, Article 98.

Petition to declare estate insolvent. Notice to parties interested.
Heard v. Whitehead, 41 M. 404.

Executor or administrator. Account and schedule. Insolvency. Order for sale, &c. Infant devisee or distributee. Process.
Winston v. McLendon, 43 M. 254.

Insolvent estate. Power of probate court. Decree for sale.
Yerger v. Ferguson, 55 M. 190.

Insolvent estate. Decree for sale. Minor party. Service of process. Guardian ad litem.
Burrus v. Burrus, 56 M. 92.
Billups v. Brander, 56 M. 495.

Page 449, Article 99.

Probate court. Insolvent estate. Execution of decree of sale.
Yerger v. Ferguson, 55 M. 190.

Page 449, Article 101.

Probate court, on overruling exceptions to claim reported by insolvency commissioner, may appoint referees to examine into its validity.
Allen v. Miles, 36 M. 640.

Petition to declare estate insolvent. Notice to parties interested.
Heard v. Whitehead, 41 M. 404.

Insolvent estate. Creditor, who has probated and registered claim, not required to file with commissioner of insolvency.
Gibbs v. Sims, 41 M. 706.
Powell v. Cooper, 42 M. 221.

Page 450, Article 102.

Does not affect right of partnership creditors to partnership assets, nor of separate creditors to individual assets.
Irby v. Graham, 46 M. 425.

Page 451, Article 106.

Probate court. Final settlement of executor or administrator. Minor distributee or legatee. Service of process. Guardian ad litem.
Burrus v. Burrus, 56 M. 92.

Page 452, Article 110.

Descent and distribution of personal property situated in this state. Applies only to estates of intestates. Renunciation of will by widow.
Slaughter v. Garland, 40 M. 172.

Descent and distribution. Title by purchase.
Hamilton v. Homer, 46 M. 378.

Descent and distribution. Foreign will. Right of widow.
Wilson v. Cox, 49 M. 538.

Page 454, Article 117.

Minor devisee or heir. Partition. Parties in interest to be summoned. Process must be executed in like manner as that from circuit court, &c.
Mundy v. Calvert, 40 M. 181.
See Murff v. Frazier, 41 M. 408.
Burrus v. Burrus, 56 M. 92.

Partition on application of infant devisee or heir. Hotchpot.
Saxon v. Ames, 47 M. 565.

Minor devisee or heir. Partition. Void decree.
Temple v. Hammock, 52 M. 360.

Page 454, Article 118.

Probate court. Distribution. Parties in interest to be summoned. Service of process.
Mundy v. Calvert, 40 M. 181.
See Murff v. Frazier, 41 M. 408.
Burrus v. Burrus, 56 M. 92.

Legatee. Rule on executor to pay legacy. Petition. Discretion of court.
Packwood v. Elliott, 43 M. 504.

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Page 455, Article 119.
Executors and administrators. Remedies.
Bowen v. Bonner, 45 M. 10.

Page 455, Article 120.
Legatee. Action at law.
Packwood v. Elliott, 43 M. 504.

Page 456, Article 124.
Executors and administrators. Suits and actions by or against as not abated by death, &c. Scire facias. Judgment. Revivor.
Dibble v. Norton, 44 M. 158.

Administrator de bonis non. Death of judgment debtor. Scire facias.
Bowen v. Bonner, 45 M. 10.

Death of complainant. Revivor in name of administrator.
Smith v. Pattison, 45 M. 619.

Page 457, Article 131.
Foreign executor. Suit to recover property or debts. Certificate.
Hill v. Boyland, 40 M. 618.

Page 458, Article 136.
Devise of land "to be sold." Sale by administrator c. t. a. appointed after failure of executor to qualify.
Sandifer v. Grantham, 62 M. 412.

Power confided to executor virtute officii executable by administrator c. t. a.
Cohea v. Johnson, 69 M. 46, 13 So. 40.

Page 458, Article 137.
Title bond. Death of obligor. Order on executor or administrator to make title.
Adams v. Harris, 47 M. 144.

Page 458, Section 138.
Administrator of vendee of land not paid for, in full. Sale. Vendor, necessary party.
Wells v. Smith, 44 M. 296.

Page 459, Articles 140, 141.
Testamentary guardianship. Acceptance.
Gregory v. Field, 63 M. 323.

Page 459, Article 142.
Probate court cannot appoint guardian for minor, resident in foreign county.
Duke v. State, 57 M. 229.

Probate court. Letters of guardianship. Minor with living father. Const. 1832, art. 4, § 18.
Ex parte Atkinson, 40 M. 17.
Earle v. Crum, 42 M. 165.

Page 460, Article 145.
Guardian. Sureties. Apprehension of danger. Petition for discharge.
Coleman v. Lamar, 40 M. 775.

Guardian. Bond. Past default.
State v. Hull, 53 M. 626.

Page 462, Article 148.
Attainment of majority by ward, terminates powers, &c., of guardian. Delivery of property to, and final settlement with ward.
Garland v. Norman, 50 M. 238.

Guardian and ward. Money invested in Confederate bonds. Accountability for interest.
Fitz-Gerald v. Bailey, 58 M. 658.
See Bailey v. Fitz-Gerald, 56 M. 578.

Marriage of ward. Delivery of estate.
Chapman v. Hughes, 61 M. 339.

Page 462, Article 149.
Guardian. "Real estate." Cultivation or lease. Mortgage.
Sample v. Lane, 45 M. 556.

Page 462, Article 150.
Probate court to settle sum to be expended in education and maintenance of orphan.
Sample v. Lane, 45 M. 556.

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Pages 462, 463, Articles 150, 151.
Guardian. Sale of land. Bond.
Vanderburg v. Williamson, 52 M. 233.

Page 463, Article 151.
Probate court. Process. Proceeding to sell land under Code 1857, p. 464, art. 153.
Hanks v. Neal, 44 M. 212.

Guardian. Sale of lands. Summons. Record, &c.
Stampley v. King, 51 M. 728.
Temple v. Hammock, 52 M. 360.

Minor party. Service of process. Guardian ad litem.
Burrus v. Burrus, 56 M. 92.

Sale of land by guardian. Notice. Bond.
Morton v. Carroll, 68 M. 699, 9 So. 896.

Guardian's sale. Interest in homestead.
Morton v. McCanless, 68 M. 810, 10 So. 72.

Page 463, Article 152.
Guardian. Sale. Lien.
Brown v. Barlow, 51 M. 7.

Page 464, Article 153.
Probate court. Guardian. Minor heir or devisee. Sale of land. Petition. Appointment of day for hearing. Process. Constitutionality.
Hanks v. Neal, 44 M. 212.

Minors. Sale of lands. Commissioners.
Harrington v. Wofford, 46 M. 31.

Minor party. Service of process. Guardian ad litem.
Burrus v. Burrus, 56 M. 92.

Page 465, Article 156.
Lunatic. Judgment against guardian. Sale of lands under execution.
Saunders v. Mitchell, 61 M. 321.

Pages 467-470, Articles 162-176.
Widow. Separate estate. Distributive share and dower.
Whitley v. Stephenson, 38 M. 113.

Page 467, Article 162.
Dower. Conveyance of lands by husband during coverture, as bar. Burden of proving good faith and valuable consideration. Dwelling-house. Jurisdiction of probate court.
Jiggitts v. Jiggitts, 40 M. 718.

Dower. Solvent estate.
Quin v. Coleman, 42 M. 386.

Dower. Distributive share. Mortgage.
Pickett v. Buckner, 45 M. 226.

Dower. Judgment against husband.
Gould v. Luckett, 47 M. 96.

Deed of trust and sale thereunder as bar to dower.
Hinds v. Pugh, 48 M. 268.

Lease by husband does not bar dower.
Sykes v. Sykes, 49 M. 190.

Dower. Mortgage by husband.
Tucker v. Field, 51 M. 191.

Dower. "Seized and possessed." Land conveyed in fraud of wife.
Bates v. McDowell, 58 M. 815.

Page 467, Article 163.
Dower. Foreign will. Renunciation.
Wilson v. Cox, 49 M. 538.

Page 468, Article 164.
Dower of widow of insolvent, issueless husband, is only life estate, &c.
Quin v. Coleman, 42 M. 386.

Page 468, Article 168.
Devise to widow in lieu of dower.
Wilson v. Cox, 49 M. 538.

Page 468, Article 169.
Widow. Failure to renounce will as election to take under same. Worthless devise. Right of dower.
Collins v. Melton, 40 M. 242.

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Page 469, Article 170.
Dower. Bequest of personalty.
Booth v. Stubbins, 47 M. 161.

Page 469, Article 172.
Widow. Property exempt from execution. Administration by probate court.
Coleman v. Brooks, 37 M. 71.
Whitley v. Stephenson, 38 M. 113.
Holliday v. Holland, 41 M. 528.
Mason v. O'Brien, 42 M. 420.

Exempt personalty. Widow. Separate property. Amended by Laws 1860, p. 375.
Wally v. Wally, 41 M. 657.
Hardin v. Osborne, 43 M. 532.
Thoms v. Thoms, 45 M. 263.

Page 469, Article 173.
Dower. Petition for allotment. Proof necessary. Parties concluded.
Gould v. Luckett, 47 M. 96.

Dower. Minor heir or devisee. Service of process. Guardian ad litem.
Burrus v. Burrus, 56 M. 92.

Page 470, Article 174.
Liability of widow for rent of land not included in dower. Insolvent estate.
Wood v. Bott, 56 M. 128.

Page 470, Article 176.
Widow owning separate property equal to her otherwise portion of estate of deceased husband, not dowable in realty.
Magee v. Young, 40 M. 164, 90 Am. Dec. 322.

Page 479, Article 9.
Judge of circuit court. Mandamus.
Swann v. Buck, 40 M. 268.

Page 482, Article 29.
Circuit court. Jurisdiction.
Swann v. Buck, 40 M. 268.

Pages 483, Article 32.
Civil actions. Venue.
Wolley v. Bowie, 41 M. 553.
See Andrews v. Powell, 41 M. 729.
American Surety Co. v. Holly Springs, 77 M. 428, 27 So. 612.

Venue of actions not local. Executors and administrators within operation. Counties of appointment and residence, different.
McLeod v. Shelton, 42 M. 517.

Freeholder sued out of his county. Judgment by default. Dismissal of suit as to resident co-defendant.
Christian v. O'Neal, 46 M. 669.

Page 485, Article 42.
Contract providing for lien on crops for rent, &c. Assignment in writing for value. Effect. Parties to action.
Stewart v. Hollins, 47 M. 708.

Page 485, Article 43.
Suit by partners in partnership name. Non-joinder. Demurrer.
Blackwell v. Reid, 41 M. 102.

Page 486, Article 48.
Negligence. Actions for injuries causing death. First statutory utterance of Lord Campbell's act. Code 1871, § 676.
Brissey v. Gulf &c. R. Co., 79 M. 597, 31 So. 212.

Page 486, Articles 49-51.
Scire facias not necessary when executor or administrator comes into court voluntarily.
Bowen v. Bonner, 45 M. 10.

Page 487, Article 52.
Personal judgment against co-defendants, joint and several. Execution issuable against survivors. Representatives of deceased party. Scire facias. Revivor.
Bowen v. Bonner, 45 M. 10.

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Page 488, Article 61.

Civil action. Summons to be first process except, &c. Attachment against debtor.
Rankin v. Dulaney, 43 M. 197.

Page 489, Article 63.

Process, to be indorsed by sheriff with date of receipt, and to be returned on return day, with written statement of proceedings, &c. Attachment against debtor.
Rankin v. Dulaney, 43 M. 197.

Process. Probate court.
Burrus v. Burrus, 56 M. 92.

Page 489, Articles 63, 64.

Circuit court. Original process. Return of service.
Merritt v. White, 37 M. 438.

Page 489, Article 64.

Service of garnishment. "Original process."
Jefferies v. Harvie, 38 M. 97.

Process. Service: personal, and by copy.
Foster v. Simmons, 40 M. 585.

Process for infant defendant. Service. Return.
Ingersoll v. Ingersoll, 42 M. 155.
Johnson v. McCabe, 42 M. 255.
Erwin v. Carson, 54 M. 282.
See Moody v. McDuff, 58 M. 751.

Original process. Service.
York v. Crawford, 42 M. 508.
Davis v. Patty, 42 M. 509.

"Original process." Mode of service upon defendant who can be found.
Rankin v. Dulaney, 43 M. 197.

Mother and minor children included in single summons. Service. Return.
McIlvoy v. Alsop, 45 M. 365.

Summons. Service on minors.
Smith v. Pattison, 45 M. 619.

Summons. Return. Judgment by default.
Milan v. Strickland, 45 M. 721

Attachment. Service. Judgment.
Tucker v. Byars, 46 M. 549.

Absent debtor who has left undisturbed, furnished home in this state. Service of process.
Dent v. Jones, 50 M. 265.

Process. Inapplicable to probate court.
Burrus v. Burrus, 56 M. 92.

Summons. Service on parent. Guardian.
Cocks v. Simmons, 57 M. 183.

Summons. Infant. Return.
Rigby v. Lefevre, 58 M. 639.

Infant. Process. Service on parent or guardian.
Erwin v. Carson, 54 M. 282.
Moody v. McDuff, 58 M. 751.

Page 490, Article 67.

Removal of defendant to foreign county after commencement of action. Testatum writ.
Andrews v. Powell, 41 M. 729.

Page 490, Article 70.

Attachment against debtor. Service and return.
Rankin v. Dulaney, 43 M. 197.

Page 490, Article 73.

Scire facias. Execution and return.
Davis v. Patty, 42 M. 509.

Renewal of judgment. Death. Non-resident.
Bowen v. Bonner, 45 M. 11.

Page 491, Article 78.

Declaration. Sufficiency.
Lamkin v. Nye, 43 M. 241.

Demurrer to evidence.
Jordan v. Foxworth, 48 M. 607.

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Page 491, Article 82.
Pleading. Judgment. Jurisdiction.
State v. Bowen, 45 M. 347.

Page 492, Article 86.
Abolishes distinction between actions of trespass vi et armis, and actions of trespass on case. Suit for damages. Personal injuries.
New Orleans &c. R. Co. v. Ellbritton, 38 M. 242, 75 Am. Dec. 98.

Page 492, Article 87.
Venue need not be stated in declaration.
Hurt v. Southern R. Co., 40 M. 391.

Page 492, Article 89.
Fictitious designation of defendant. Suit by partners in partnership name, &c.
Blackwell v. Reid, 41 M. 102.

Page 492, Article 90.
Copy of writing sued on, to be filed with declaration. Record.
Marshall v. Hamilton, 41 M. 229.

Action for money paid. Judgment final, erroneous, unless copy of account or bill of particulars was filed with declaration. Writ of inquiry.
Barker v. Justice, 41 M. 240.

Suit on account. Bill of particulars.
Pipes v. Norton, 47 M. 61.

Page 493, Article 96.
Slander. Evidence admissible under general issue.
Jarnigan v. Fleming, 43 M. 710, 5 Am. Rep. 514.

Page 493, Article 98.
Set-off. Assignee of open account.
Casper v. Thigpen, 48 M. 639.

Page 495, Article 112.
Joinder in demurrer, unnecessary.
Hawkins v. Mississippi &c. R. Co., 35 M. 688.

Page 496, Article 116.
Special demurrer abolished.
Polkinghorne v. Hendricks, 61 M. 366.
See State v. Swinney, 60 M. 39, 45 Am. Rep. 405n.
Merchants' &c. Bank v. Calmes, 82 M. 603, 35 So. 161.

Page 499, Article 131.
Empanelment of grand jury to be conclusive evidence of its competency and qualifications.
Head v. State, 44 M. 731, 2 Mor. St. Cas. 1700.
Durrah v. State, 44 M. 789, 2 Mor. St. Cas. 1668.
Nichols v. State, 46 M. 284.
See Lee v. State, 45 M. 114.

Pages 499–500, Articles 135–139.
Special venire. How drawn.
Lee v. State, 45 M. 114.

Page 501, Article 142.
Jury. Challenge to array. Special venire facias in criminal case.
Durrah v. State, 44 M. 789.

Page 501, Article 143.
Jurors in civil case. Oath. Record.
Hewett v. Cobb, 40 M. 61.

Page 503, Article 150.
Judgment by default at return term. Personal service.
Merritt v. White, 37 M. 438.

Continuance. Defendant may file written notice with clerk, &c. Garnishment on judgment. Answer of garnishee to be filed at return term.
Thrasher v. Buckingham, 40 M. 67.

Judgment by default, premature before fourth day of term.
Davis v. Patty, 42 M. 509.

Page 504, Article 161.
Written instructions. Indorsement by clerk. Part of record without bill of exceptions.
Barney v. Scherling, 40 M. 320.

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Instructions: when part of record.
Swann v. West, 41 M. 104.
Fisher v. Fisher, 43 M. 212.

Malicious mischief. Cruelty to animals. Criminal prosecution. Unrequested instructions.
Duncan v. State, 49 M. 331.

Page 504, Article 162.

Applies to bills of exceptions taken and signed, pending trial and before verdict.
Barney v. Scherling, 40 M. 320.

Page 505, Article 166.

Exception to action of court on motion for new trial. Reasons for latter to be reduced to writing.
Barney v. Scherling, 40 M. 320.

New trial ruling reviewable only after disposition of cause on final trial. Brings forward H. C., 885, 886. Later, becomes Code 1871, § 648.
Brown v. Carraway, 47 M. 668.

Page 508, Article 180.

Declaration in name of holder of note amendable by inserting name of legal owner as nominal plaintiff.
Montague v. King, 37 M. 441.

Amendment of pleadings and correction of defects therein. Trial of right of property.
Phillips v. Cooper, 50 M. 722.

Page 508, Article 181.

Defective pleadings. Stay or reversal.
Gale v. Lancaster, 44 M. 413, 3 So. 137.

Cures mistake as to form of action.
Breck v. Smith, 44 M.690.

Failure to amend pleadings. Waiver of defects. Trial of right of property.
Phillips v. Cooper, 50 M. 722.

Appellate practice, law and equity. Husband and wife. Reversal and affirmance. Entry of judgment against wife.
Mhoon v. Colment, 51 M. 60.

Page 509, Article 186.

Rectification of mistakes in judgments or decrees. Special remedy. Papers in cause. Amendment. Notice.
Shirley v. Conway, 44 M. 434.

Page 509, Articles 186, 187.

Appellate practice, law and equity. Husband and wife. Reversal and affirmance. Entry of judgment against wife.
Mhoon v. Colment, 51 M. 60.

Page 509, Article 188.

Release of excess in, and rendition of proper judgment by, appellate court.
Breck v. Smith, 44 M. 690.

Page 510, Article 190.

Wife, incompetent, in civil cause, as witness for or against husband.
Dunlap v. Hearn, 37 M. 471.
Overrules: Lockhart v. Luker, 36 M. 68.

Proviso. Applies only to suits before justice of peace. Excludes alleged debtor of deceased as witness to prove payment, &c.
Griffin v. Lower, 37 M. 458.

Administrator, incompetent to testify in own behalf to establish account against estate of deceased.
Haralson v. White, 38 M. 178.

Executor, who is principal legatee and devisee under will, competent witness to sustain same.
Kelly v. Miller, 39 M. 17.

Interested witness must depose orally in open court.
Anderson v. Gregg, 44 M. 170.

Estate. Witness. Nominal plaintiff.
Hedges v. Aydelott, 46 M. 99.

Claim originating during lifetime of deceased. Incompetency of owner as witness.
Lamar v. Williams, 39 M. 342.
Witherspoon v. Blewett, 47 M. 570.

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Evidence. Interested witness.
Lockhart v. Camfield, 48 M. 470.

Estate. Witness. Incompetency.
Reinhardt v. Evans, 48 M. 230.
Overruled: Rothschild v. Hatch, 54 M. 554.

Suit for divorce. Complainant wife as incompetent to testify against husband.
Anonymous, 58 M. 15.

Page 510, Article 193.
Criminal prosecutions. Husband and wife, competent witnesses, either for other.
Dunlap v. Hearn, 37 M. 471.

Page 515, Article 221.
Waiver by exceptor of exceptions to deposition.
Herndon v. Bryant, 39 M. 335.

Page 516, Article 222.
Attachment. Before whom affidavit may be made.
Griffing v. Mills, 40 M. 611.

Page 516, Article 223.
Evidence. Certified copies of foreign deeds.
Davis v. Rhodes, 39 M. 152.

Evidence. Unrecorded deed, acknowledged and entitled to be recorded according to law of state where executed, inadmissible.
Lock v. Jayne, 39 M. 157.

Page 519, Article 241.
Proof of publication of notice. Record.
Yerger v. Ferguson, 55 M. 190.

Page 520, Article 244.
Attachment. Before whom affidavit may be made.
Griffing v. Mills, 40 M. 611.

Page 521, Article 252.
Proof sufficient to create presumption of death.
Learned v. Corley, 43 M. 687.

Page 521, Article 253.
Judgments by default. Setting aside.
Barker v. Justice, 41 M. 240.

Form of action. Assumption. Trespass. Judgment final for want of appearance or plea.
Mississippi Cent. R. Co. v. Fort, 44 M. 423.

Pages 521–525, Articles 253–264.
Personal judgment against co-defendants, joint and several. Execution issuable against survivors.
Bowen v. Bonner, 45 M. 10.

Page 521, Article 253.
Action on bond of tax collector. Judgment by default. Writ of inquiry, &c.
Boykin v. State, 50 M. 375.

Page 523, Articles 257, 258.
Judgment. Office confession.
Bass v. Estill, 50 M. 300.

Page 524, Article 260.
"Judgment roll." Enrolment of final judgments and decrees.
Reed & Co. v. Haviland & Co., 38 M. 323.

Judgments. Priority. Execution unissued by senior lienor. Notice to precede levy by junior judgment creditor. Purchaser at sale.
Dibble v. Norton, 44 M. 158.
See Curry v. Lampkin, 51 M. 91.

Page 524, Articles 260, 261.
Judgment. Enrolment. Priority. Diligence.
Mobile &c. R. Co. v. Trotter, 36 M. 416.
Dabney v. Stackhouse, 49 M. 513.

Page 524, Article 261.
Judgment or decree, legally enrolled, lien on after-acquired property of defendant.
Jenkins v. Gowen, 37 M. 444.

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Enrolled judgments and decrees. Lien. Priority.
Reed v. Haviland & Co., 38 M. 323.

Enrolled judgments and decrees. Lien and binding effect. Priority.
Howard v. Simmons, 43 M. 75.

Judgment. Enrolment. Lien.
Mitchell v. Wood, 47 M. 231.

Enrolled judgments. Lien. Re-enacted, Code 1871, § 830, except as to final clause of section, regarding justices' judgments.
Cayce v. Stovall, 50 M. 396.

Pages 525–538, Articles 265–314.
Personal judgment against co-defendants, joint and several. Execution issuable against survivors.
Bowen v. Bonner, 45 M. 10.

Page 526, Article 269.
Unissued execution. Death of co-defendant. Failure to note.
Wade v. Watt, 41 M. 248.

Page 527, Article 275.
Sheriff may demand bond of indemnity after he has levied, "or shall be about to levy."
Dabney v. Stackhouse, 49 M. 513.

Page 528, Article 277.
Execution on land. Place of sale.
Koch v. Bridges, 45 M. 247.
See Vasser v. George, 47 M. 713.

Page 528, Article 280.
Property exempt from seizure under execution or attachment. Slave. Liability of officer levying on, or seizing same.
Mosely v. Anderson, 40 M. 49.

Pages 528–529, Articles 280–281.
Widow. Property exempt from execution. Administration by probate court.
Whitley v. Stephenson, 38 M. 113.
Holliday v. Holland, 41 M. 528.
See Wally v. Wally, 41 M. 657.
Mason v. O'Brien, 42 M. 420.

Page 529, Article 281.
Debtor, becoming householder after rendition of judgment and before sale, entitled to exemption.
Trotter v. Dobbs, 38 M. 198.
Homestead. Right of exemption ended by sale and abandonment of possession. Judgment creditors.
Whitworth v. Lyons, 39 M. 467.
Bank v. Lyons, 52 M. 181.
See Partee v. Stewart, 50 M. 717.

Homestead. Character of occupancy.
Campbell v. Adair, 45 M. 170.

Homestead. Interest of wife. Husband's power of alienation. Course of descent, &c.
Thoms v. Thoms, 45 M. 263.

Homestead. Occupancy. Abandonment.
Pennington v. Seal, 49 M. 518.

Homestead. How claimed. Waiver.
Lessley v. Phipps, 49 M. 790.
See Taylor v. Smith, 54 M. 50.

Homestead. Purchase in name of another. Fraud.
Edmonson v. Meacham, 50 M. 34.

Homestead. Sale. Right of purchaser.
McCaleb v. Burnett, 55 M. 83.

Homestead. Change of statute. Effect.
Acker v. Trueland, 56 M. 30.

Homestead exemptions. Continued contracts.
Washburn v. Blundell, 75 M. 266, 22 So. 946.

Page 530, Article 284.
Qualification of right to exemption.
Mosely v. Anderson, 40 M. 49.
Homestead. Judgment for purchase money against exemptionist's executrix only. Enforcement.
Buckingham v. Nelson, 42 M. 417.

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Property of debtor: when not exempt. Claim for rent.
Mason v. O'Brien, 42 M. 420.

Homestead exemption. Sale of land for purchase money.
Patrick v. Rembert, 55 M. 87.

Page 531, Article 288.

Goods and chattels on demised premises. Lien in favor of landlord. Sale or incumbrance by tenant. Judgment creditor of latter. Execution. Tender of year's rent.
Marye v. Dyche &c. Co., 42 M. 347.
Stamps v. Gilman, 43 M. 456.

Page 531, Article 291.

Levy of execution. Undivided interest.
Willis v. Loeb, 59 M. 169.

Page 532, Article 295.

Execution. Default of plaintiff. Issue to try right of property not made up at return term. Levy. Claimant's bond.
Sears v. Gunter, 39 M. 338.
See Bedford &c. Co. v. Adams Machine Co., 93 M. 537, 47 So. 429.

Execution. Interposition of claim to property. Issue to be made up between parties, under direction of court.
Phillips v. Cooper, 50 M. 722.

Page 533, Article 297.

Execution. Trial of right of property. Default in making up issue.
Sears v. Gunter, 39 M. 338.
Bedford &c. Co. v. Adams Machine Co., 93 M. 537, 47 So. 429.

Page 533, Article 298.

Trial of right of property. Burden on plaintiff in execution to show judgment, execution, levy, and title to property levied on, in debtor.
Phillips v. Cooper, 50 M. 722.

Pages 537–538, Articles 313–314.

Garnishment on judgment.
Jefferies v. Harvie, 38 M. 97.
Thrasher v. Buckingham, 40 M. 67.

Pages 539–559, Articles 1–125.

Jurisdiction of chancery court. Matters of probate.
Troup v. Rice, 49 M. 248.

Page 540, Article 2.

Chancery court. Jurisdiction. Divorce.
Clark v. Slaughter, 38 M. 64.

Grant to chancery court of plenary jurisdiction in all equity matters, limited by proviso as to minimum amount.
Champenois v. Hort, 45 M. 355.

Page 541, Article 6.

Chancery court. Jurisdiction. Venue. Property. Defendant.
Hill v. Boyland, 40 M. 618.
See Boswell v. Wheat, 37 M. 610.

Page 544, Article 26.

Bill in chancery. Process.
Robertson v. Johnson, 40 M. 500.

Page 544, Article 27.

Chancery summons. Return. Written statement of proceedings.
Robertson v. Johnson, 40 M. 500.
Foster v. Simmons, 40 M. 585.
Mullins v. Sparks, 43 M. 129.

Process for infant defendant. Service.
Johnson v. McCabe, 42 M. 255.

Attachment against debtor. Service and return.
Rankin v. Dulaney, 43 M. 197.

Execution of chancery court process.
Burrus v. Burrus, 56 M. 92.

Page 545, Article 34.

Chancery. Absent or non-resident defendant. Order for appearance, &c.
Foster v. Simmons, 40 M. 585.

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Page 546, Article 35.
Chancery. Unknown heirs. Publication.
Reed v. Gregory, 46 M. 740.
Decree on publication. Rehearing.
Jacks v. Bridewell, 51 M. 881.

Page 546, Article 39.
Chancery court. Pro confesso, not to be "set aside, without good cause shown."
Putman v. McClellan, 55 M. 299.

Page 547, Articles 44, 45.
Chancery practise. Answer. Denial. Sufficiency. Disclaiming personal knowledge.
McAllister v. Clopton, 51 M. 257.
Mead v. Day, 54 M. 58.

Page 547, Article 48.
Mortgage or deed of trust. Foreclosure suit. Account. Notice to parties of time and place of taking. Vendor's lien.
Kilcrease v. Lum, 36 M. 569.
Suit to foreclose mortgage or deed of trust. Notice to parties of time and place of taking account unnecessary.
Ingersoll v. Ingersoll, 42 M. 155.

Page 547, Article 49.
Unseasonable application to file amended bill.
Walker v. Brown, 45 M. 615.
Answer in chancery. Application for leave to amend, made on hearing and during argument, not reasonable.
Duggan v. Champlin, 75 M. 441, 23 So. 179.

Page 547, Article 50.
Striking unverified chancery answer. Failure of defendant to plead further. Final decree.
Hodges v. Phillip, 50 M. 362.

Page 548, Article 51.
Chancery. Cross bill. Notice. Relief.
Burford v. Kersey, 48 M. 642.

Page 548, Article 52.
Return of process, executed, or proof of publication made, prerequisite to appointment of guardian ad litem for infant defendant.
Ingersoll v. Ingersoll, 42 M. 155.
Johnson v. McCabe, 42 M. 255.
Erwin v. Carson, 54 M. 282.
Requires minor to be made party, by process or publication, before appointment of guardian ad litem.
Burrus v. Burrus, 56 M. 92.

Page 548, Article 57.
Chancery court. Interlocutory orders which may be assigned for error. Code 1871, § 1036.
Putman v. McClellan, 55 M. 299.

Page 548, Article 58.
Injunction to stay proceedings at law. Bond. Amendment.
Miller v. McDougall, 44 M. 682.

Page 549, Article 59.
Gives to bond, with sureties, for property bought at judicial sale, force and effect, after maturity, of judgment, collectible by execution, &c.
Bank of Mississippi v. Duncan, 52 M. 740.
Probate sale of land. Bond.
Tate v. Bush, 62 M. 145.

Page 549, Article 60.
Chancery jurisdiction. Attachments.
Statham v. New York Life Ins. Co., 45 M. 581, 7 Am. Rep. 737.
Attachment in chancery. Jurisdiction.
McNeill v. Roache, 49 M. 436.

Page 550, Article 65.
Injunction. Bond, not conditioned as prescribed.
Boswell v. Wheat, 37 M. 610.

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Injunction to stay proceedings at law. Bond. Amendment.
Miller v. McDougall, 44 M. 682.

Page 551, Article 68.
Injunction to restrain execution of judgment at law operates per se as release of errors in judgment.
Thompson v. Munson, 43 M. 176.

Page 551, Article 69.
Injunction. Dissolution. Dismissal.
Maury v. Smith, 46 M. 81.

Page 551, Article 70.
Motion to dissolve injunction, may be heard in vacation upon notice to adverse party.
Martin v. O'Brien, 34 M. 21.

Page 551, Article 73.
Partition. Jurisdiction of chancery court. Joint tenancy.
Pankey v. Howard, 47 M. 83.

Page 552, Article 74.
Receiver. Appointment. Notice.
Vause v. Woods, 46 M. 120.

Page 555, Article 97.
Chancery decree for sale or conveyance of realty of infant. Saving.
McLemore v. Chicago &c. R. Co., 58 M. 514.

Page 555, Articles 101, 102.
Chancery. Appeal from decree overruling demurrer. Allowance by clerk, nullity.
Nesbit v. Rodewald, 43 M. 304.
See Johnson v. Jones, 51 M. 860.
McKee v. Coffee, 58 M. 653.

Pages 555, 556, Articles 103, 108.
Chancery. Appeal. Divorce.
Fulton v. Fulton, 36 M. 517.

Page 557, Article 114.
Constitutional. Orders without consent of parties, valid. Same vest jurisdiction in transferee courts.
Marble v. Whaley, 35 M. 527.

Page 560, Article 3.
Judges of high court. Remedial process.
Swann v. Buck, 40 M. 268.

Page 561, Articles 4, 5.
High courts. Terms. Unrepealed by act of February 21, 1867.
Mobile &c. R. Co. v. Mattan, 41 M. 692.

Page 563, Article 9.
Writ of error. Practice. Parties.
Saunders v. Saunders, 49 M. 327.

Page 563, Article 11.
Appellate practice. Suit against husband and wife on debt of latter. Judgment. Reversal and affirmance.
Mhoon v. Colment, 51 M. 60.

High court. Reversal. Rendition of final judgment.
Fisher v. Fisher, 43 M. 212.

High court. Rendition of proper judgment.
Bowen v. Bonner, 45 M. 10.

Page 563, Article 12.
Judgment of high court. Attack on scire facias.
Bowen v. Bonner, 45 M. 10.

Page 564, Article 14.
Attack on judgment of high court sought to be revived by scire facias.
Bowen v. Bonner, 45 M. 10.

Page 566, Article 23.
Death of plaintiff in error. Revivor.
Tarleton v. Cox, 45 M. 430.

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Page 572, Article 2.
Accessory before the fact to crime committed prior to adoption of Code 1857, not indictable as principal.
Josephine v. State, 39 M. 613.

Page 573, Article 3.
Distinguished from Code 1892, § 4370 (Code 1880, § 1433; Laws 1878, p. 200).
Arbuckle v. State, 80 M. 15, 31 So. 437.

Page 573, Article 7.
Applies only to defects in indictment capable of being waived.
Newcomb v. State, 37 M. 383, 2 Mor. St. Cas. 1303.
Obtaining money by false pretenses. Indictment. Defect not cured.
Bowler v. State, 41 M. 570, 2 Mor. St. Cas. 1515.
Language of indictment for statutory offense.
Kline v. State, 44 M. 317, 2 Mor. St. Cas. 1695.
See Unger v. State, 42 M. 642, 2 Mor. St. Cas. 1584.
Gamblin v. State, 45 M. 658.
Objection to indictment: when to be made.
Jefferson v. State, 46 M. 270.
Verdict in criminal case, not to be reversed for errors which might have been, but were not, taken advantage of in lower court. Constitutionality.
Ex parte Phillips, 57 M. 357.

Page 573, Article 8.
Unlawful cohabitation. Offense.
Carotti v. State, 42 M. 334, 2 Mor. St. Cas. 1562, 97 Am. Dec. 465.
See Rundle v. Pegram, 49 M. 751.
See Kinard v. State, 57 M. 132.
Granberry v. State, 61 M. 440.

Page 575, Article 18.
Indictment under first clause. Objection, &c.
Jefferson v. State, 46 M. 270.

Page 577, Article 29.
Bigamy. Absence of husband. Presumption of death.
Wilkie v. Collins, 48 M. 496.

Page 582, Article 56.
Exhibiting deadly weapon. Indictment. Clerical omission.
Gamblin v. State, 45 M. 658.

Page 583, Article 60.
Relates only to costs and expenses accruing outside of circuit court.
Burt v. Harwood, 39 M. 756.

Page 590, Article 99.
Collection of money not authorized by law. Penalty.
Furlong v. State, 58 M. 717.

Page 590, Article 100.
Obtaining money by false pretenses. Indictment, &c.
Bowler v. State, 41 M. 570, 2 Mor. St. Cas. 1515.

Page 599, Article 162.
Public road. Failure of overseer to keep same in repair, &c.
Sutton v. Carroll County, 41 M. 236.

Page 600, Article 164.
Placing obstruction on railroad. Sufficiency of indictment.
McCarty v. State, 37 M. 411, 2 Mor. St. Cas. 1330.

Page 600, Article 165.
Murder defined. "Deliberate design." Presumption as to malice.
Hawthorne v. State, 58 M. 778.

Page 605, Article 201.
Cruelty to animals. Malicious mischief.
Duncan v. State, 49 M. 331.
Thompson v. State, 51 M. 353.
Rembert v. State, 56 M. 280.

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Page 607, Article 226.
Prosecution of secular business on Sunday. Indictment. Description of offense. Certainty.
Kline v. State, 44 M. 317, 2 Mor. St. Cas. 1695.

Page 613, Article 250.
Declares jury laws to be merely directory. Applies in both civil and criminal proceedings to grand and petit juries.
Head v. State, 44 M. 731, 2 Mor. St. Cas. 1700.

Page 614, Article 252.
Grand juror may be examined in open court as to action and proceedings of, and testimony heard by, grand jury.
Rocco v. State, 37 M. 357, 2 Mor. St. Cas. 1280.

Page 614, Article 257.
Indictment. Presentment.
Lee v. State, 45 M. 114.
Indictment to be presented to court, marked "filed," &c.
Nichols v. State, 46 M. 284.

Page 615, Article 262.
Indictment. Amendment. Striking out descriptive words.
Rocco v. State, 37 M. 357, 2 Mor. St. Cas. 1280.

Page 615, Article 265.
Homicide. Indictment. As not violative of Const. 1832, art. 1, § 10.
Newcomb v. State, 37 M. 383, 2 Mor. St. Cas. 1303.
Manslaughter. Indictment need charge only that accused did "feloniously kill and slay" deceased.
Nichols v. State, 46 M. 284.

Page 616, Article 268.
Indictment. Formal defects. Objection. Amendment.
Surratt v. State, 45 M. 601.
See Kline v. State, 44 M. 317, 2 Mor. St. Cas. 1695.
Gamblin v. State, 45 M. 658.

Page 620, Article 291.
Recognizance, not void for mistake as to time of holding court.
Curry v. State, 39 M. 511, 2 Mor. St. Cas. 1362.

Page 622, Article 302.
Adverse party admitting affidavit for continuance as evidence, may contradict same. Otherwise, if facts stated are admitted.
Brent v. Heard, 40 M. 370.

Page 622, Article 305.
Conviction of inferior constituent misdemeanor or offense, necessarily included in complete felony charged. "Assault in attempt to commit manslaughter."
Gipson v. State, 38 M. 295.
Jury may convict of inferior, or other offense, necessarily included in one charged in indictment.
Bedell v. State, 50 M. 492.

Page 630, Article 348.
Felony, to obtain money or goods, in any amount or quantity, however small, by false tokens or pretenses.
Bowler v. State, 41 M. 570, 2 Mor. St. Cas. 1515.

Page 630, Article 357.
Inapplicable where grade of common law offense has been statutorily increased from misdemeanor to felony.
Bowler v. State, 41 M. 570, 2 Mor. St. Cas. 1515.

Page 632, Article 368.
Mistake in recognizance as to time of holding court, not fatal to validity of same.
Curry v. State, 39 M. 511, 2 Mor. St. Cas. 1362.

Page 643, Article 1.
Technical words in statutes to be construed according to technical meaning. "Dower." "Endowed."
Quin v. Coleman, 42 M. 386.

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CODE 1871.

Chapters given force and effect as laws by passage by two houses and approval by governor as "separate acts." (Per Simrall, C. J.)
Gibbons v. Brittenum, 56 M. 232.

Chapter 9.
Revised by Laws 1876, pp. 178–194.
Gibbons v. Brittenum, 56 M. 232.
See Lombard v. Lombard, 57 M. 171.

Chapter 16.
Replevin, by tenant, of goods distrained for rent. Judgment.
Moore v. Lee, 51 M. 375.
Attachment for rent. Replevin by third person. Plea in abatement. Issue.
Kendrick v. Watkins, 54 M. 495.
Replevin. Plea additional to "not guilty."
Bennett v. Holloway, 55 M. 211.
Replevin. Defendant's bond. Costs.
Phillips v. Cooper, 59 M. 17.
See Sparks v. Hopsen, 83 M. 124, 35 So. 446.

Chapter 18.
Set-off: not allowed against state.
Raymond v. State, 54 M. 562, 28 Am. Rep. 382.

Chapter 19.
Unlawful detainer. Duplicity in complaint. Amendment. Dismissal in circuit court. Defective summons. Record. Objection. Organization of justice's court.
Brown v. Ashford, 56 M. 677.

Chapter 21.
Landlord and tenant. Attachment for rent.
Tucker v. Whitehead, 58 M. 762.
Horton v. Heath, 2 Miss. Dec. 144.

Chapter 22.
Accepts, as fact, existence of person, denominated "collector" or "tax collector," charged with collection of state and county revenue.
Byrne v. State, 50 M. 688.
Taxation. Store. Transient vendor.
Bangle v. Holden, 52 M. 804.
Sheriffs, as tax collectors, to give bonds. Time. Penalty.
Harris v. State, 55 M. 50.
See James v. State, 55 M. 57, 30 Am. Rep. 496n.
State v. Harney, 57 M. 863.
Tax title. Effect.
Brigins v. Chandler, 60 M. 862.

Chapter 34.
Has reference to obstructions to watercourses created by persons erecting mills, gins, or other machinery.
Trice v. Lagrone, 57 M. 839.

Chapter 39.
Obligation of sureties on county treasurer's bond to be tested in part by provisions.
State v. Mayes, 54 M. 417.
Repealed in part by Laws 1878, p. 114. Board of supervisors. School lands. Lease. Submission to vote.
Jones v. Madison County, 72 M. 777, 18 So. 87.
See Lauderdale County v. East Miss. Mills, 18 So. 94.

Chapter 53.
County cannot lawfully build public road over private land without first paying damages.
Cameron v. Washington County, 47 M. 264.

Chapter 55.
Insurance company. Deposit. Security for policy holders.
Arlington Life Ins. Co. v. Wallin, 58 M. 1.

Chapter 56.
Effect upon charter of town of Aberdeen as to money received from liquor licenses.
State Board of Education v. Aberdeen, 56 M. 518.

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Bond conditioned to keep provisions, but not against sale to minors under Code 1880, ch. 39, cured by Code 1880, § 2305.
State v. Depeder, 65 M. 26, 3 So. 80.

Chapter 57.
Trespass. Cutting trees. Penalty. Limitation.
Miller v. Wesson, 58 M. 831.

Section 1.
Sixty-one enumerated chapters to constitute Code. Five additional chapters as of equal force with those designated. (Per Simrall, C. J.)
Gibbons v. Brittenum, 56 M. 232.

Section 8.
Code 1871 supersedes and repeals statutes of general nature therein revised and consolidated.
Mobile &c. R. Co. v. Weiner, 49 M. 725.
Cayce v. Stovall, 50 M. 396.

Whether Code 1857, p. 71, art. 5, is repealed, quære.
Byrne v. State, 50 M. 688.

Not required, to fix time of going into effect of last five of sixty-six code chapters. (Per Simrall, C. J.)
Gibbons v. Brittenum, 56 M. 232.

Section 11.
Orderly arrangement and publication of code, single object. (Per Simrall, C. J.)
Gibbons v. Brittenum, 56 M. 232.

Section 106.
Public officer. Vacancy. How filled.
Brady v. Howe, 50 M. 607.
O'Leary v. Adler, 51 M. 28.

Section 143.
Claim of sheriff for maintenance of prisoners. Warrant. Serious doubts of auditor as to legality of allowance.
Furlong v. State, 58 M. 717.

Allowance of claim by circuit court, prima facie settlement of auditing officer, &c.
State v. Furlong, 60 M. 839.

Section 215.
District attorneys. "Forfeited bonds or recognizances." Commission. Responsibility of state. Code 1880, § 257.
Miller v. State, 69 M. 112, 12 So. 265.

Section 219.
Bond of sheriff. Absence of condition prescribed.
Cox v. Ross, 56 M. 481.

Sheriff. Bond. Default as tax collector. Liability of sureties.
State v. Mathews, 57 M. 1.
See State v. Harney, 57 M. 863.

Section 225.
Sheriff. Failure to return execution. Suit on bond.
Dailey v. State, 56 M. 475.

Section 227.
Sheriff. Failure to return execution. Liability.
Beall v. Shattuck, 53 M. 358.
Tapp v. Bonds, 57 M. 281.

Motion against sheriff for failure to return execution. Venue. Insolvency of execution debtor, no defense. Introduction of judgment.
Cox v. Ross, 56 M. 481.

Sheriff. Failure to return execution. Penalty.
Simms v. Quinn, 58 M. 221.

Section 235.
Taking of bonds and recognizances by sheriff.
Jacquemine v. State, 48 M. 280.
Luckett v. State, 51 M. 799.

Sections 261, 262.
County treasurer. Bond. School fund.
State v. Mayes, 54 M. 417.
State v. Felton, 59 M. 402.

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Section 262.
Criminal law. Public officer. Surrender of books.
Howze v. State, 59 M. 230.

Section 271.
Failure of tax collector to pay money into county treasury. Suit on bond.
Lewenthall v. State, 51 M. 645.

Section 280.
Reward. Fugitive. Capture by officer.
Ex parte Gore, 57 M. 251.

Section 282.
Motion for failure to return execution applies to default of sheriff, arising from his own wilfulness or negligence, &c.
Swain v. Alcorn, 50 M. 320.

Section 309.
County treasurer. Bond. Obligation of sureties.
State v. Mayes, 54 M. 417.

Prescribes form of official bonds. Defects. Validity.
Harris v. State, 55 M. 50.

Means that informal bond shall be valid and binding as statutory bond, &c. Sheriff.
Cox v. Ross, 56 M. 481.

Section 311.
Suit on bond of executor, administrator or guardian.
Smith v. Everett, 50 M. 575.

Section 315.
Surety on bond of county officer becoming insolvent. New bond.
Lewenthall v. State, 51 M. 645.
See State v. Harney, 57 M. 863.

Section 316.
Official bond. Tax collector. Sureties on new bond.
Lewenthall v. State, 51 M. 645.
See State v. Harney, 57 M. 863.

Sheriff. Default as tax collector. Release of sureties. New bond.
State v. Mathews, 57 M. 1.

Sureties on sheriff's bond. Attempted substitution. Effect. Contribution. Estoppel.
Matthews v. Millsaps, 58 M. 564.

Sheriff. Failure to give new bond. Discharge of sureties.
Bennett v. State, 58 M. 556.
State v. Morgan, 59 M. 349.

Section 319.
Sheriff. Failure to give bond as tax collector. Vacancy.
French v. State, 52 M. 759.
See State v. Harney, 57 M. 863.

Section 342.
Registrar shall not be candidate for any office at next ensuing election.
Sublett v. Bedwell, 47 M. 266, 12 Am. Rep. 338n.

Sections 356–363.
Election on first Tuesday after first Monday in November, 1871, biennial, within *Const.* 1869, art. 4, § 7.
State v. Williams, 49 M. 640.

Sections 387–391.
Attempt to provide for determining election controversies.
Sublett v. Bedwell, 47 M. 266, 12 Am. Rep. 338n.

Section 391.
Contested election. Design of election laws. Irregularities. Misconduct of officials.
Pradat v. Ramsey, 47 M. 24.

Section 409.
Supreme Court. Jurisdiction. Constitution 1869.
Planters' Ins. Co. v. Cramer, 47 M. 200.

Supreme Court. Jurisdiction. Grant of new trial. Appeal.
Brown v. Carraway, 47 M. 668.

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Sections 409–411.
Supreme Court. Unlawful entry and detainer. Appeal.
Gill v. Jones, 57 M. 367.

Sections, 410, 411.
Appeal. Board of supervisors. Supreme Court.
Crump v. Colfax County, 52 M. 107.
Supreme Court. Appeal. Bond.
Winters v. Claitor, 54 M. 341.

Sections 410, 414.
Parties. Affirmance as to one. Judgment on bond.
Cook v. Ligon, 54 M. 625.

Section 411.
Supreme Court. Appeal. Writ of error.
Patterson v. Gathings, 48 M. 639.
Supreme Court. Writ of error. Bond.
Swann v. Horne, 54 M. 337.

Sections 414, 415.
Affirmance of decree to sell property to satisfy demand. Damages. Decree in personam for debt.
Redd v. Thompson, 56 M. 230.

Section 431.
Appeal. Citation. Return day.
New York Hospital v. Knox, 57 M. 600.

Section 522.
Venue. Justice of the peace. Jurisdiction.
Cain v. Simpson, 53 M. 521.
Circuit court. Ordinary suits. Venue. Attachment.
Barnett v. Ring, 55 M. 97.

Section 525.
Provides means whereby child of slave "marriage" may be rendered legitimate.
Andrews v. Simmons, 68 M. 732, 10 So. 65.

Section 533.
Habeas corpus. Power of judge.
Luckett v. State, 51 M. 799.
Supersedeas. Power of circuit judge to grant. Practice.
Kramer v. Holster, 55 M. 243.
Counterpart of Code 1871, § 979.
Alexander v. Manning, 58 M. 634.

Section 536.
Regular, not presiding, judge, to sign bill of exceptions.
Rankin County Sav. Bank v. Johnson, 56 M. 125.
Criminal procedure. Special judge.
Butler v. State, 57 M. 630.

Section 571.
Costs. Pauper's affidavit.
Leggett v. Ryan, 55 M. 379.
Suit in forma pauperis before justice. Bond prerequisite to appeal by plaintiff.
Woods v. Davidson, 57 M. 206.

Sections 571, 572.
Costs. Security. Action in forma pauperis.
Henry v. Shepherd, 52 M. 125.

Section 576.
Abolished fictions in pleading. Writ of prohibition.
Crisler v. Morrison, 57 M. 791.

Section 577.
Pleading. Plaintiff must state facts revealing actual cause of complaint.
Tittle v. Bonner, 53 M. 578.
Common law fictions abolished. Writ of prohibition.
Crisler v. Morrison, 57 M. 791.

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Section 592.

Pleading. Defendant must show by plea, actual ground of defense.
Tittle v. Bonner, 53 M. 578.

Section 597.

Pleading. Practice. Joinder of pleas. Judgment non pros.
Hartford Fire Ins. Co. v. Green, 52 M. 332.

Replevin. Pleading. Joinder of pleas.
Bennett v. Holloway, 55 M. 211.

Section 599.

Pleading. Certainty. Fraud, want of consideration, &c.
Tittle v. Bonner, 53 M. 578.
Boone v. Boone, 58 M. 820.

Section 600.

Pleading. Indemnifying bond. Nil debet.
Butler v. Alcus, 51 M. 47.

Section 602.

Set-off. Estate of deceased. Mutual dealings.
Bales v. Hyman, 57 M. 330.

Section 608.

Three replications to plea. Affidavit.
Hartford Fire Ins. Co. v. Green, 52 M. 332.

Section 611.

Failure to state in declaration, alleging that cause of action was concealed until barred by limitations, that concealment was fraudulent, waived, unless objected to by demurrer.
Shoults v. Kemp, 57 M. 218.

Section 612.

Judgment of quod recuperet on overruling demurrer to declaration, unless, &c.
Tittle v. Bonner, 53 M. 578.

Section 613.

Pleading. Replication. Demurrer sustained. Judgment final.
Memphis &c. R. Co. v. Orr, 52 M. 541.
See Scharff v. Lisso, 63 M. 213.

Judgment on overruling demurrer to plea. Leave to reply.
Tittle v. Bonner, 53 M. 578.

Section 621.

Amendment of pleadings. Proceedings in circuit court.
Marx v. Trussell, 50 M. 498.

Amendments. Mechanic's lien. Changing form of action.
Duff v. Snider, 54 M. 245.

Amendment. Appeal. Bill of particulars.
McCleary v. Anthony, 54 M. 708.

Sections 621, 623.

Amendments must be made before judgment.
State v. Powers, 52 M. 198.

Practice. Introduction of evidence. Amendment.
Rogers v. Klein, 56 M. 808, 31 Am. Rep. 389.

Section 622.

Plea. Absence of replication, &c.
Georgia Home Ins. Co. v. Jones, 49 M. 80.
Hartford Fire Ins. Co. v. Green, 52 M. 332.

Failure to amend pleadings. Waiver of defects. Trial of right of property.
Phillips v. Cooper, 50 M. 722.

Single action. Double judgment.
Williams v. Devine, 52 M. 139.

Supreme Court. New point. Statute of jeofails.
Parisot v. Helm, 52 M. 617.

Jeofails. Failure to join issue. Defect cured by verdict.
Grubbs v. Collins, 54 M. 485.

Pleading. Insufficiency. Failure to demur. Jeofails.
Canton Academy v. Gilman, 55 M. 148.

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Section 623.

Variance. Materiality. Immediate amendment.
Ware v. McQuillan, 54 M. 703.

Section 627.

Judgment. Amendment. Limitations.
Healey v. Just, 53 M. 547.

Criminal law. Record. Amendment.
McCarthy v. State, 56 M. 294.

Section 630.

Interpleader. Justice's court. Money claim.
Moore v. Ernst, 54 M. 642.

Execution of writings denied by affidavit. Practice in justice's court.
McBride v. Kilgore, 55 M. 242.

Process. Constructive service. Default judgment at return term.
Betts v. Baxter, 58 M. 329.

Section 631.

Judgment by default. Premature rendition. Waiver.
Burns v. Loeb, 59 M. 167.

Section 632.

Personal service necessary to render valid, default judgment at return term. Does not apply to chancery courts.
Clarke v. Jefferson College, 2 Miss. Dec. 198.

Process. Constructive service. Default judgment.
Betts v. Baxter, 58 M. 329.

Section 634.

Jury. Practice. Challenges.
Tatum v. Preston, 53 M. 654.

Section 643.

Criminal procedure. Murder trial. Voluntary instruction by court.
Edwards v. State, 47 M. 581.

Malicious mischief. Cruelty to animals. Criminal prosecution. Unrequested instructions.
Duncan v. State, 49 M. 331.

Criminal law. Procedure. Oral instruction.
Stewart v. State, 50 M. 587.

Section 646.

Bill of exceptions. Procedure following judge's refusal to sign.
Williams v. Ramsey, 52 M. 851.

Section 647.

Practice. Third new trial. Exceptions. Supreme Court.
Bowers v. Ross, 55 M. 213.
Tagert v. Baker, 57 M. 303.
See Shelby v. Offutt, 51 M. 128.

Section 648.

Motion for new trial. Time for disposition. Power of judge.
Scarborough v. Smith, 52 M. 517.

Supreme Court. Motion for new trial. Bill of exceptions.
Memphis &c. R. Co. v. Chastine, 54 M. 503.
See Brown v. Carraway, 47 M. 668.

Section 649.

Jury: what constitutes waiver.
Jarvis v. Warren County, 49 M. 603.

Section 650.

Practice. Special finding of facts. Record.
Bloom v. Helm, 53 M. 21.

Circuit court. Trial by judge. Absence of separate finding of law and facts. Presumption. Affirmance of judgment.
Weathersby v. Thoma, 57 M. 296.

Section 651.

New trial. Bill of exceptions. Power of Supreme Court.
Shelby v. Offutt, 51 M. 128.

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Trial by court. Bill of exceptions. Motion for new trial.
Nicholson v. Karpe, 58 M. 34.
See Quin v. Myles, 59 M. 375.

Section 652.
Referees. Right of court to compel return of evidence as part of report. Conclusiveness of award. Judgment.
Anding v. Levy, 60 M. 487.

Sections 653, 654.
Order of reference made on ex parte application. Review by court.
Anding v. Levy, 60 M. 487.

Section 656.
Interpleader. Justice's court. Money claim.
Moore v. Ernst, 54 M. 642.

Replevin against garnishee. Interpleader.
Morin v. Bailey, 55 M. 570.

Section 666.
Replevin. Jurisdiction of circuit court. Valuation.
Fenn v. Harrington, 54 M. 733.
See Potts v. Hines, 57 M. 735.

Section 668.
Motion for new trial. Continuance of course.
Vicksburg v. Hennessy, 52 M. 178.

Discontinuance. Effect of statute.
Germania Fire Ins. Co. v. Francis, 52 M. 457, 24 Am. Rep. 674.

Section 669.
Previous order of court not essential to enable person to prosecute suit as "next friend" of infant.
Klaus v. State, 54 M. 644.

Infant. Next friend: when admitted to sue. Premature action.
Bull v. Dagenhard, 55 M. 602.

Section 670.
Transfer of interest of defendant after bringing of suit. Right of assignee to become party.
Anspach v. Relfe, 2 Miss. Dec. 243.

Bailment. Receipt as evidence. Assignment.
Hunt v. Shackleford, 55 M. 94.

Assignability of choses in action. When assignee may sue in his own name.
Lowenberg v. Jones, 56 M. 688, 31 Am. Rep. 379.

Section 676.
Negligence. Actions for injuries causing death. Statutory utterance of Lord Campbell's act. Code 1880, § 1510.
Bussey v. Gulf &c. R. Co., 79 M. 597, 31 So. 212.

Section 678.
Representative of deceased usee not required to come in and make himself party. Dismissal of suit.
American Burial Case Co. v. Shaughnessy, 59 M. 398.

Section 679.
Discontinuance. Death of plaintiff.
Germania Fire Ins. Co. v. Francis, 52 M. 457, 24 Am. Rep. 674.

Dismissal of action. Death of usee. Revivor.
American Burial Case Co. v. Shaughnessy, 59 M. 398.

Section 683.
Practice. Suit on written instrument. Denial on oath. Justice's court.
McBride v. Kilgore, 55 M. 242.

Section 687.
Chancery practice. Creditor's bill. Oath by solicitor.
Waller v. Shannon, 53 M. 500.

Practice. Affidavit by attorney of defendant to latter's plea of non est factum.
Northrop v. Flaig, 57 M. 754.

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Section 701.

Absent debtor who has left undisturbed, furnished home in this state. Service of process.

Dent v. Jones, 50 M. 265.

Process. Service. Justice's court.

Betts v. Baxter, 58 M. 329.

Sections 701, 702.

Process. Constructive service. Return.

Robison v. Miller, 57 M. 237.

Section 703.

Service of process on corporation. Laws 1872, p. 53. "Notice."

Vicksburg &c. R. Co. v. McCutchen, 52 M. 645.

Section 704.

Infant. Process. Service on parent or guardian.

Erwin v. Carson, 54 M. 282.

Moody v. McDuff, 58 M. 751.

Section 705.

Suit against lunatic. Process. Service.

Potts v. Hines, 57 M. 735.

Section 712.

Replevin. Writ without seal or scroll. Amendment.

Spratley v. Kitchens, 55 M. 578.

Amendment of process. Execution.

Dailey v. State, 56 M. 475.

Section 722.

Change of venue. Practice. Consent.

Wilson v. Rodewald, 49 M. 506.

Section 724.

Juror. Qualification. Inability to read and write.

American Life Ins. Co. v. Mahone, 56 M. 180.

Jurors. Proper qualifications.

Nelson v. State, 57 M. 286, 34 Am. Rep. 444.

Brown v. State, 57 M. 424.

Section 729.

Objection cannot be made to competency and qualification of grand jury, subsequently to its impaneling, otherwise than by challenge to array for fraud.

Lee v. State, 45 M. 114.

Nichols v. State, 46 M. 284.

Chase v. State, 46 M. 683.

Exceptions cannot be taken to individual member of grand jury after swearing and impaneling of latter.

Logan v. State, 50 M. 269.

Section 743.

Criminal procedure. Impaneling jury. Challenge.

Rolls v. State, 52 M. 391.

Sections 756, 759, 760.

Suit for divorce. Complainant wife, incompetent to testify against husband.

Anonymous, 58 M. 15.

Section 758.

Witness. Competency. Claim against estate.

Witherspoon v. Blewett, 47 M. 570.

Sweatman v. Parker. 49 M. 19.

Claim originating during lifetime of deceased. Owner incompetent witness to establish, &c.

Jacks v. Bridewell, 51 M. 881.

O'Leary v. Burns, 53 M. 171.

Rothschild v. Hatch, 54 M. 554.

Mitchell v. Savings Institution, 56 M. 444.

Gordon v. McEachin, 57 M. 334.

Combs v. Black, 62 M. 831.

See Jones v. Sherman, 56 M. 559.

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Section 760.

Chancery practice. Wife of unnecessary party defendant, incompetent as witness for complainant.
Leach v. Shelby, 58 M. 681.

Section 774.

Jurisdiction of chancery court. Matters of probate.
Troup v. Rice, 49 M. 248.

Section 782.

Affidavit to open account. Effect. Pleading. In pari materia with Code 1871, § 800.
Reinhardt v. Carter, 49 M. 315.

Practice. Verified open account. Evidence. Failure to object.
Bloom v. McGrath, 53 M. 249.

Object and effect. Verified open account. Counter affidavit.
Bower v. Henshaw, 53 M. 345.

Amended, Laws 1875, p. 161. Action on open account. Counter affidavit. Effect.
Tichenor v. Sarven Wheel Co., 54 M. 589.

Suit before justice on open account. Appeal. Leave to file counter affidavit in circuit court, grantable on seasonable application.
Rose v. Watson, 54 M. 673.

Open account. Oath. Appeal. Reversal. Final judgment.
Ware v. McQuillan, 54 M. 703.

Section 799.

Depositions on file. Written exception.
Hartford Fire Ins. Co. v. Green, 52 M. 332.

Section 800.

Foreign commissioners to administer oaths and affidavits. In pari materia with Code 1871, § 782.
Reinhardt v. Carter, 49 M. 315.

Section 814.

Certified copy of list, filed with auditor, of lands sold to state for taxes, admissible in evidence to same extent as original.
Gamble v. Witty, 55 M. 26.

Section 819.

Attachment. Non-resident defendant. Proof of publication.
Wood v. Page, 55 M. 105.

Section 826.

Action for damages for assault and battery, libel or slander. Plaintiff, recovering less than ten dollars, not entitled to costs. Jurisdiction of circuit court.
Fenn v. Harrington, 54 M. 733.

Section 829.

Judgments: manner of enrolling.
Bergen v. State, 58 M. 623.

Section 830.

Enrolled judgments. Lien. Re-enacts Code 1857, p. 524, art. 261, except final clause of latter, regarding justices' judgments.
Cayce v. Stovall, 50 M. 396.

Senior and junior judgment creditors. Priority of former. Levy by latter. Notice, &c.
Curry v. Lampkin, 51 M. 91.

Judgment. Priority. Stay of execution.
Virden v. Robinson, 59 M. 28.

Sections 830–832.

Execution sale. Judgment lien. Priority.
Hall v. Savings Institution, 56 M. 674.

Section 831.

Execution purchaser acquires title of judgment debtor.
Curry v. Lampkin, 51 M. 91.

Section 832.

Proceeds of execution sale. Senior and junior judgments. Creditors' conflicting claims.
Curry v. Lampkin, 51 M. 91.

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Sections 833, 834.

Judgment. Lien. Enrolling. "Recorded."
Bergen v. State, 58 M. 623.

Section 841.

Does not embrace executions issued by justices of peace.
McGehee v. Field, 2 Miss. Dec. 25.

Judgment. Expiration of general lien. Acquisition of special lien on particular property by delivery of execution to sheriff and levy of same.
Buckner v. Pipes, 56 M. 366.

Section 844.

Sheriff. Bond of indemnity from levying creditor.
Dabney v. Stackhouse, 49 M. 513.

Entire responsibility imputed to obligors in indemnifying bond.
Shattuck v. Miller, 50 M. 386.

Sections 844, 845.

Bond of indemnity. Liability. Motion against sheriff.
Swain v. Alcorn, 50 M. 320.

Section 845.

Indemnifying bond as substitute for, and in bar of, suit against sheriff.
Shattuck v. Miller, 50 M. 386.

Attachment. Bond of indemnity. Return by officer.
Butler v. Alcus, 51 M. 47.

Replevin against levying constable. Failure to set up indemnifying bond as defense to damages. Res adjudicata.
McAllister v. Clopton, 60 M. 207.

Section 852.

Levy on tenant's goods. Rent. Apportionment.
Shanks v. Greenville, 57 M. 168.

Section 855.

Provides circumstances under which levy on personalty can be made without taking possession.
Butler v. Lee, 54 M. 476.

Common carrier. Lien for freight and advances. Attachment by creditor of shipment's owner.
Wolfe v. Crawford, 54 M. 514.

Levy of execution. Undivided interest.
Willis v. Loeb, 59 M. 169.

Section 858.

Personalty levied on under execution. Claim by third person.
Butler v. Lee, 54 M. 476.

Sections 858, 859, 860.

Attachment. Tender of issue upon claim of third person.
Smokey v. Wack, 57 M. 832.

Section 858.

Bond of claimant in attachment. Dismissal of claim. Estoppel, &c.
Higdon v. Vaughn, 58 M. 572.

Section 859.

Execution on personal property. Claimant. Indemnifying bond. Trial of right of property. Replevin.
Swain v. Alcorn, 50 M. 320.

Indorsement on executions issued subsequently to giving of indemnifying bond.
Shattuck v. Miller, 50 M. 386.

Execution. Practice. Defective pleading. Objection.
Phillips v. Cooper, 50 M. 722.

Section 861.

Claimant's issue triable by rules regulating trial of issue in detinue.
Shattuck v. Miller, 50 M. 386.

Trial of right of property. Burden on plaintiff in execution to show judgment, execution, levy, and title to property levied on in debtor.
Phillips v. Cooper, 50 M. 722.

Section 862.

Trial of claimant's issue.
Shattuck v. Miller, 50 M. 386.

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Section 874.

Affidavit by plaintiff, his agent or attorney, condition precedent to issuance of writ of garnishment. Recital, &c.

Hoffman v. Simon, 52 M. 302.

Section 878.

Special terms generally. Notice. Non-conflicting with Laws 1876, p. 241, authorizing, on notice, certain special terms in Warren county.

Mastronada v. State, 60 M. 86.

Section 975.

Chancery jurisdiction. Removal of clouds. Conflicting titles.

Glazier v. Bailey, 47 M. 395.

Removal of clouds. Jurisdiction of chancery court. "Real owner."

Carlisle v. Tindall, 49 M. 229.
See Jones v. Rogers, 85 M. 802, 38 So. 742.

Removal of clouds. Complainant's title.

Handy v. Noonan, 51 M. 166.
Memphis &c. R. Co. v. Neighbors, 51 M. 412.

Removal of clouds. Defective acknowledgment. Married woman.

Shivers v. Simmons, 54 M. 520, 28 Am. Rep. 372n.

Chancery jurisdiction. Removal of clouds. Remedy.

Wofford v. Bailey, 57 M. 239.

Chancery court. Quieting title to real property.

Jordan v. Bobbitt, 91 M. 1, 45 So. 311.

Section 976.

Constitutional law. Chancery jurisdiction. Suit on administrator's bond.

Smith v. Everett, 50 M. 575.
Halfacre v. Dobbins, 766.
Brunini v. Pera, 54 M. 649.
See Holiman v. Dibrell, 51 M. 96.

Chancery jurisdiction. Suits against executors and their sureties.

Buie v. Pollock, 55 M. 309.
Bank of Mississippi v. Duncan, 52 M. 740.

Chancery jurisdiction. Infant. Necessaries.

Epperson v. Nugent, 57 M. 45, 34 Am. Rep. 434.

Chancery jurisdiction. Estate. Bill by creditors.

Clopton v. Haughton, 57 M. 787.

Chancery jurisdiction. Estate of deceased.

Hunt v. Potter, 58 M. 96.

Chancery jurisdiction. Suit on administrator's bond. Devastavit.

Whitfield v. Evans, 56 M. 488.

Section 977.

Chancery jurisdiction. Suit for legacy. Venue.

Turner v. Turner, 57 M. 775.

Section 979.

Counterpart of Code 1871, § 533. Not carried forward, as to appointment of receivers, in Code 1880.

Alexander v. Manning, 58 M. 634.

Section 983.

Chancery clerk: power of chancellor to appoint.

Brady v. Howe, 50 M. 607.

Section 995.

Chancery clerk. Ex officio master and commissioner. Bond of commissioner.

Swofford v. Garmon, 51 M. 348.

Section 1001.

Non-resident deceased, leaving realty but no personalty in this state. Administration upon estate.

Partee v. Kortrecht, 54 M. 66.
See Temples v. Cain, 60 M. 478.

Section 1005.

Chancery practice. Process: when returnable.

Walker v. Joyner, 52 M. 789.

Section 1013.

Chancery practice. Publication for non-resident. Mailing notice.

Wilson v. Basket, 47 M. 637.

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Publication. Citation. "Four weeks' notice."
Knowles v. Summey, 52 M. 377.

Chancery practice. Publication. Non-resident.
Davidson v. Wallace, 53 M. 475.

Section 1016.

Chose in action. Answer. Injunction. Motion to dissolve.
Richardson v. Lightcap, 52 M. 508.

Chancery practice. Answer. Denial. Sufficiency. Disclaiming personal knowledge.
McAllister v. Clopton, 51 M. 257.
Mead v. Day, 54 M. 58.

Section 1021.

Chancery practice. Personal service unnecessary to pro confesso at return term.
Clark v. Jefferson College, 2 Miss. Dec. 198.

Chancery practice. Setting aside pro confesso. Discretion.
Pittman v. McClellan, 55 M. 299.
Yost v. Alderson, 58 M. 40.

Section 1022.

Chancery. Motion to set aside pro confesso. Exhibition of answer or showing as to cause of failure so to do and request for additional time. "Good cause."
Pittman v. McClellan, 55 M. 299.

Section 1023.

Plea to bill, by assignee of note, to foreclose mortgage, of total want of consideration. Joinder of issue.
Hughes v. Thweatt, 57 M. 376.

Section 1024.

Chancery pleading. Bill. Answer. Facts not denied.
Cowen v. Alsop, 51 M. 158.

Chancery practice. Answer. Denial. Sufficiency. Disclaiming personal knowledge.
McAllister v. Clopton, 51 M. 257.
Mead v. Day, 54 M. 58.

Chancery practice. Answer. Denial. Admission.
Davis v. Lumpkin, 57 M. 506.

Section 1027.

Mortgage. Foreclosure. Commissioner's report. Notice.
Brooks v. Robinson, 54 M. 272.

Section 1028.

Chancery practice. Injunction. Defective bond. Motion to dissolve.
Smith v. Harrington, 49 M. 771.

Section 1029.

Striking unverified chancery answer. Failure of defendant to plead further. Final decree.
Hodges v. Phillip, 50 M. 362.

Section 1030.

Cross-bill. Appearance. Jurisdiction. Practice.
Thomason v. Neeley, 50 M. 310.

Section 1036.

Chancery practice. Setting aside pro confesso. Appeal.
Pittman v. McClellan, 55 M. 299.

Section 1037.

Chancery practice. Injunction. Defective bond. Motion to dissolve.
Smith v. Harrington, 49 M. 771.

Section 1038.

Does not regulate guardian's sale of land.
Williamson v. Warren, 55 M. 199.

Decree authorizing administrator of insolvent estate to designate place of sale, valid.
Ladd v. Craig, 94 M. 659, 47 So. 777.

Section 1045.

Injunction bond. Illegal condition. Breach. Remedy.
Menken v. Frank, 57 M. 732.

Sections 1047, 1048.

Injunction. Stay of execution. Release of errors.
Bass v. Nelms, 56 M. 502.

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Section 1049.

Injunction. Motion to dissolve. Notice: service, &c. County of hearing in vacation.
Hiller v. Cotten, 54 M. 551.

Motion to dissolve injunction. Notice.
Carraway v. Odeneal, 56 M. 223.

Section 1068.

Penalty in absence of showing a good cause for failure to observe, of having to plead or answer.
Watson v. Byrd, 53 M. 480.

Section 1069.

Practice. Unknown defendants. Publication. Affidavit.
Kirkland v. Texas Express Co., 57 M. 316.

Sections 1070, 1071.

Chancery practice. Rehearing. Not affected by Code 1871, § 1264.
McAllister v. Plant, 49 M. 628.

Chancery court. Publication. Decree.
Rodney v. Seelye, 54 M. 537.
Belcher v. Wilkerson, 54 M. 677.

Section 1070.

Chancery practice. Right to rehearing. Actual notice.
Jacks v. Bridewell, 51 M. 881.

Section 1075.

Jurisdiction of chancery court and that of probate court, distinct.
Troup v. Rice, 49 M. 248.

Section 1076.

Chancery court. Evidence. Witness. Oral examination.
McLaughlin v. Green, 48 M. 175.

Affidavit. Oral examination of interested witness. Suppression of deposition.
Ogden v. Guice, 56 M. 330.

Suit against minors for appointee in place of deceased trustee. Proof of death required. Deposition. Presumption on appeal.
Coffin v. Murphy, 62 M. 542.

Section 1087.

Bill. Oath by attorney. Two witnesses.
Jacks v. Bridewell, 51 M. 881.

Section 1088.

Deceased non-resident owning no goods, &c., here. Letters of administration ungrantable either to next of kin or creditor.
Partee v. Kortrecht, 54 M. 66.
See Temples v. Cain, 60 M. 478.

Sections 1088–1199.

Comprise complete scheme for administration of estates. Regulates exercise of probate jurisdiction by chancery courts.
Tell City Furniture Co. v. Stiles, 60 M. 849.

Section 1092.

Non-resident deceased leaving realty but no personalty in this state. Administration upon estate.
Partee v. Kortrecht, 54 M. 66.
See Temples v. Cain, 60 M. 478.

County administrator. Administration not conferred.
Sandifer v. Mackey, 3 So. 570.

Section 1098.

Taking proof of wills, to pertain to chancery court.
Martin v. Perkins, 56 M. 204.

Section 1099.

Nuncupative will: validity may be contested at any time within two years.
George v. Greer, 53 M. 495.

Purported will. Refusal to probate in "common form." Subsequent presentation, &c.
Martin v. Perkins, 56 M. 204.

Section 1100.

Language implies that, on proof of will in common form, testimony must extend to mental capacity of testator, &c. Code 1871, § 1098.
Martin v. Perkins, 56 M. 204.

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Section 1101.

Execution of will is that which must "otherwise be proved."
Swanzy v. Kolb, 46 So. 549.

Section 1105.

Will. Probate in another state. Copy.
Bate v. Incisa, 59 M. 513.

Section 1122.

Administratrix. Marriage. Order requiring her to join husband in new bond does not vitiate her original appointment.
Cassedy v. Jackson, 45 M. 397.

Acceptance of resignation of, and appointment of successor to, executor or administrator.
Sivley v. Summers, 57 M. 712.

Sections 1131–1133.

Final settlement, &c. Duty of court, without petition to compel inventory and account.
Troup v. Rice, 49 M. 248.

Section 1133.

Estate of deceased. Insolvency proceedings. Manner of dealing with lands omitted.
Cocke v. Foote, 49 M. 181.

Section 1134.

Rent, incident to reversion, &c. Destination after death of lessor. Statute declaratory of common law.
Bloodworth v. Stevens, 51 M. 475.

Estate of deceased. Lands. Subjection to debts.
Partee v. Kortrecht, 54 M. 66.

Section 1135.

Creditors of estate of deceased. Notice to probate claims: one publication only, insufficient.
Wilkerson v. Dockery, 2 Miss. Dec. 50.

Section 1142.

Estate of deceased. Claims. Reference to auditors.
Boyd v. Lowry, 53 M. 352.
Bell v. Faison, 53 M. 354.

Section 1144.

Ejectment unmaintainable by heirs against administrator who has indirectly purchased at his own confirmed sale.
Temples v. Cain, 60 M. 478.

Sections 1144–1146.

Estate in administration. Valid sale of personalty.
Tell City Furniture Co. v. Stiles, 60 M. 849.

Sections 1148, 1149.

Estate of deceased. Administration. Creditor's bill.
Hargrove v. Baskin, 50 M. 194.

Section 1154.

Estate in administration. Valid sale of personalty.
Tell City Furniture Co. v. Stiles, 60 M. 849.

Section 1156.

Administrator. Cultivating farm. Advances.
Farley v. Hord, 45 M. 96.

Estate of deceased. Advances. Subrogation.
Evans v. Robertson, 54 M. 683.

Section 1163.

Estate of deceased. Insolvency proceedings. Manner of dealing with lands omitted.
Cocke v. Foote, 49 M. 181.

Insolvent estate. Garnishment. Attachment. Death of defendant.
Holman v. Fisher, 49 M. 472.

Section 1166.

Administrator. Discharge. Presumption.
Barr v. Sullivan, 75 M. 536, 23 So. 772.

Section 1169.

Administration. Final settlement. Execution.
Hines v. Noah, 52 M. 192.

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Section 1173.

Estate in administration. Valid sale of personalty.
Tell City Furniture Co. v. Stiles, 60 M. 849.

Section 1176.

Suit against estate of deceased. Judgment for costs de bonis propriis.
Campbell v. Doyle, 57 M. 292.

Section 1179.

Forfeiture of bond of administrator. Allegations of bill. Prayer.
Holiman v. Dibrell, 51 M. 96.

Section 1180.

Estate of deceased. Parties. Administrator's bond. Action thereon.
Pilcher v. Drennan, 51 M. 873.

Administrator. Bond. Devastavit.
Dobbins v. Halfacre, 52 M. 561.

Chancery jurisdiction. Suit on administrator's bond. Devastavit.
Whitfield v. Evans, 56 M. 488.

Section 1183.

Executor or administrator must give appeal bond for costs. Supersedeas of judgment or decree, to extent same affects estate.
Campbell v. Doyle, 57 M. 292.

Section 1184.

Limitations. Suits against administrators. Scire facias.
Pollard v. Eckford, 50 M. 631.

Limitation. Death of debtor. Administration.
Adams v. Williams, 57 M. 38.

Section 1190.

Administrator. Liability for costs. Certificate.
Taylor v. Webb, 56 M. 631.

Applies only where executor or administrator is unsuccessful. Relieves from personal liability for costs recovered by opposite party.
Campbell v. Doyle, 57 M. 292.

Section 1194.

Power confided to executor virtute officii executable by administrator c. t. a.
Cohea v. Johnson, 69 M. 46, 13 So. 40.

Section 1197.

County administrator. Sale of realty. New bond.
Heth v. Wilson, 55 M. 587.

Section 1198.

Probate power of chancery court. Settlement of estate. Summary process against administrator.
Troup v. Rice, 49 M. 248.

Section 1207.

Suit, on bond of guardian, without previous order by chancellor.
Klaus v. State, 54 M. 644.

Section 1212.

Guardian and ward. New bond. Principal and surety.
McWilliams v. Norfleet, 60 M. 987.

Section 1220.

Guardian and ward. Expenditures.
Dalton v. Jones, 51 M. 585.

Sections 1221, 1222.

Guardian and ward. Petition for sale of land. Appointment of day for hearing. Place of sale.
Williamson v. Warren, 55 M. 199.

Section 1221.

Order for sale of land of ward. Special bond required of guardian, in addition to general bond.
State v. Cox, 62 M. 786.

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Section 1223.
Decree to sell land, made at instance of guardian, not affected by Code 1871, §§ 1070, 1071, 1264.
Rodney v. Seelye, 54 M. 537.

Sections 1250, 1251.
Chancery. Appeal. Approval of bond.
Eustis v. Holmes, 48 M. 34.

Sections 1250, 1256, 1257.
Chancery practice. Appeal. Interlocutory order. Clerk.
Holiman v. Dibrell, 51 M. 96.
See Gilleylen v. Martin, 73 M. 695, 19 So. 482.

Sections 1251, 1252, 1257.
Appeals. Bonds. Do not embrace case of decree overruling demurrer.
Byrd v. Clarke, 52 M. 623.
See McKee v. Coffee, 58 M. 653.

Sections 1252, 1254.
Chancery. Appeal from final decree. Bond. Supersedeas, &c.
Swann v. Horne, 54 M. 337.
Winters v. Claitor, 54 M. 341.

Section 1253.
Whether justification of sureties should appear in record sent to supreme court, quære.
Thompson v. Toomer, 50 M. 394.

Section 1256, 1257.
Chancery. Appeal from decree overruling demurrer. Allowance by clerk, nullity. Matter of jurisdiction, &c.
Thompson v. Toomer, 50 M. 394.
See Johnson v. Jones, 51 M. 860.

Section 1256.
Bond, unnecessary as condition precedent to appeal from decree overruling demurrer.
Byrd v. Clarke, 52 M. 623.
See McKee v. Coffee, 58 M. 653.

Section 1258.
One of several parties in interest may prosecute appeal from chancery court.
Thompson v. Toomer, 50 M. 394.
Holiman v. Dibrell, 51 M. 96.

Section 1259.
Affirmance of decree to sell property to satisfy demand. Damages. Decree in personam for debt.
Redd v. Thompson, 56 M. 230.

Section 1261.
Appeal bond sufficient, if signed by one of several appellants.
Thompson v. Toomer, 50 M. 394.
Holiman v. Dibrell, 51 M. 96.

Section 1264.
Non-affective as to right to rehearing, of non-resident chancery defendant, summoned by publication. Code 1871, §§ 1070, 1071.
McAllister v. Plant, 49 M. 628.

Chancery practice. Right to rehearing. Actual notice.
Jacks v. Bridewell, 51 M. 881.

Chancery court. Decree on publication. Rehearing.
Rodney v. Seelye, 54 M. 537.

Non-resident. Publication. Chancery practice. Rehearing.
Belcher v. Wilkerson, 54 M. 677.

Section 1265.
Decree. Bill to impeach. Minor.
Sledge v. Boone, 57 M. 222.
Enochs v. Harrelson, 57 M. 465.

Decree. Impeachment by infant. Evidence aliunde.
Mayo v. Clancy, 57 M. 674.

Bill of review. Infants. Res adjudicata. Appeal.
Vaughn v. Hudson, 59 M. 421.

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Section 1267.
Chancery court. Writ of assistance: when to issue.
Griswold v. Simmons, 50 M. 123.

Section 1281.
Dower. Widow of childless intestate entitled to half of latter's land, including homestead exemption.
Glover v. Hill, 57 M. 240.

Sections 1281–1283.
Repeal by implication. Conflicting provisions. Intent.
Gibbons v. Brittenum, 56 M. 232.
See Lombard v. Lombard, 57 M. 171.

Sections 1281, 1282.
Amended, Laws 1876, pp. 193, 194, §§ 54, 55. Partial intestacy of childless husband. Devise to widow. Effect on right of inheritance, of failure to renounce will.
Wall v. Dickens, 66 M. 655, 6 So. 515.

Sections 1286, 1287, 1288.
Childless husband. Partial intestacy. Devise to widow. Effect on right of inheritance of failure to renounce will.
Wall v. Dickens, 66 M. 655, 6 So. 515.

Section 1290.
Exempt property. Right of widow to personalty.
Hickman v. Ruff, 55 M. 549.

Section 1302.
Justice of peace. Civil jurisdiction. Action for damages.
Bell v. West Point, 51 M. 262.

Sections 1302, 1303.
Civil jurisdiction of justice of peace. Debt.
Cain v. Simpson, 53 M. 521.

Section 1303.
Justice of peace. Jurisdiction. Replevin.
Turner v. Lilly, 56 M. 576.

Territorial jurisdiction of justices of peace.
Ellison v. Lewis, 57 M. 588.

Section 1305.
Justice of peace. Suit by summons. Venue. Attachment.
Smith v. Mulhern, 57 M. 591.
See Cain v. Simpson, 53 M. 521.

Section 1305, 1306.
Appeal from justice's court. Set-off. Practice.
Marx v. Trussell, 50 M. 498.

Section 1310.
Civil process issued by justice of peace to be under his hand and seal.
Spratley v. Kitchens, 55 M. 578.

Section 1320.
Suit before justice. More than one defendant. Venue. Process.
Cain v. Simpson, 53 M. 521.

Justice of peace. Summons issuable to foreign county, &c.
Ellison v. Lewis, 57 M. 588.

Section 1332.
Appeal from justice's court. Sufficiency of affidavit.
White v. Shumate, 50 M. 130.
Coppock v. Smith, 54 M. 640.

Appeal from judgment of justice, taken after expiration of five days, void. Limitation of jurisdiction of circuit court.
Kramer v. Holster, 55 M. 243.

Suit in forma pauperis before justice. Bond prerequisite to appeal by plaintiff.
Woods v. Davidson, 57 M. 206.

Justice of the peace. Judgment for costs. Appeal.
Lagrone v. Trice, 57 M. 227.
See Trice v. Lagrone, 57 M. 839.

Appeal from justice of peace, by executor or administrator. Bond, &c.
Mann v. Lowry, 58 M. 73.

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Section 1332, 1334.

Justice's court. Appeal. Damages.
Prewett v. Nash, 50 M. 584.

Sections 1332, 1334, 1336.

Bond for certiorari. New trial and judgment in circuit court. Liability of surety.
Hudson v. Nalty, 55 M. 582.

Section 1334.

Supreme Court. Jurisdiction. Amount in controversy.
New Orleans &c. R. Co. v. Evans, 49 M. 785.

Supreme Court. Jurisdiction. Certiorari from justice's court. Amount.
O'Leary v. Harris, 50 M. 13.

Appeal from justice's court. Set-off. Practice.
Marx v. Trussell, 50 M. 498.

Supreme Court. Case originating before justice of peace. Amount.
Jackson v. Whitfield, 51 M. 202.

Supreme court. Jurisdiction. Amount.
Ward v. Scott, 57 M. 826.

Supreme Court. Appeal. Amount. Remittitur.
Wimbush v. Chinault, 58 M. 234.

Appeal. Amount. Interest.
Davis v. Holberg, 59 M. 362.

Section 1336.

Justice's court. New trial. Certiorari.
Morris v. Shryock, 50 M. 590.

Certiorari. Affidavit. Waiver.
Moore v. Ernst, 54 M. 642.

Justice of peace. Agricultural lien. Certiorari to remove case to circuit court.
Burrow v. Sanders,57 M. 211.

Section 1340.

Justice of peace. Transfer of case. Estoppel.
Cross v. Levy, 57 M. 634.

Section 1353.

Levy of taxes made at adjourned meeting of board of supervisors, void.
Smith v. Nelson, 57 M. 138.

Tax sale. Assessment roll approved on seventh day of regular session of board of supervisors, void.
Tierney v. Brown, 67 M. 109, 6 So. 737.

Section 1361.

Board of supervisors. Minutes. Approval, and signing by president, at next succeeding meeting.
Beck v. Allen, 58 M. 143.

Clerk of board of supervisors. Compensation.
Hendricks v. Lowndes County, 49 M. 612.

Clerk of board of supervisors to keep and preserve complete and correct record of orders and proceedings.
Crump v. Colfax County, 52 M. 107.

Chancery clerk. Fees. Ex officio allowance.
Ex parte Patty, 56 M. 499.

Section 1363.

Board of supervisors. Jurisdiction. Appropriations.
Allgood v. Hill, 54 M. 666.

Section 1368.

Board of supervisors. Contract for public work. Alteration.
Benton County v. Patrick, 54 M. 240.

Section 1369.

Boards of supervisors. Power to levy special tax. Const. 1869, art. 12, § 16.
Beck v. Allen, 58 M. 143.

Section 1370.

Board of supervisors. Rent of buildings. Power to contract.
Crump v. Colfax County, 52 M. 107.

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Sections 1372–1376.

County taxes. Levy. Certification to auditor of public accounts and sheriff. Person collecting state taxes to collect county taxes.

Byrne v. State, 50 M. 688.

Section 1372.

Assumes that sheriff is tax collector.

French v. State, 52 M. 759.
See State v. Matthews, 57 M. 1.

County taxes. Time to make levy.

Harris v. Stockett, 58 M. 825.

Sections 1372, 1373.

Board of supervisors. Levy of taxes.

Beard v. Lee County, 51 M. 542.
Gamble v. Witty, 55 M. 26.

Levy of taxes made at adjourned meeting of board of supervisors, void.

Smith v. Nelson, 57 M. 138.

Section 1376.

Bond requirable by supervisors, of collector of special tax, levied for county purposes.

Harris v. State, 55 M. 50.
State v. Matthews, 57 M. 1.
See State v. Harney, 57 M. 863.

Section 1378.

Board of supervisors. Misappropriations. Suit on bonds. Liability.

Paxton v. Baum, 59 M. 531.

Section 1379.

Public officer. Fees. Extra compensation.

Hendricks v. Lowndes County, 49 M. 612.

Section 1380, 1381.

County warrants. Mandamus.

Honea v. Monroe County, 63 M. 171.

Section 1381.

Claim against a county. Refusal to allow. Entry.

Brookhaven v. Lawrence County, 55 M. 187.

Section 1382.

Board of supervisors. Allowance of claim. "Dollar for dollar."

Warren County v. Klein, 51 M. 807.

Limitation on rule that judgment of allowance by county board could not be collaterally impeached.

Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

County warrants. Depreciation. Issuance for amount due.

Crump v. Colfax County, 52 M. 107.

Changed by Code 1892, § 322, by insertion of "cash" before "compensation."

Monroe County v. Strong, 78 M. 565, 29 So. 530.

Section 1383.

Board of supervisors. Appeal. Judgment.

Bridges v. Clay County, 57 M. 252.

Sections 1383, 1384.

Claim against county. Rejection by board of supervisors. Modes of enforcement. Writ of error.

Taylor v. Marion County, 51 M. 731.
See State Board of Education v. West Point, 50 M. 638.
Lawrence County v. Brookhaven, 51 M. 68.
Crump v. Colfax County, 52 M. 107.
Benton County v. Patrick, 54 M. 240.

Section 1384.

Opens courts to those having claims against counties. Schoolhouse warrants. Mandamus to compel tax levy.

Jarvis v. Warren County, 49 M. 603.

Attachment by county. Board of supervisors. Bond.

State v. Fortinberry, 54 M. 316.

Claim against county. Presentation. Record. Parol evidence.

Brookhaven v. Lawrence County, 55 M. 187.

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Section 1385.

Civil matters in relation to state and county taxes. Employment, by supervisors, of counsel to conduct proceedings.
Lewenthall v. State, 51 M. 645.

Claim of attorney against county. Rejection by board of police. Modes of enforcement. Writ of error.
Taylor v. Marion County, 51 M. 731.

Section 1386.

Action on supervisor's bond, in name of taxpayer, for recovery of illegally appropriated money.
Paxton v. Archer, 2 Miss. Dec. 611.

Board of supervisors. Misappropriations. Suit on bonds. Liability.
Paxton v. Baum, 59 M. 531.

Sections 1389, 1391.

Board of supervisors cannot empower or authorize person to make contract for public work in vacation. Violation, misdemeanor.
Benton County v. Patrick, 54 M. 240.

Section 1396.

Habeas corpus. Writ "extends to all cases of illegal confinement or detention whatsoever."
Donnell v. State, 48 M. 661, 12 Am. Rep. 375.

Parent. Custody of child. Harboring. Habeas corpus.
Maples v. Maples, 49 M. 353.
Moore v. Christian, 56 M. 408, 31 Am. Rep. 375.

Section 1397.

Habeas corpus. Convict. Void sentence.
Ex parte Phillips, 57 M. 357.

Section 1400.

Habeas corpus by parent to recover child.
Maples v. Maples, 49 M. 393.

Section 1409.

Habeas corpus. Bail bond. Invalidity.
Jacquemine v. State, 48 M. 280.

Sections 1409–1414.

Habeas corpus. Trial.
Luckett v. State, 51 M. 799.

Section 1410.

Habeas corpus. Evidence to contradict return.
Donnell v. State, 48 M. 661, 12 Am. Rep. 375.

Section 1413.

Habeas corpus. Res adjudicata. Second writ.
Ex parte Pattison, 56 M. 161.

Habeas corpus. Bail. Res adjudicata.
Ex parte Bridewell, 57 M. 177.

Section 1420.

Attachment. Non-resident. Domicile.
Morgan v. Numes, 54 M. 308.

Grounds for attachment. Undervaluation of property.
Roach v. Brannon, 57 M. 490.

Attachment. Jurisdiction. County of residence of garnishee.
Smith v. Mulhern, 57 M. 591.

Section 1420.

Attachment. "Unfair preference." Question of law. Clause, "with intent to give an unfair preference," omitted from Code 1880, § 2415.
Eldridge v. Phillipson, 58 M. 270.

Section 1429.

Contemplates return of attachment writ to proper court of county of issuance and levy.
Barnett v. Ring, 55 M. 97.
See Smith v. Mulhern, 57 M. 591.

Section 1432.

Requires duplicate writ of attachment issued to foreign county to be returnable to same court as original.

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Barnett v. Ring, 55 M. 97.
See Smith v. Mulhern, 57 M. 591.

Section 1435.
Declaratory of common law. Mode of serving attachment on designated kinds of property.
Wolfe v. Crawford, 54 M. 514.

Section 1436.
Attachment levying officer required to make full return of proceedings. Presumption.
Phillips v. Harvey, 50 M. 489.

Section 1437.
Attachment. Jurisdiction. Alias writ. Return by constable.
Barnett v. Ring, 55 M. 97.

Section 1439.
Attachment. Replevin bond. Judgment against sureties.
Phillips v. Harvey, 50 M. 489.

Sections 1439, 1441.
Attachment. Replevin. Bond. Insufficiency. Remedy.
Atkinson v. Foxworth, 53 M. 733.

Section 1448.
Attachment. Replevin. Separate valuation.
Thomason v. Wadlington, 53 M. 560.

Section 1448.
Attachment. Property replevied. Assessment of value.
Roberts v. Weiler, 55 M. 249.

Section 1451.
Garnishment. Sufficiency of plea. Remedy.
Kellogg v. Freeman, 50 M. 127.
Replevin. Garnishee holding property. Remedy of claimant.
Morin v. Bailey, 55 M. 570.

Section 1455.
Attachment. Debt not due. Grounds.
Thomason v. Wadlington, 53 M. 560.

Section 1456.
Bond of claimant in attachment. Dismissal of claim. Breach of condition. Action. Plea. Presumption on appeal.
Higdon v. Vaughn, 58 M. 572.

Sections 1458–1465.
Defendant in attachment. Plea in abatement.
Smith v. Mulhern, 57 M. 591.

Section 1462.
Wrongful attachment. Measure of damages.
Roach v. Brannon, 57 M. 490.
Wrongful attachment. Damages. Evidence.
Marqueze v. Sontheimer, 59 M. 430.
See Myers v. Farrell, 47 M. 281.

Section 1463.
Attachment. Nature of remedy. Two suits.
Lewenthall v. Mississippi Mills, 55 M. 101.

Sections 1472–1475.
Notice, to defendant in attachment, by publication and through mail. Affidavits of creditor, his agent or attorney, and clerk.
Erwin v. Heath, 50 M. 795.

Section 1475.
Clerk's affidavit not defective for failure to append copy of notice, already part of record.
Wood v. Page, 55 M. 105.

Section 1476.
Makes possible, as it were, two simultaneous processes against debtor: in rem and in personam.
Holman v. Fisher, 49 M. 472.

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Section 1479.
Attachment against non-resident. Publication. Judgment by default. Sale. Failure to give bond.
Hinds v. Miller, 52 M. 845.
See Hiller v. Lamkin, 54 M. 14.
Murdock v. Daniel, 58 M. 411.

Section 1486.
Attachment. Service. Death of defendant. Abatement. Judgment and sale, or final process against garnishee and property attached.
Holman v. Fisher, 49 M. 472.
Attachment. Death of defendant. Judgment against garnishees.
Dyson v. Baker, 54 M. 24.
Service of writ of garnishment, sufficient to prevent abatement of attachment.
Anspach v. Relfe, 2 Miss. Dec. 243.

Section 1490.
Quo warranto. Applies only where there is already "incumbent" holding public office, or exercising its functions.
Sublett v. Bedwell, 47 M. 266, 12 Am. Rep. 338n.

Section 1496.
Ineligibility to office. Information in nature of quo warranto. Scope of inquiry.
Brady v. Howe, 50 M. 607.

Section 1517.
Mandamus. Definition and description.
State Board of Education v. West Point, 50 M. 638.

Section 1519.
Demand of performance necessary prerequisite to writ of mandamus.
Jarvis v. Warren County, 49 M. 603.

Sections 1519, 1520.
Mandamus. Return. Pleadings.
Jones v. Gibbs, 51 M. 401.
Haskins v. Scott County, 51 M. 406.
Beard v. Lee County, 51 M. 542.
Warren County v. Klein, 51 M. 807.

Section 1520.
Mandamus. Pleadings and proceedings.
Jarvis v. Warren County, 49 M. 603.

Section 1521.
Mandamus. Scope of discretion.
Vicksburg v. Rainwater, 47 M. 547.

Sections 1521, 1522.
Mandamus. Discretion as to, and prohibition upon, issuance.
State Board of Education v. West Point, 50 M. 638.

Section 1522.
Mandamus non-issuable where there is plain, speedy and adequate remedy at law, except, &c.
Jarvis v. Warren County, 49 M. 603.

Section 1528.
Replevin. "Goods and chattels" broad enough to embrace choses in action.
Saunders v. Jordan, 54 M. 428.
Replevin, for goods seized by officer. Right of immediate possession. Wrongful "taking."
Morin v. Bailey, 55 M. 570.

Section 1529.
In contrast with Code 1871, § 1631. Replevin. Affidavit.
Moore v. Lee, 51 M. 375.
Replevin for property taken under execution must be against officer,—not plaintiff.
Griffin v. Lancaster, 59 M. 340.

Section 1530.
Writ of replevin to command sheriff or other lawful officer of proper county to take goods. "Proper county."
Ellison v. Lewis, 57 M. 588.

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Replevin. Bond of defendant. Liability of sureties.
Phillips v. Cooper, 59 M. 17.
See Sparks v. Hopson, 83 M. 124, 35 So. 446.

Replevin for property taken under execution must be against officer,—not plaintiff.
Griffin v. Lancaster, 59 M. 340.

Sections 1530, 1533.

Replevin. Bond. Damages. Liability of sureties.
Dent v. Ross, 52 M. 188.

Section 1534.

In contrast with Code 1871, §§ 1630, 1631, 1632. Replevin. Judgment.
Moore v. Lee, 51 M. 375.

Replevin. Suit abated. Writ of inquiry. Damages.
Kendrick v. Watkins, 54 M. 495.

Replevin. Judgment directed to be given against plaintiff in possession, silent as to costs. Liability of sureties on bond.
Phillips v. Cooper, 59 M. 17.

Section 1535.

Bond of defendant in replevin is security for costs. Fieri facias.
Phillips v. Cooper, 59 M. 17.
See Sparks v. Hopson, 83 M. 124, 35 So. 446.

Replevin for property taken under execution must be against officer,—not plaintiff.
Griffin v. Lancaster, 59 M. 340.

Section 1541.

Special plea of statute of limitations, nullity. Defense admissible under general issue.
Wilson v. Williams, 52 M. 487.
Dean v. Tucker, 58 M. 487.

Section 1551.

Ejectment. Bill of particulars. Non-delivery to plaintiff. Objection. Continuance. Amendment.
Summers v. Brady, 56 M. 10.

Section 1557.

Ejectment. Valuable improvements. "Good faith."
Cole v. Johnson, 53 M. 94.
Gaines v. Kennedy, 53 M. 103.

Ejectment. Recovery of mesne profits.
Emrich v. Ireland, 55 M. 390.

Ejectment. Improvements. Rents.
Miller v. Ingram, 56 M. 510.

Ejectment. Mesne profits. Res adjudicata.
Bell v. Medford, 57 M. 31.

Section 1562.

Ejectment. Death of plaintiff. Revivor. Proof of heirship.
Myrick v. McRaven, 54 M. 11.

Section 1573.

State amenable to suit. To be strictly construed.
Raymond v. State, 54 M. 562, 28 Am. Rep. 382.

Action against state. Auditor's warrant.
Green v. State, 53 M. 148.

Section 1580.

Enforcement of judgment or decree against state.
Raymond v. State, 54 M. 562, 28 Am. Rep. 382.

Section 1582.

Forcible entry. Unlawful detainer. Jurisdiction. Possession.
Ragan v. Harrell, 52 M. 818.

Unlawful detainer lies only in designated cases, &c. Land entered under federal homestead laws.
McCorkle v. Yarrell, 55 M. 576.

Section 1590.

Unlawful detainer. Appellate jurisdiction. Limit of recovery.
Poston v. Mhoon, 49 M. 620.

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Section 1594.
Forcible entry and detainer. Summary remedy. Justice's court. Appeal. Transcript. Trial anew on merits.
Brown v. Ashford, 56 M. 677.

Section 1595.
Unlawful detainer. Appeal to circuit court. Jurisdiction. Amount.
Poston v. Mhoon, 49 M. 620.

Section 1609.
Mechanic's lien. Statute of limitations. Amendment of personal action.
Dinkins v. Bowers, 49 M. 219.
Mechanic's lien. Creation. Limitation.
Ehlers v. Elder, 51 M. 495.

Section 1613.
Mechanic's lien. Enforcement. Judgment.
Sharpe v. Spengler, 48 M. 360.

Section 1620.
Rent, incident to reversion, &c. Destination after death of lessor. Statute declaratory of common law.
Bloodworth v. Stevens, 51 M. 475.

Sections 1621, 1622.
Attachment for rent. Proceedings. Replevin. Dismissal, &c.
Maxey v. White, 53 M. 80.

Sections 1629–1632.
Distress for rent. Replevin. Judgment.
Moore v. Lee, 51 M. 375.

Sections 1630–1632.
Attachment for rent. Tenant's remedy. Replevin. Pleading. Practice.
Maxey v. White, 53 M. 80.

Section 1631.
Attachment for rent. Replevin. Property claimed by third party.
Evermann v. Robb, 52 M. 653, 24 Am. Rep. 682.
Gibson v. Lock, 58 M. 298.
Attachment for rent. Replevin. Procedure.
Kendrick v. Watkins, 54 M. 495.
Horton v. Heath, 2 Miss. Dec. 144.

Section 1636.
Rent. Destination after death of lessor. Declaratory of common law.
Bloodworth v. Stevens, 51 M. 475.

Section 1639.
Rent. Tenant for life. Apportionment.
Bloodworth v. Stevens, 51 M. 475.

Section 1646.
Tenant holding over. Justice of the peace. Jurisdiction.
Usher v. Moss, 50 M. 208.

Section 1660.
Justice of the peace. Jurisdiction. Appeal. Certiorari.
Usher v. Moss, 50 M. 208.

Section 1663.
Wilkinson county. Tax sale for taxes abolished.
Havard v. Day, 62 M. 748.

Section 1665.
Municipality. Change of boundaries. Effect on tax lien.
Deason v. Dixon, 54 M. 585.

Section 1675.
Tax titles. Assessment. Suspension.
Brigins v. Chandler, 60 M. 862.

Section 1676.
Assessment. Description. Ambiguities.
Cogburn v. Hunt, 54 M. 675.

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Section 1677.
Lands to be assessed only on rolls of counties in which they are situated.
Prophet v. Lundy, 63 M. 603.

Section 1683.
Rule for taxation of bank stock. Code 1880, § 498.
Bank of Oxford v. Oxford, 70 M. 504, 12 So. 203.

Section 1684.
Failure to file objection to assessment. Sale of land. Laws 1875, p. 11.
Cato v. Gordon, 62 M. 373.

Section 1685.
Assessment roll. Auditor of public accounts and sheriff to have copies after settlement of objections.
Byrne v. State, 50 M. 688.
Assumes that sheriff is tax collector.
French v. State, 52 M. 759.
See State v. Matthews, 57 M. 1.
Board of supervisors. Failure to meet to equalize assessment. Curative effect of Laws 1875, p. 11.
Cato v. Gordon, 62 M. 373.
Six-day limitation on sitting of supervisors, to examine assessment rolls, not repealed by Laws 1875, p. 50.
Bowman v. Roe, 62 M. 513.
County taxes. Time for making levy.
Brigins v. Chandler, 60 M. 862.

Section 1687.
Time for levying county taxes.
Harris v. Stockett, 58 M. 825.

Section 1690.
Recognizes existence of "tax collector."
Byrne v. State, 50 M. 688.
County taxes. Time for making levy.
Brigins v. Chandler, 60 M. 862.

Section 1697.
Tax sale. Failure to first sell personalty. Statute directory.
Virden v. Bowers, 55 M. 1.

Sections 1697–1715.
Tax sale. Redemption, &c. Re-enacted by Laws 1874 (special session), p. 14.
Caruthers v. McLaran, 56 M. 371.

Section 1698.
Lands sold to state for taxes. List vests title.
Gamble v. Witty, 55 M. 26.
Mayson v. Banks, 59 M. 447.
List certified by tax collector, necessary to pass to state, title to lands struck off to it.
Clymer v. Cameron, 55 M. 593.
Vaughan v. Swayzie, 56 M. 704.
Weathersby v. Thoma, 57 M. 296.
French v. Ladd, 57 M. 678.
Yazoo &c. R. Co. v. McLarty, 71 M. 755, 15 So. 928.
Taxes. List of lands sold to state. Purchaser from latter. Evidence.
Ferrill v. Dickerson, 63 M. 210.
Lands sold to state for taxes. Valid certification of list.
Cole v. Coon, 70 M. 634, 12 So. 849.
Tax title. List of lands sold to the state. Evidence.
National Bank v. Louisville &c. R. Co., 72 M. 447, 17 So. 7.

Section 1700.
Tax deed not to be invalidated except, &c. Does not apply to sales made under and by virtue of Laws 1872, p. 1.
Weir v. Kitchens, 52 M. 74.
See Vaughan v. Swayzie, 56 M. 704.
Howard v. Walters, 2 Miss. Dec. 187.
Tax title. Deed. Absence of seal.
Bowers v. Chambers, 53 M. 259.

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Tax title. Conveyance by collector. Evidence.
Allen v. Poole, 54 M. 323.
See Beirne v. Burdett, 52 M. 795.
Brigins v. Chandler, 60 M. 862.

Tax deed. Prima facie evidence. Statute constitutional.
Virden v. Bowers, 55 M. 1.
See Nelson v. Abernathy, 74 M. 164, 21 So. 150.

Tax title. Prima facie validity.
Chamberlain v. Lawrence County, 71 M. 949, 15 So. 40.

Sections 1701, 1702.
Tax sale. "Equity of redemption." Laws 1875, p. 11.
Caruthers v. McLaran, 56 M. 371.

Section 1707.
Tax title. Limitation. Sale under special statute.
Clay v. Moore, 65 M. 81, 3 So. 142.

Section 1709.
Tax title. Lapse of three years. Cure of precedent defects.
Nevin v. Bailey, 62 M. 433.
Pearce v. Perkins, 70 M. 276, 12 So. 205.
Cole v. Coon, 70 M. 634, 12 So. 849.
Lyebrook v. Hall, 73 M. 241, 19 So. 348.
See McLemore v. Anderson, 92 M. 42, 43 So. 878, 47 So. 801.

Effect on tax title of lapse of three years.
Gibson v. Berry, 66 M. 515, 6 So. 325.
Sigman v. Lundy, 66 M. 522, 6 So. 245.

Tax title. Limitation of three years.
Ricks v. Baskett, 68 M. 250, 8 So. 514.
Zingerling v. Henderson, 18 So. 432.
See Kennedy v. Sanders, 90 M. 524, 43 So. 913.

Tax title, not assailable after three years' possession.
Bennett v. Chaffe, 69 M. 279, 13 So. 731.
Jonas v. Flanniken, 69 M. 577, 11 So. 319.

Section 1718.
Taxes. Payment by another. Lien. Subrogation.
Ingersoll v. Jeffords, 55 M. 37.

Tax title. Void deed. Enforcement of lien.
Cogburn v. Hunt, 56 M. 718.

Tax sale. Purchase price. Lien.
McLaran v. Moore, 60 M. 376.

Lands sold to state for taxes. Failure of title. Lien of purchaser.
Capital State Bank v. Lewis, 64 M. 727, 2 So. 243.

Sections 1718, 1719.
Tax title. Void sale. Purchase money. Lien.
Mayer v. Peebles, 58 M. 628.
See Redmond v. Banks, 60 M. 293.

Tax title. Void sale. Charging land.
Cogburn v. Hunt, 57 M. 681.

Section 1724.
Tax collector. Defalcation as to county taxes. Damages.
State v. Lewenthall, 55 M. 589.

Section 1725.
Failure of tax collector to pay money to treasurer. Notification of district attorney. Suit on bond.
Lewenthall v. State, 51 M. 645.

Directs suit on bond of tax collector for failure to pay into state and county treasuries, taxes collected.
Harris v. State, 55 M. 50.
See State v. Harney, 57 M. 863.

Section 1727.
Suit by district attorney on bond of tax collector for non-payment of county taxes, on notification by county treasurer.
Lewenthall v. State, 51 M. 645.

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Sections 1735, 1738, 1739, 1741.

License tax. Hawkers and peddlers. Personal privilege.
Temple v. Sumner, 51 M. 13, 24 Am. Rep. 615.

Section 1747.

Amended by act approved April 6, 1874. Tax upon practicing lawyers. Constitutional.
Stewart v. Potts, 49 M. 749.

Section 1750.

Attorney. Failure to pay privilege tax. Misdemeanor. Habeas corpus.
Stewart v. Potts, 49 M. 749.

Section 1751.

Injunction to restrain taxation. Dissolution. Damages.
Brooks v. Shelton, 47 M. 243.

Section 1752.

Tax collector. Action on bond. Declaration.
French v. State, 53 M. 651.

Directs suit against principal and sureties on collector's bond for failure or omission to collect taxes.
Harris v. State, 55 M. 50.
See State v. Harney, 57 M. 863.

Section 1753.

Tax title. Suit to confirm. "Unknown" parties defendant. Order of publication.
Davis v. Gibbs, 1 Miss. Dec. 89.

Tax title. Confirmation. Levee taxes.
Beirne v. Burdett, 52 M. 795.

Tax titles. Confirmation. Chancery practice.
Belcher v. Wilkerson, 54 M. 677.

Running of limitation in favor of one in adverse possession of land, not stopped by bill against him, to confirm tax title.
Bell v. Coats, 56 M. 776.

Bill to confirm tax title may be filed upon expiration of "period for redemption." Infant defendants.
Metcalfe v. Perry, 66 M. 68, 5 So. 232.

Section 1760.

Circuit clerk. Marriage license. Penalty.
Holland v. Beard, 59 M. 161, 42 Am. Rep. 360.
Beard v. Holland, 59 M. 164.

Sections 1762–1766.

Did not validate slave "marriages."
Andrews v. Simmons, 68 M. 732, 10 So. 65.

Section 1763.

Cohabitation by man with his stepdaughter, not indictable offense.
Chancellor v. State, 47 M. 278.

Section 1767.

Divorce. Inhuman treatment. Personal violence.
Johns v. Johns, 57 M. 530.

Section 1770.

Divorce. Insanity at time of marriage.
Smith v. Smith, 47 M. 211.

Section 1778.

Conveyance or incumbrance for separate debts of husband, not binding on wife beyond amount of her income.
Erwin v. Hill &c. Co., 47 M. 675.
Dibrell v. Carlisle, 48 M. 691.
See O'Hara v. Alexander, 56 M. 516.

Secures to wife "fruits of her personal service."
Bowden v. Gray, 49 M. 547.

Husband and wife. Mortgage by wife to secure debts of husband.
Reed v. Coleman, 51 M. 835.
Sledge v. Obenchain, 58 M. 670.

Married woman. Conveyance. Debt of husband.
Hand v. Winn, 52 M. 784.

Married woman. Separate property. Parol evidence.
Klein v. McNamara, 54 M. 90.

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Husband and wife. Void conveyance. Debts protected.
Cook v. Ligon, 54 M. 652.

Married woman may employ attorney to defend suit against separate estate and bind same for services.
Porter v. Haley, 55 M. 66, 30 Am. Rep. 502.

Execution by attorney of wife's power of disposition.
McDougal v. People's Sav. Bank, 62 M. 663.

Married woman. Estate in expectancy.
Futch v. Jeffries, 59 M. 506.

Section 1779.

Rights of creditors of husband investing wife's means in his own name.
Brooks v. Shelton, 54 M. 353.
Porter v. Caspar, 54 M. 359.

Married woman may employ attorney to defend suit against separate estate and bind same for services.
Porter v. Haley, 55 M. 66, 30 Am. Rep. 502.

Married woman. Resulting trust. Labor of slaves.
Kenneday v. Price, 57 M. 771.

Person, becoming husband's surety on administration bond on faith of apparent ownership, creditor.
Myers v. Little, 60 M. 203.

Sections 1779, 1780.

Married woman. Contracts. Agency of husband.
Wright v. Walton, 56 M. 1.

Section 1780.

Contract of husband and wife for supplies for plantation of latter. General personal judgment against both.
Mallett v. Parham, 52 M. 921.

Married woman. Power to contract. Application of borrowed money. Trade or business.
Netterville v. Barber, 52 M. 168.

Feme covert trading as feme sole. Partnership debts.
Newman v. Morris, 52 M. 402.

Married woman. Promissory note. Conveyance of real estate as security for debt.
Nelson v. Miller, 52 M. 410.

Married woman. Agency. Personal liability.
Cook v. Ligon, 54 M. 368.

Married woman. Plantation supplies. Liability.
Grubbs v. Collins, 54 M. 485.

Married woman. Separate estate. Plantation supplies.
Lake v. Dillard, 55 M. 63.
Morrison v. Kinstra, 55 M. 71.

Married woman may employ attorney to defend suit against separate estate and bind same for services.
Porter v. Haley, 55 M. 66, 30 Am. Rep. 502.

Married woman. Judgment against agent. Chancery jurisdiction.
Smiley v. Meyer, 55 M. 555.

Antenuptial debts. Evidence. Admissions of wife.
Travis v. Willis, 55 M. 557.

Wife, owning plantation operated for her account, not, as to operations thereon, in "trade or business as feme sole."
Duncan v. Robertson, 58 M. 390.

Married executrix. Continuation of business. Reception of profits. Separate estate. Firm creditors.
Brasfield v. French, 59 M. 632.

Section 1781.

Married woman. Bond in judicial proceedings.
Ketchum v. Brennan, 53 M. 596.

Sections 1781, 1783.

Married woman. Contracts. Account stated.
Klotz v. Butler, 56 M. 333.

Section 1783.

Suit to enforce liability of married woman. Declaration. Confession of judgment. Admissions. Husband, joint defendant, nominal party.
Travis v. Willis, 55 M. 557.

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Suit by married woman, as feme sole, without disclosing coverture. Proof of reason for non-joinder of husband.
Drane v. Land, 56 M. 757.

Suit by wife and husband. Liability of latter for costs.
Davis v. Lumpkin, 58 M. 327.

Action against married woman. Averment of separate property. Plea in bar.
Duncan v. Robertson, 58 M. 390.

Sections 1786, 1788.
Repeal by implication. Conflicting provisions. Intent.
Gibbons v. Brittenum, 56 M. 232.
See Lombard v. Lombard, 57 M. 171.

Section 1788.
Interest of widow in estate of childless intestate.
Wall v. Dickens, 66 M. 655, 6 So. 515.

Section 1790.
Rents, profits, and income. Husband's liability.
Hill v. Bugg, 52 M. 397.

Rents and income of separate estate of wife. Accountability of husband.
Thomson v. Hester, 55 M. 656.
See Wyatt v. Wyatt, 81 M. 219, 32 So. 317.

Section 1791.
Wife abandoned by husband. Decree of chancery court. Operation and effect.
Garland v. Garland, 51 M. 16.

Section 1793.
Parent. Custody of child. Habeas corpus.
Maples v. Maples, 49 M. 393.

Sections 1793, 1794, 1795, 1800.
Apprenticing children. Conditions. Notice.
Howry v. Calloway, 48 M. 587.

Section 1809.
Partition: when allowable. Estate in reversion.
Belew v. Jones, 56 M. 342.

Section 1810.
Amended, Laws 1875, p. 119. Partition. Solicitor's fee.
Potts v. Gray, 60 M. 57.

Sections 1823, 1824.
Chancery jurisdiction. Partition.
Paddock v. Shields, 57 M. 340.

Section 1829.
Partition. Sale for division. Minors.
Albright v. Flowers, 52 M. 246.

Section 1881–1883.
Landings on Mississippi river. Proceedings.
Pearson v. Johnson, 54 M. 259.

Section 1884.
Eminent domain. Compensation. Constitutional law.
Pearson v. Johnson, 54 M. 259.

Establishment of public landings. Similar to Laws 1882, p. 273. Amended by Code 1880, § 918.
Cage v. Trager, 60 M. 563.

Section 1897.
Execution by attorney of wife's power of disposition.
McDougal v. People's Sav. Bank, 62 M. 663.

Section 1922.
Fence-breaking. Impounding animals.
Dent v. Ross, 52 M. 188.
See Duncan v. State, 49 M. 331.

Section 1924.
Allows "double damages" to owner of stock injured by one whose fence is "not a lawful one."
Duncan v. State, 49 M. 331.

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Section 1935.
Watercourse. Obstruction. Proceedings to remove.
Lagrone v. Trice, 57 M. 227.
Trice v. Lagrone, 57 M. 839.

Sections 1948–1951.
Repeal by implication. Conflicting provisions. Intent.
Gibbons v. Brittenum, 56 M. 232.
See Lombard v. Lombard, 57 M. 171.

Section 1950.
Intestate domiciled in foreign state. Administration here.
Carroll v. McPike, 53 M. 569.
Estate of non-resident deceased. Administration here.
Partee v. Kortrecht, 54 M. 66.
See Temples v. Cain, 60 M. 478.

Section 1952.
Descent of property not devised.
Wall v. Dickens, 66 M. 655, 6 So. 515.

Section 1956.
Homestead. Descent. Right of children.
Taylor v. Smith, 54 M. 50.
Exempt property. Descent, &c.
Hickman v. Ruff, 55 M. 549;
Norris v. Callahan, 59 M. 140.
Osborn v. Sims, 62 M. 429.
Kelly v. Alred, 65 M. 495, 4 So. 551.
Descent, on death of husband, of homestead property.
Glover v. Hill, 57 M. 240.
Exempt property. Descent, &c.
Warren v. Davis, 90 M. 336, 43 So. 604.
Unassigned dower. Execution sale of homestead on judgment against widow. Title of purchaser.
Falkner v. Thurmond, 23 So. 584, 877.

Sections 1996, 1997.
State board of education. Maintenance of suits in respect to common school funds, &c.
State Board of Educ. v. West Joint, 50 M. 638.

Section 1997.
State board of education proper party to bring suit for violation of provisions of Code 1871, § 2424.
Mobile &c. R. Co. v. State, 51 M. 137.

Section 2006.
Teacher. Annullment of certificate. Compensation.
Jamison v. Senter, 56 M. 194.

Section 2014.
Schoolhouse warrants. Mandamus. Petition.
Jarvis v. Warren County, 49 M. 603.

Section 2024.
School funds. Warrant. School directors. Lost order.
Tunica County v. Rhodes, 85 M. 500, 37 So. 1005.

Section 2025.
Warrants for erection of schoolhouses. Mandamus to compel tax levy. Petition.
Jarvis v. Warren County, 49 M. 603.
School funds. Warrant. Specification of use to which money is to be applied. Mandamus.
Tunica County v. Rhodes, 85 M. 500, 37 So. 1005.

Section 2051.
School fund. Duty of auditor as to apportionment, &c.
Beard v. Lee County, 51 M. 542.

Section 2053.
County tax levy. Not more than four mills on dollar to be imposed for teachers' fund, nor more than six mills for schoolhouse purposes. Unrepealed by Laws 1873, p. 1.
Beard v. Lee County, 51 M. 542.

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Schoolhouse warrants. Mandamus to compel tax levy. Petition.
Jarvis v. Warren County, 49 M. 603.
See Tunica County v. Rhodes, 85 M. 500, 37 So. 1005.

Section 2131.
Exempt property. Execution. Evidence. Presumption.
Dailey v. State, 56 M. 475.

Section 2134.
Exempt property. Seizure under execution. Remedy.
Ross v. Hawthorne, 55 M. 551.

Sections 2135-2137.
Allotment of homestead. Indivisible premises. Incumbrance of realty not included.
State Nat. Bank v. Lyons, 52 M. 181.
See Nixon v. Hewes, 80 M. 88, 31 So. 899.

Section 2135.
Homestead exemption. Nature of family.
Hill v. Franklin, 54 M. 632.

Homestead exemption embraces eighty acres of land and buildings thereon, owned and occupied as residence by debtor.
Glover v. Hill, 57 M. 240.

Section 2136.
Allotment of homestead included in invalid trust deed sought to be foreclosed.
Howell v. Bush, 54 M. 437.

Section 2140.
Exempt property. Execution. Evidence. Presumption.
Dailey v. State, 56 M. 475.

Section 2142.
Homestead exemption. Sale of land for purchase money.
Patrick v. Rembert, 55 M. 87.

Section 2143.
Liability of devised homestead for exemptionist's debts.
Norris v. Callahan, 59 M. 140.

Section 2144.
Homestead. Abandonment. Intention to return.
Thompson v. Tillotson, 56 M. 36.

Homestead. Incumbrance. Temporary absence.
Majors v. Majors, 58 M. 806.

Section 2147.
Limitations. Action for land. Successive disabilities.
Watts v. Gunn, 53 M. 503.

Limitations. Real actions. Disabilities. Saving.
Summers v. Brady, 56 M. 10.

Section 2148.
Limitation of actions. Trusts.
Cooper v. Cooper, 61 M. 676.
See Stanton v. Helm, 87 M. 287, 39 So. 457.

Section 2149.
Limitation of actions. Mortgagee in possession after forfeiture.
Little v. Teague, 60 M. 115.

Section 2150.
Limitation of actions. Foreclosure of mortgage.
Maddux v. Jones, 51 M. 531.

Recovery in ejectment cannot be defeated by outstanding deed of trust, inoperative by reason of bar of limitations.
Freeman v. Cunningham, 57 M. 67.

Limitations. Bar of debt. Non-payment.
Cook v. Reynolds, 58 M. 243.

Section 2151.
Limitation of actions. Claim of infant against estate of insolvent deceased.
Eckford v. Evans, 56 M. 18.

Limitation of actions. Open account. Verbal acknowledgment. Account stated.
Floyd v. Pearce, 57 M. 140.

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Limitations. Implied contract. Taxes illegally paid.
Musgrove v. Jackson, 59 M. 390.

Section 2153.
Limitations. Judgment. Scire facias. Death of plaintiff.
Palmer v. Jones, 50 M. 657.

Sections 2153, 2154.
Judgment. Perpetuation of general lien. New suit within seven years.
Buckner v. Pipes, 56 M. 366.

Sections 2153, 2155.
Limitations. Revivor against administrator. Heir not bound.
Champion v. Cayce, 54 M. 695.

Section 2154.
Limitation of actions. Judgments rendered by foreign courts of record. Debtor never in this state.
Kennard v. Alston, 62 M. 763.

Section 2155.
Limitation of actions. Executor or administrator. Inapplicable unless cause of action accrued during lifetime of deceased.
Buckingham v. Walker, 48 M. 609.

Limitations. Action or scire facias against executor.
Boyd v. Lowry, 53 M. 352.

Limitations. Promissory note maturing after maker's death. Notice to creditors, &c.
Sivley v. Summers, 57 M. 712.

Action or scire facias against executor or administrator, as such. Limitations. Suspension by petition to declare estate insolvent.
Pool v. Ellis, 64 M. 555, 1 So. 725.

Limitations. Suit against executor. Right to plead bar.
Gibbs v. Bunch, 63 M. 47.

Section 2156.
Limitations. Indorsement of note. Coverture.
McLaughlin v. Spengler, 57 M. 818.

Limitations. Real actions. Disabilities. Saving.
Summers v. Brady, 56 M. 10.

Section 2157.
Limitation of actions. Absence from state. Effect.
Dent v. Jones, 50 M. 265.
Sledge v. Jacobs, 58 M. 194.
Scharff v. Lisso, 63 M. 213.

Limitations. Married woman. Absence from state.
Hodges v. Darden, 51 M. 199.

Limitations. Absence of defendant. Deduction of time.
Withers v. Bullock, 53 M. 539.

Limitations. Removal from, and residence out of, state, of person liable. Subsequent visits here.
Pindell v. Harris, 57 M. 739.

Limitation of actions. Foreign judgment debtor never in this state.
Kennard v. Alston, 62 M. 763.

Limitation of actions. Absence from state. Suit to foreclose mortgage.
Hunt v. Belknap, 78 M. 76, 28 So. 751.

Section 2158.
Plea of statute of limitations, demurrable if declaration alleges that defendant concealed cause of action until bar attached.
Shoults v. Kemp, 57 M. 218.

Section 2159.
Removal of clouds. Judgment creditor. Limitations.
Partee v. Matthews, 53 M. 140.
Fleming v. Grafton, 54 M. 79.

Judgment. Perpetuation of general lien. New suit within seven years.
Buckner v. Pipes, 56 M. 366.

Section 2162.
Limitation of actions. Estate of deceased.
Clayton v. Merritt, 52 M. 353.

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Limitations. Suit by ward.
Wilson v. Sibley, 54 M. 656.

Limitation of actions. Death of debtor. Administration.
Boyce v. Francis, 56 M. 573.

Limitations. Estates. One year after administration.
Bissinger v. Lawson, 57 M. 36.
Adams v. Williams, 57 M. 38.

Limitation of actions. Death of debtor. Effect.
Sledge v. Jacobs, 58 M. 194.

Limitation of actions. Note. Death of payee.
Cook v. Reynolds, 58 M. 243.
Hughston v. Nail, 73 M. 284, 18 So. 920.

Limitations. Death of debtor. Administration.
Rembert v. Key, 58 M. 533.

Limitations. Death of creditor. New promise to foreign executor.
Hambrick v. Jones, 64 M. 240, 8 So. 176.

Section 2163.

Limitation of actions. Bringing second suit.
Memphis &c. R. Co. v. Orr, 52 M. 541.

Section 2164.

Limitations. Mutual and open current accounts.
Abbey v. Owens, 57 M. 810.

Section 2165.

Limitations. Guardian. Minor wards. Disability.
Eckford v. Evans, 56 M. 18.
Ellis v. McGee, 63 M. 168.

Limitations. New promise. Account stated.
Floyd v. Pearce, 57 M. 140.
See Potts v. Hines, 57 M. 735.

Section 2170.

Limitation of actions. Suspension of running by injunction, &c.
Jordan v. Bobbitt, 91 M. 1, 45 So. 311.

Section 2172.

Limitation. Suit against executor. Right to plead bar.
Gibbs v. Bunch, 63 M. 47.

Section 2173.

Probate sale. Invalidities. Limitations.
Richardson v. Brooks, 52 M. 118.

Probate sale. One year's limitation. Adverse possession necessary. "Good faith."
Morgan v. Hazlehurst, 53 M. 665.

Probate sale. Void appointment of guardian. Limitation of one year.
Hall v. Wills, 54 M. 289.

Chancery sale. Limitations. "Good faith."
Summers v. Brady, 56 M. 10.

Void chancery sale. Mala fide purchaser, not paying purchase price.
Wilson v. Parker, 14 So. 264.

Limitation of actions. Sale by guardian. Good faith.
Jeffries v. Dowdle, 61 M. 504.

Limitation of actions. Administrator's sale of real property. Death of widow. Surviving heirs of deceased original owner.
Jordan v. Bobbitt, 91 M. 1, 45 So. 311.

Section 2175.

Limitations. Married woman. Note for land. Bill to compel election.
McNair v. Stanton, 57 M. 298.

Limitation of actions. Trusts.
Cooper v. Cooper, 61 M. 676.
See Stanton v. Helm, 87 M. 287, 39 So. 457.

Section 2227.

Note. Seal: omission to affix.
McCarley v. Tippah County, 58 M. 483, 38 Am. Rep. 338.

Section 2228.

Bailment. Receipt as evidence. Assignment.
Hunt v. Shackleford, 55 M. 94.

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Notes. Assignment. Equities.
Etheridge v. Gallagher, 55 M. 458.

Bill of exchange. Accommodation acceptor. Liability.
Meggett v. Baum, 57 M. 22.

Plea, to bill by assignee of note to foreclose mortgage, of total want of consideration, valid.
Hughes v. Thweatt, 57 M. 376.

Section 2230.
Verbal, implied, or conditional acceptance of order or draft, valid.
McCutchen v. Rice, 56 M. 455.

Section 2236.
Dismissal as to principal in indemnifying bond. Judgment against surety.
Shattuck v. Miller, 50 M. 386.

Abrogates common law, as to remedy, by allowing suit against one or more of parties jointly liable.
Mhoon v. Colment, 51 M. 60.

Joint and several liability. Partners.
Scharff v. Noble, 67 M. 143, 6 So. 843.

Section 2237.
Action on promissory note or bill of exchange. Time for objection for non-joinder.
Stiles v. Inman, 55 M. 469.

Bill of exchange. Suit. Venue. Parties.
Hamilton v. Catchings, 58 M. 92.

Sections 2237, 2241.
Husband and wife. Joint judgment. Error as to husband. Appellate practice.
Mhoon v. Colment, 51 M. 60.

Section 2247.
Ejectment will not lie by county, after ten years, against holder, under void lease by supervisors, of land never devoted to public purpose, &c.
Warren County v. Lamkin, 93 M. 123, 46 So. 497.
Section number erroneous?—Ed.

Section 2255.
Injunction. Motion to dissolve. Notice served on solicitor.
Hiller v. Cotton, 54 M. 551.

Section 2258.
Principal and surety. Judgment. Payment by surety.
Dibrell v. Dandridge, 51 M. 55.

Principal and surety. Subrogation.
Partee v. Mathews, 53 M. 140.

Sections 2279, 2281.
County warrants. Interest.
Warren County v. Klein, 51 M. 807.

Section 2279.
Principal and surety. Contract to forbear suit. Usury.
Brown v. Prophit, 53 M. 649.

Interest on open account, incident of debt.
Thompson v. Mathews, 56 M. 368.

Interest. Debt. Decree. Excessive rate.
Robison v. Miller, 57 M. 237.

Usury. Rights of substituted debtor.
Chaffe v. Wilson, 59 M. 42.

Section 2282.
Unexplained credit on note will be applied to accrued interest.
Moore v. Love, 2 Miss. Dec. 724.

Interest. Partial payments. Application.
Brooks v. Robinson, 54 M. 272.

Section 2288.
Rent, collectible by devisee of land. Changed by Code 1880, § 1327.
Tucker v. Whitehead, 58 M. 762.

Section 2289.
Landlord and tenant. Void attornment of latter.
Tucker v. Whitehead, 58 M. 762.

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Section 2295.

Interest of vendee by title bond who has paid part of purchase money, subject to execution. Purchaser at sale.

Adams v. Harris, 47 M. 144.
See Thompson v. Wheatley, 5 S. & M. 499.
Carpenter v. Bowen, 42 M. 28.

Mortgage. Right of possession. Replevin.

Buck v. Payne, 52 M. 271.

Execution leviable on equity of redemption.

Vicksburg &c. R. Co. v. McCutchen, 52 M. 645.

Ownership of legal title to personalty conveyed by deed of trust. Execution.

Butler v. Lee, 54 M. 476.

None but trustee in deed of trust, or those claiming under him, can prevent recovery on title of grantor.

Freeman v. Cunningham, 57 M. 67.
See Heard v. Baird, 40 M. 793.

Section 2297.

Trust deed of personalty. Suit by trustee to recover possession of property. Absence of formal entry of satisfaction. Parol evidence admissible to prove payment.

Stadeker v. Jones, 52 M. 729.

Section 2301.

Joint tenancies. Trust. Foreclosure. Parties.

McAllister v. Plant, 54 M. 106.

Section 2302.

Conveyance by auditor of public accounts. Official seal. Evidence.

Day v. Day, 59 M. 318.

Section 2304.

Deed. Record. Notice.

Loughridge v. Bowland, 52 M. 546.

Section 2305.

Trust deed. Personal property. Sale in another county. Notice.

Elson v. Barrier, 56 M. 394.

Section 2307.

"Every contract in relation to land," acknowledged and recorded, notice to world. Recital in deed of trust.

Mairs v. Bank of Oxford, 58 M. 919.

Section 2315.

Acknowledgment. Married woman.

Allen v. Lenoir, 53 M. 321.

Section 2323.

Wife not disseized by husband's conveyance of her land.

Hill v. Nash, 73 M. 849, 19 So. 707.

Provided that no act of husband should affect wife's interest in land. Rendered inoperative by emancipation of married women.

Southworth v. Brownlow, 84 M. 405, 36 So. 522.

Sections 2334–2336.

Highways: manner of establishment.

Kinnare v. Gregory, 55 M. 612.

Section 2339.

Damages for taking land for public road.

Cage v. Trager, 60 M. 563.

Section 2346.

Delivery to sheriff by chancery clerk of copies of appointment by supervisors of road overseers.

Hendricks v. Lowndes County, 49 M. 612.

Section 2360.

Board of supervisors. Appropriation for work on roads.

Paxton v. Arthur, 60 M. 832.

Section 2367.

Authority granted by supervisors to erect gates across public road, withdrawable.

Teague v. Attala County, 56 M. 29.

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Section 2379.
Ferry license. Owner of soil, upon complying with law and orders of supervisors, &c., to have preference.
Blake v. McCarthy, 56 M. 654.
See Sullivan v. Lafayette County, 58 M. 790.

Section 2388.
Will, not wholly written and subscribed by testator. Attestation. "Credible." Devisee as witness.
Swanzy v. Kolb, 46 So. 549.
Last will and testament: persons who may make.
Martin v. Perkins, 56 M. 204.

Section 2393.
Nuncupative will. Probate in six months. Evidence.
George v. Greer, 53 M. 495.

Section 2409.
Corporations. Service of process.
Vicksburg &c. R. Co. v. McCutchen, 52 M. 645.

Section 2411.
Service of writ of garnishment, sufficient to prevent abatement of attachment.
Anspach v. Relfe, 2 Miss. Dec. 243.

Section 2413.
Corporation. Liability of stockholders. Remedy of creditors.
Vick v. Lane, 56 M. 681.
Corporation. Stockholder. Unpaid stock. Liability to creditors.
Vick v. La Rochelle, 57 M. 602.

Section 2414.
Mortgage. Validity. Railroads. Earnings.
Vicksburg &c. R. Co. v. McCutchen, 52 M. 645.
Corporate franchise. Execution. Assignment.
McAllister v. Plant, 54 M. 106.

Section 2421.
Legislative power. Regulation of speed of trains.
Mobile &c. R. Co. v. State, 51 M. 137.

Section 2424.
Railroads. Signboards. Highways. Constitutionality.
Mobile &c. R. Co. v. State, 51 M. 137.
See Hamline v. Southern R. Co., 76 M. 410, 25 So. 295.

Section 2429.
Railroads. Injury in another state. Negligence. Liability.
New Orleans &c. R. Co. v. Wallace, 50 M. 244.

Section 2442.
Foreign insurance company. Certificate of auditor condition precedent to right to do business here.
American Life Ins. Co. v. Mahone, 56 M. 180.

Section 2456.
Sale of liquors. Indictment. Druggist.
Blakely v. State, 57 M. 680.

Section 2457.
Municipalities. Right to grant liquor licenses and to fix amount to be paid by each applicant. Disposition of revenue derived.
State Board of Education v. West Point, 50 M. 638.

Section 2458.
Retail license. Municipal charter. School found.
Tupelo v. Beard, 56 M. 532.

Section 2460.
Liquor license. Payment of tax to treasurer of county or corporation, condition precedent.
State Board of Education v. West Point, 50 M. 638.
See State Board of Education v. Aberdeen, 56 M. 518.

Section 2464.
Note for liquors. Illegality of consideration.
Cotten v. McKenzie, 57 M. 418.

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Judgment on void note. Relief in chancery.
Bonney v. Bowman, 63 M. 166.

Section 2469.
Failure of municipal treasurer to pay license money into state treasury. Penalty.
State Board of Education v. Aberdeen, 56 M. 518.

Sections 2473–2482.
Trespass. Cutting trees. Penalty. Limitation.
Miller v. Wesson, 58 M. 831.

Section 2486.
Unlawful cohabitation. Offense.
Kinard v. State, 57 M. 132.
See Granberry v. State, 61 M. 440.

Section 2487.
Cohabitation by man with his stepdaughter, not indictable offense.
Chancellor v. State, 47 M. 278.

Section 2489.
Indictment. Statutory offense. Alteration of record. Intent.
Harrington v. State, 54 M. 490.

Section 2490.
Arson. Indictment. Statutory crimes.
Lewis v. State, 49 M. 354.

Sections 2490, 2494.
Arson. Indictment. Erroneous sentence.
Dick v. State, 53 M. 384.

Section 2497.
Assault with intent to kill. Indictment. Amendment. Constitutionality.
Miller v. State, 53 M. 403.

Section 2508.
Criminal law. Indictment. Discretion as to penalty. Legislative power.
Murrah v. State, 51 M. 652.
Murrah v. State, 51 M. 675.

Section 2552.
Indictment. Aiding an escape. Acquittal.
Westbrook v. State, 52 M. 777.

Section 2582.
Forgery. City tax assessment roll is "book of accounts."
Turbeville v. State, 56 M. 793.

Section 2628.
Murder defined. "Deliberate design." Presumption as to malice.
Hawthorne v. State, 58 M. 778.

Section 2631.
Homicide. Self-defense. Overt act. Imminent danger.
Scott v. State, 56 M. 287.

Section 2638.
Homicide. Manslaughter.
Long v. State, 52 M. 23.
See McMasters v. State, 29 So. 522.
Barrow v. State, 54 So. 305.

Section 2647.
Cohabitation of man with his stepdaughter, not indictable offense.
Chancellor v. State, 47 M. 278.

Section 2672.
Rape. Child under ten years of age. Consent.
Williams v. State, 47 M. 609.
Rape. Indictment. Distinct charge of felonious perpetration. Assault. Reversal. Practice.
Hays v. State, 57 M. 783.

Section 2684.
Rafting timbers. Levee lands. Illegal arrest.
Fossett v. Wilson, 59 M. 1.

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Section 2708.
Cruelty to animals. Malicious mischief.
Duncan v. State, 49 M. 331.
Thompson v. State, 51 M. 353.
Rembert v. State, 56 M. 280.
Malicious mischief. Assumpsit in satisfaction of award. Instruction.
Murphy v. State, 62 M. 97.

Sections 2731, 2732.
Amended, Laws 1873, p. 66. Discrimination on account of race. Accommodation in theater.
Donnell v. State, 48 M. 661, 12 Am. Rep. 375.

Section 2759.
Murder trial. Special venire. Waiver.
Jefferson v. State, 52 M. 767.
Criminal procedure. Special venire. Quashal. Waiver.
Russell v. State, 53 M. 367.
Capital prosecution. Special venire: mode of execution.
Cavanah v. State, 56 M. 299.
Criminal prosecution. Impaneling jury before arraignment. Failure to object.
Dillard v. State, 58 M. 368.

Section 2761.
Court's substitution for incompetent juror, during reading of indictment, not error.
Jefferson v. State, 52 M. 767.
Criminal procedure. Jurors. Peremptory challenges. Joint trial.
Thompson v. State, 58 M. 62.
Smith v. State, 57 M. 822.

Sections 2761, 2762.
Criminal law. Change of venue. Juror. Peremptory challenge.
Stewart v. State, 50 M. 587.

Section 2768.
Criminal prosecution. Six months for finding new indictment. Effect.
Thompson v. State, 54 M. 740.

Section 2786.
Arrest of fugitive. Statutory reward. Special act.
Jones v. Gibbs, 51 M. 401.

Section 2787.
Criminal offender. Commitment for default in bail. Release on recognizance.
Luckett v. State, 51 M. 799.

Section 2788.
Power of sheriff to take recognizance derived from judgment of committing justice. Loss of mittimus.
Cornwell v. State, 53 M. 385.

Section 2791.
Bail. Appearance. Discharge of bond. Escape.
Lee v. State, 51 M. 665.

Sections 2794, 2795.
Criminal law. Indictment. Presentation. Report.
Cachute v. State, 50 M. 165.

Section 2794.
Indictment. Return into court. Record.
Speed v. State, 52 M. 176.
Indictment. Return into court. Indorsements.
Jefferson v. State, 52 M. 767.
See Shanks v. State, 51 M. 464.
Indictment. Indorsement. Presentation.
Fitzcox v. State, 52 M. 923.

Section 2794.
Criminal prosecution. Indictment. Amendment.
Garvin v. State, 52 M. 207.

Section 2795.
Entry of indictment. Alteration. Amendment.
Cornwell v. State, 53 M. 385.

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Indictment. Return and filing. Entry on minutes.
Cook v. State, 57 M. 654.

Section 2799.
Criminal prosecution. Indictment. Amendment.
Murrah v. State, 51 M. 675.
Garvin v. State, 52 M. 207.
Blumenberg v. State, 55 M. 528.

Indictment for larceny. Amendment. New trial.
Foster v. State, 52 M. 695.

Criminal law. Indictment. Amendment. Constitutionality.
Miller v. State, 53 M. 403.
Peebles v. State, 55 M. 434.

Section 2802.
Murder. Indictment. Sufficiency.
Hawthorne v. State, 58 M. 778.

Section 2803.
Criminal law. Indictment. Date of commission of offense.
Smith v. State, 58 M. 867.
Holland v. State, 60 M. 939.

Section 2806.
Criminal prosecution. Continuance. Affidavit. Admissions.
Strauss v. State, 58 M. 83.

Section 2809.
Criminal law. Conviction of lesser offense. Sentence.
Bedell v. State, 50 M. 492.

Section 2820.
Conviction of felony. Sentence of imprisonment. Lapse of time without incarceration. Designation of new date for beginning of term.
Ex parte Bell, 56 M. 282.

Section 2825.
Evidence. Voluntary statement of accused.
Wright v. State, 50 M. 332.

Section 2841.
Criminal convicted in circuit court. Appeal or writ of error as matter of right.
Wall v. State, 51 M. 396, 24 Am. Rep. 640.

Section 2842.
Prescribes only valid bond for appearance of convict in Supreme Court.
Ex parte Bell, 56 M. 282.

Appeal. Supersedeas. Jurisdiction of supreme court.
State v. Bell, 58 M. 345.

Criminal appeal. Appearance bond. Judgment nisi. Scire facias. Plea of sureties.
State v. Bell, 58 M. 823.

Section 2843.
Jury laws directory merely.
Logan v. State, 50 M. 269.

Criminal procedure. Impaneling jury. Special venire. Waiver.
Gavigan v. State, 55 M. 533.

Criminal law. Impaneling jury before arraignment.
Dillard v. State, 58 M. 368.

Section 2867.
Right to compound minor offenses, pending in circuit court.
Wilkins v. Riley, 47 M. 306.

Section 2874 1-2.
Statute. Evidence. Omission from code. Effect.
Greer v. State, 54 M. 378.
Nugent v. Jackson, 72 M. 1040, 18 So. 493.

Section 2884.
Criminal procedure. Statute of jeofails. Constitutionality.
Ex parte Phillips, 57 M. 357.
Dillard v. State, 58 M. 368.

Criminal prosecution. Indictment. Irregularities.
Smith v. State, 58 M. 867.

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Statute of jeofails. Distinguished from Code 1892, § 4370. (Code 1880, § 1433; Laws 1878, p. 200.)
Arbuckle v. State, 80 M. 15, 31 So. 437.

Section 2887.
Criminal law. Attempt. Overt act.
Cunningham v. State, 49 M. 685.

Section 2890.
County treasurer. Unlawful retention of public moneys. Indictment and punishment.
Brady v. Howe, 50 M. 607.

County treasurer whose term expired before Code 1880 went into effect, guilty of misdemeanor in failing to deliver books.
Howze v. State, 59 M. 230.

Section 2894.
Fraudulent conveyance. Rights of subsequent purchaser.
Prestidge v. Cooper, 54 M. 74.

Section 2896.
Parol trusts. Statute of frauds.
Miazza v. Yerger, 53 M. 135.

Mortgage. Deed absolute in form. Parol evidence.
Klein v. McNamara, 54 M. 90.

Proviso leaves resulting and constructive trusts under operation of unwritten equity law.
Cameron v. Lewis, 56 M. 76.

Section 2937.
Publication of notice of grant of letters testamentary. Limitation.
Wilkerson v. Dockery, 2 Miss. Dec. 50.

CODE 1880.

Chapter 12.
Paupers. Board of supervisors.
Jones v. DeSoto County, 60 M. 409.

Chapter 20.
Creates state board of health. Pauper. Poverty and contagion combined. Liability of county for medical attention. Practice in Supreme Court.
Jones v. DeSoto County, 60 M. 409.

Chapter 38.
Ownership, by foreign corporations, of lands in this state. Public policy. Comity.
Taylor v. Alliance Trust Co., 71 M. 694, 15 So. 121.

Chapter 39.
Action in name of state on bond of licensed liquor dealer, on information by private counsel for informer, is action by state.
Albrecht v. State, 62 M. 516.

As amended Laws 1882, pp. 10, 11, chaps. 6, 7, authorized sale of wine made of grapes and other fruits, without reference as to who grew them, in any quantity not less than pint. Laws 1884, p. 18.
Whittington v. State, 62 M. 796.

Bond not conditioned against sale to minors under this chapter, but to keep Code 1871, ch. 56, cured by Code 1880, § 2305.
State v. Depeder, 65 M. 26, 3 So. 80.

Criminal law relied on to prevent illegal sale of liquor. Civil suit to recover back privilege tax.
State v. Piazza, 66 M. 426, 6 So. 316.

Granting of license, regardless of compliance with statutory provisions, not obligatory.
Perkins v. Ledbetter, 68 M. 327, 8 So. 507.

Retailer not subject to suit in behalf of state for unpaid local license.
State v. Adler, 68 M. 487, 9 So. 645.

Alcohol, not vinous or spirituous liquor.
Lemly v. State, 70 M. 241, 12 So. 22, 20 L. R. A. 645n.

Chapter 50.
Lien for rent. Attachment.
Henry v. Davis, 60 M. 212.

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Chapter 52.

Suit to enforce laborer's lien, both in rem and in personam. Judgment.
May v. Williams, 61 M. 125, 48 Am. Rep. 80.

Chapter 53

Public buildings contracted for by board of supervisors, not subject to lien provided.
Panola County v. Gillen, 59 M. 198.

Lien on water craft, separate and distinct from one provided by Code 1880, ch. 55, &c.
Archibald v. Citizens' Bank, 64 M. 523, 1 So. 739.

Chapter 55.

Lien on water craft. Innocent purchaser. Jurisdiction of chancery to enforce.
Archibald v. Bank, 64 M. 523, 1 So. 739.

Chapter 71.

Partition. Proceedings, &c.
Martin v. Gilleylen, 70 M. 324, 12 So. 254.

Chapter 79.

County prisoners. Medical attendance. Liability.
Thurmond v. Carter, 59 M. 127.

County prisoner. Escape. Liability of contractor.
State v. Banks, 66 M. 431, 6 So. 184.

County prisoners. Operation and effect of Laws 1882, p. 23, and Laws 1890, p. 94.
Monroe County v. McDaniel, 68 M. 203, 8 So. 645.

Section 3.

Laws 1876, p. 229, as to construction of telegraph lines, was repealed by Code 1880.
Southern Tel. Co. v. Alabama &c. R. Co., 1 Miss. Dec. 489.

Acts, &c., subjects whereof are revised in code, repealed. Lease of school land under Code 1880, § 732.
Moss Point Lumber Co. v. Harrison County, 89 M. 448, 42 So. 290, 873.

Section 4.

Dower, though abolished, may be established and applied to wife's debts by appropriate proceedings in chancery court.
McKenzie v. Donald, 61 M. 452.

Section 19.

"Bond": what embraced.
McLeod v. State, 69 M. 221, 13 So. 268.

Section 110.

Election districts. Change. Register of voters.
Perkins v. Carraway, 59 M. 222.

Section 122.

Municipality. Charter. Eligibility of mayor to re-election.
Tyler v. Fant, 3 So. 374.

Sections 136, 137.

Election. Ballots. Names: excess, and distance apart.
Perkins v. Carraway, 59 M. 222.

Sections 137–140.

Elections. Illegal ballots. Mandamus.
Oglesby v. Sigman, 58 M. 502.

Section 137.

Municipal elections. Form of ballots.
Harrison v. Greaves, 59 M. 453.

Elections. Ballots. Devices.
Steele v. Calhoun, 61 M. 556.

Election ballots. Provisions mandatory. Standard prescribed arbitrary. Degree of departure.
Keller v. Toulme, 7 So. 508.

Section 141.

Election. Contest. Mandamus.
Myers v. Chalmers, 60 M. 772.

Section 150.

Election contest. Circuit court. Practice.
Hall v. Lyon, 59 M. 218.
Perkins v. Carraway, 59 M. 222.

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Does not embrace elections of municipal officers, provided for by corporation charter.
Easly v. Badenhausen, 59 M. 580.

Section 151.
Election contest. Trial in vacation. Appeal.
Perkins v. Carraway, 59 M. 222.

Section 229.
Allowance of claim by circuit court, prima facie settlement of auditing officer, &c.
State v. Furlong, 60 M. 839.

Section 247.
Suit on bond of state treasurer. Attorney general.
Miller v. State, 69 M. 112, 12 So. 265.

Section 257.
District attorneys. "Forfeited bonds or recognizances." Commission. Responsibility of state.
Miller v. State, 69 M. 112, 12 So. 265.

Sections 328, 331.
Plaintiff who induces sheriff to relax vigilance, cannot enforce penalty on his bond for failure to return execution.
Skinner v. Wilson, 61 M. 90.

Section 328.
Deputy sheriff. Return. Signing name of sheriff.
Kelly v. Harrison, 69 M. 856, 12 So. 261.

Section 331.
Sheriff. Liability for failure to return execution.
Staples v. Fox, 45 M. 667.
Beall v. Shattuck, 53 M. 358.
Cox v. Ross, 56 M. 481.
Tapp v. Bonds, 57 M. 281.
Simms v. Quinn, 58 M. 221.

Section 332.
Sheriff. Liability for error in return.
Beall v. Shattuck, 53 M. 358.

Section 333.
Sheriff. Failure to pay over money collected.
Howard v. Proskauld, 57 M. 247.
Howard v. Priestly, 58 M. 21.

Section 340.
Sheriff, with capias returnable forthwith, cannot take appearance bond from person arrested.
Bourdeaux v. Warren County, 66 M. 231, 5 So. 227.

Section 344.
Venue of actions.
Chrisman v. O'Neal, 46 M. 669.
Cain v. Simpson, 53 M. 521.
Cox v. Ross, 56 M. 481.
Smith v. Mulhern, 57 M. 591.
Baum &c. Co. v. Burns, 66 M. 124, 5 So. 697.
Archibald v. Mississippi &c. R. Co., 66 M. 424, 6 So. 238.
See Wessinger v. Mauser &c. Imp. Co., 75 M. 64, 21 So. 757.

Section 367.
County treasurer. General bond. School funds.
Hall v. Lafayette County, 69 M. 529, 13 So. 38.

Section 369.
County treasurer. Failure to report. Liability of sureties.
Lafayette County v. Hall, 68 M. 719, 10 So. 54.

Section 375.
County treasurer. Embezzlement. Bond. Reformation.
Lafayette County v. Hall, 70 M. 678, 13 So. 39.

Section 396.
Term of office: clerks of circuit and chancery courts.
Andrews v. Covington, 69 M. 740, 13 So. 853.

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Section 403.
Official bond. Chancery clerk as guardian.
Faust v. Murphy, 71 M. 120, 13 So. 862.
Treasurer of levee board. Validity of bond: failure of principal to sign.
Adams v. Williams, 97 M. 113, 52 So. 865.

Section 404.
Action on bond. Res adjudicata.
State v. Morrison, 60 M. 74.

Sections 405, 406.
Approval of bonds. Mandamus.
Shotwell v. Covington, 69 M. 735, 12 So. 260.

Section 411.
Public officers. New bonds: when required.
Lewenthall v. State, 51 M. 645.
Faust v. Murphy, 71 M. 120, 13 So. 862.

Sections 412, 413.
Surety on bond of circuit clerk. Release.
Lewis v. State, 65 M. 468, 4 So. 429.

Section 413.
Official bond. Execution. Irregularity.
Faust v. Murphy, 71 M. 120, 13 So. 862.

Section 415.
De facto officers. Validity of acts.
Mobley v. State, 46 M. 501.
Matthews v. Copiah County, 53 M. 715, 24 Am. Rep. 715.
Cohn v. Beal, 61 M. 398.
Dabney v. Hudson, 68 M. 292, 8 So. 545, 24 Am. St. 276.

Section 417.
Power of circuit court to remove clerk from office. Indictment. Conviction.
Ex parte Lehman, 60 M. 967.

Section 424.
Drunkenness in office. Indictment. Expiration of term.
Shanks v. State, 51 M. 464.
Stubbs v. State, 53 M. 437.

Sections 442, 444.
Fees and costs. Chancery clerk.
Ex parte Thomas, 59 M. 522.

Section 447.
Execution. Commissions of sheriff. Collection of money.
Wynne v. Mississippi &c. R. Co., 45 M. 569.
Mileage for conveying prisoner.
Bourdeaux v. Warren County, 66 M. 231, 5 So. 227.
Sheriff's fees. Road overseers' commissions.
Thomas v. Hinds county, 69 M. 665, 12 So. 558.

Section 457.
County surveyor. Fees. Map.
Swoope v. Moody, 73 M. 82, 18 So. 799.

Section 460.
County treasurer. Commissions.
Beal v. Sharp, 1 Miss. Dec. 325.

Section 466.
Poll tax is "county tax."
Butt v. Montgomery, 62 M. 213.

Section 468.
Exempt property. Printing press.
Frantz v. Dobson, 64 M. 631, 2 So. 75, 60 Am. Rep. 68.
Exemption of municipal property. Failure to urge objection to assessment and sale.
Meridian v. Phillips, 65 M. 362, 4 So. 119.
Taxation. Property exempt.
Bank of Oxford v. Oxford, 70 M. 504, 12 So. 203.

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Lands of one county, though located in another, are exempt from taxation.
Warren County v. Nall, 78 M. 726, 29 So. 755.

Section 469.
Poll tax. Collection and distribution.
Butt v. Montgomery, 62 M. 213.

Section 470.
Foreclosure of lien for taxes. Railroads. Parties.
Yazoo &c. R. Co. v. Adams, 77 M. 764, 25 So. 355.

Section 471.
Personal property. Place of taxation.
Colbert v. Leake County, 60 M. 142.

Section 486.
Taxation. Assessment of escaped property.
State v. Simmons, 70 M. 485, 12 So. 477.

Section 490.
Tax title. Double assessment. Description. Parol evidence.
Trager v. Jenkins, 75 M. 676, 23 So. 424.

Sections 490, 491.
Taxation. Assessment. Description. Evdience.
Cogburn v. Hunt, 54 M. 675.
Dodds v. Marks, 63 M. 443.

Section 491.
Taxation. Realty. Description.
Bowers v. Chambers, 53 M. 259.
McCready v. Langsdale, 58 M. 877.
Enochs v. Miller, 60 M. 19.

Assessment. Description. Ambiguity.
Herring v. Moses, 71 M. 620, 14 So. 437.

Tax title. Ambiguous description. Pleading.
Mixon v. Clevenger, 74 M. 67, 20 So. 148.

Ambiguous description in tax deed and decree of confirmation. Evidence.
Illinois Cent. R. Co. v. Le Blanc, 74 M. 650, 21 So. 760.

Section 497.
Taxation. Money loaned. Non-residents.
State v. Smith, 68 M. 79, 8 So. 294.

Section 498.
Assessment. Bank. Action by revenue agent.
State v. Vicksburg Bank, 69 M. 99, 10 So. 102.

Assessment. Corporate stock. Manufacturing company.
State v. Simmons, 70 M. 485, 12 So. 477.

Rule for taxation of bank stock. Unrepealed.
Bank of Oxford v. Oxford, 70 M. 504, 12 So. 203.

Section 499.
Increase in assessment by board of supervisors. Failure to object. Right to appeal.
Simmons v. Scott County, 68 M. 37, 8 So. 259.

Tax title. Tardy filing of assessment roll.
Carlisle v. Goode, 71 M. 453, 15 So. 119.

Section 503.
Increase in assessment by board of supervisors. Failure to attend meeting. Right to appeal.
Simmons v. Scott County, 68 M. 37, 8 So. 259.
See Jennings v. Coahoma County, 79 M. 523, 31 So. 107.

Section 504.
Board of supervisors. Assessment. Appeal.
Anderson v. Ingersoll, 62 M. 73, 8 So. 259.
See Jennings v. Coahoma County, 79 M. 523, 31 So. 107.

Section 507.
Change of assessments. Board of supervisors.
Anderson v. Ingersoll, 62 M. 73.
Simmons v. Scott County, 68 M. 37, 8 So. 259.

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Section 509.

Taxation. Assessor. Addition to roll, of escaped property.
State v. Simmons, 70 M. 485, 12 So. 477.

Section 513.

Tax title. Assessment. Return by collector.
Cato v. Gordon, 63 M. 320.

Makes tax collector pro hac vice assessor, &c.
State v. Adler, 68 M. 487, 9 So. 645.
See State v. Thibodeaux, 69 M. 92, 10 So. 58.
Thibodeaux v. State, 69 M. 683, 13 So. 352.
State Rev. Agent v. Tonella, 70 M. 701, 14 So. 17, 22 L. R. A. 346.

Property unassessed. Duty of collector.
State v. Simmons, 70 M. 485, 12 So. 477.

Section 516.

Taxes. Payment. Formal receipt. Loss.
Edmondson v. Ingram, 68 M. 32, 8 So. 257.

Section 517.

Taxes collected. Settlement with auditor.
Gibson v. State, 59 M. 341.

Section 521.

Tax sale. Failure to offer land in parcels.
Herring v. Moses, 71 M. 620, 14 So. 437.

Title "acquired" at sale void under this section not validated by Code 1880, § 525.
Griffin v. Ellis, 63 M. 348.
Gregory v. Brogan, 74 M. 694, 21 So. 521.
See Nelson v. Abernathy, 74 M. 164, 21 So. 150.

Section 523.

Lands sold to state. Certified list to auditor.
Gamble v. Witty, 55 M. 26.
Clymer v. Cameron, 55 M. 593.
Vaughan v. Swayzie, 56 M. 704.
Weathersby v. Thomas, 57 M. 296.
French v. Ladd, 57 M. 678.
Mayson v. Banks, 59 M. 447.
Dingey v. Paxton, 60 M. 103.
Corburn v. Crittenden, 62 M. 125.
Gibbs v. Dortch, 62 M. 671.
Ferrell v. Dickerson, 63 M. 210.

Section 524.

Taxes. Payment to levee board. Commissions of collector.
Yazoo &c. R. Co. v. Love, 69 M. 109, 12 So. 266.

Purchase, at tax sale, by chancery clerk, against public policy and void
Barker v. Jackson, 90 M. 621, 44 So. 34.

Section 525.

Sale for taxes. Form and effect of conveyance.
McGehee v. Martin, 53 M. 519.
Mead v. Day, 54 M. 58.
Virden v. Bowers, 55 M. 1.
Harkreader v. Clayton, 56 M. 383, 31 Am. Rep. 369.
Nevin v. Bailey, 62 M. 433.
Gibson v. Berry, 66 M. 515, 6 So. 325.
Sigman v. Lundy, 66 M. 522, 6 So. 245.

Does not validate title "acquired" at sale, void under Code 1880, § 521.
Griffin v. Ellis, 63 M. 348.
Gregory v. Brogan, 74 M. 694, 21 So. 521.
See Nelson v. Abernathy, 74 M. 164, 21 So. 150.

Tax sale. Part of tax illegal.
Lochte v. Austin, 69 M. 271, 13 So. 838.

Section 526.

Tax title. List. Prima facie evidence.
Wheeler &c. Mfg. Co. v. Ligon, 62 M. 560.
Grayson v. Richardson, 65 M. 222, 3 So. 579.

Tax collector's deed. Effect. Evidence insufficient to overcome.
Mixon v. Clevenger, 74 M. 67, 20 So. 148.

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Section 527.

Tax sale. Failure to pay bid immediately.
Judah v. Brothers, 72 M. 616, 17 So. 752, 33 L. R. A. 481n.

Section 531.

Tax sale. Redemption. Effect.
Johns v. Smith, 56 M. 727.
Greene v. Williams, 58 M. 752.
Moody v. Hoskins, 64 M. 468, 1 So. 622.
Jamison v. Thompson, 65 M. 516, 5 So. 107.
Metcalf v. Perry, 66 M. 68, 5 So. 232.

Tax deed to individual, to be filed on or before first Monday of April.
Wheeler &c. Mfg. Co. v. Ligon, 62 M. 560.

Tax sale. Redemption by infant.
Price v. Ferguson, 66 M. 404, 6 So. 210.

Redemption of land sold for taxes. Infant.
Wilson v. Sykes, 67 M. 617, 7 So. 492.

Tax sale. Redemption. Repeal. Operation and effect of Const. 1890, §§ 79, 274.
Judah v. Brothers, 71 M. 414, 14 So. 455.

Sections 531, 532.

Tax title. Deposit of deed. Time for redemption.
Adams v. Mills, 71 M. 150, 14 So. 462.
See Day v. Smith, 87 M. 395, 39 So. 526.

Purchase, at tax sale, by chancery clerk, against public policy and void.
Barker v. Jackson, 90 M. 621, 44 So. 34.

Section 536.

Tax title. Lien for taxes. Assessment.
Ingersoll v. Jeffords, 55 M. 37.
Cogburn v. Hunt, 56 M. 718.
Cogburn v. Hunt, 57 M. 681.
McLaran v. Moore, 60 M. 376.
Kaiser v. Harris, 63 M. 590.
See McMahon v. Yazoo Delta Lumber Co., 92 M. 459, 48 So. 957, 46 So. 57.

Section 537.

Tax title. Purchase from state. Invalidity.
Wilkinson County v. Fitts, 63 M. 600.
McGehee v. Fitts, 65 M. 357, 4 So. 93.

Section 538.

"Unlawful detainer" maintainable by state and its vendee.
Crittenden v. Leavenworth, 62 M. 32.
Leavenworth v. Crittenden, 62 M. 573.

Tax title. Unlawful detainer. Limitation.
Cochran v. Richberger, 70 M. 843, 12 So. 851.
Pearce v. Perkins, 70 M. 276, 12 So. 205.
Foote v. Dismukes, 71 M. 110, 13 So. 879.
Wilkerson v. Hudson, 71 M. 130, 13 So. 866.
See Carlisle v. Yoder, 69 M. 384, 12 So. 255.

Tax title. Unlawful detainer. One year's possession.
McLemore v. Scales, 68 M. 47, 8 So. 844.

Section 539.

Tax title. Three years' occupancy. Bar.
Pipes v. Farrar, 64 M. 514, 1 So. 740.
McGee v. Holmes, 63 M. 50.
Clay v. Moore, 65 M. 81, 3 So. 142.
Lewis v. Seibles, 65 M. 251, 3 So. 652.
Bennett v. Chaffe, 69 M. 279, 13 So. 731.
Jonas v. Flanniken, 69 M. 577, 11 So. 319.
Jones v. Merrill, 69 M. 747, 11 So. 23.
Cochran v. Richberger, 70 M. 843, 12 So. 851.
Pearce v. Perkins, 70 M. 276, 12 So. 205.
Lyebrook v. Hall, 73 M. 509, 19 So. 348.

Tax sale. Infant, one of parties in interest. Bill to redeem. Limitation.
Patterson v. Durfey, 68 M. 779, 9 So. 354.
As overruled, see Hoskins v. Illinois Cent. R. Co., 78 M. 768, 29 So. 518, 84 Am. St. 644.

Tax title. Possession. Limitation.
Carlisle v. Yoder, 69 M. 384, 12 So. 255.

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As overruled, see Hoskins v. Illinois Cent. R. Co., 78 M. 768, 29 So. 518, 84 Am. St. 644.

Title, after three years' occupancy, &c., of purchaser from state of lands sold to latter on wrong day, &c.
Brougher v. Stone, 72 M. 647, 17 So. 509.
As impliedly overruled by Hoskins v. Illinois Cent. R. Co., 78 M. 768, 29 So. 518, 84 Am. St. 644, see Kennedy v. Sanders, 90 M. 524, 43 So. 913.

Tax title. Three years' limitation. Without application where tax collector was absolutely devoid of power to sell.
Kennedy v. Sanders, 90 M. 524, 43 So. 913.
See Eastland v. Yazoo Delta Lumber Co., 90 M. 330, 43 So. 956.

Limitation without application when chancery clerk was "purchaser"-at tax sale.
Barker v. Jackson, 90 M. 621, 44 So. 34.

Three years' limitation. Suit to confirm tax title. Purchaser pendente lite.
McLemore v. Anderson, 92 M. 42, 43 So. 878.

As to curative effect of similar statutes, see:
Nevin v. Bailey, 62 M. 433.
Metcalfe v. Perry, 66 M. 68, 5 So. 232.
Gibson v. Berry, 66 M. 515, 6 So. 325.
Sigman v. Lundy, 66 M. 522, 6 So. 245.

Section 548.

Judgment against tax collector and sureties, for damages for failure of former to report and pay over taxes collected. Repealed by Laws 1904, p. 216.
Adams v. Saunders, 93 M. 520, 46 So. 960.

Section 557.

As amended Laws 1888, p. 16, unrepugnant to Const. 1869, art. 12, §§ 13, 16, 20. Privilege tax on banks, &c.
Vicksburg Bank v. Worrell, 67 M. 47, 7 So. 219.

Section 558.

Regular day for sale. Postponement.
Brougher v. Conley, 62 M. 358.
Clarke v. Frank, 64 M. 827, 3 So. 531.
See Yazoo &c. R. Co. v. West, 78 M. 789, 29 So. 475.

Section 561.

Registration. Deed from state.
Patterson v. Langston, 69 M. 400, 11 So. 932.

Tax titles. Purchase from state. Payment of taxes.
Louisville &c. R. Co. v. Buford, 73 M. 494, 19 So. 584.

Sections 561, 562.

Tax deeds. Failure of auditor to indorse tax fees.
Paxton v. Valley Land Co., 68 M. 739, 10 So. 77.

Section 562.

Tax deed. Objection to absence of required indorsement, may be made for first time on appeal.
McLemore v. Anderson, 92 M. 42, 43 So. 878, 47 So. 801.

Section 567.

Tax collector liable for publisher's fee.
Moore v. Magee, 48 M. 567.

Section 574.

Release of land sold to state. Payment.
Sigman v. Lundy, 66 M. 522, 6 So. 245.

Section 578.

Tax titles. Confirmation.
Belcher v. Mhoon, 47 M. 613.
Belcher v. Wilkerson, 54 M. 677.
Bierne v. Burdett, 52 M. 795.
Chrisman v. Currie, 60 M. 858.
Peterson v. Kittredge, 65 M. 33, 3 So. 65, 5 So. 824.
Metcalf v. Perry, 66 M. 68, 5 So. 232.
See Magee v. Turner, 92 M. 438, 46 So. 544.

Section 585.

Fire insurance. Privilege tax.
Lee Mut. Fire Ins. Co. v. State, 60 M. 395.

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Sewing machine agent. Insufficiency of indictment for failure to pay privilege tax.
Henden v. State, 61 M. 146.

Privilege tax. Supply car is not "trading car."
Vicksburg &c. R. Co. v. State, 62 M. 105.

Privilege tax. "Store." Lumber yard.
Folkes v. State, 63 M. 81.

Druggist, without license to sell liquors, cannot make legal sale of same.
Elkin v. State, 63 M. 129.

Privilege tax. Contract of fire insurance carried by delinquent merchant, unenforceable.
Pollard v. Phœnix Ins. Co., 63 M. 244, 56 Am. Rep. 805.

Privilege tax. Keeping feed stable.
Morgan v. State, 64 M. 511, 1 So. 749.

Privilege tax. "Stock." Cotton purchased in payment of debts.
Harness v. Williams, 64 M. 600, 1 So. 759.

As amended Laws 1888, p. 16, unrepugnant to Const. 1869, art. 12, §§ 13, 16, 20. Privilege tax on banks, &c.
Vicksburg Bank v. Worrell, 67 M. 47, 7 So. 219.
Bank of Oxford v. Oxford, 70 M. 504, 12 So. 203.

Privilege tax. Agency for sewing machines.
Mitchell v. Meridian, 67 M. 644, 7 So. 493.

Privilege tax. Restaurant. Partnership.
Carter v. State, 60 M. 456.

Section 587.

Does not confer upon municipalities power to tax privileges.
Ex parte Ferguson, 59 M. 13.

Restricts right of municipality to tax sale of spirituous liquors, derived from general power in charter, to 50 per cent. of state license.
Moneghan v. Cannon, 2 Miss. Dec. 509.

Section 589.

Privilege tax. License. Penalty.
Stewart v. Potts, 49 M. 749.
Holberg v. Macon, 55 M. 112.
Anding v. Levy, 57 M. 51, 34 Am. Rep. 435n.
Decell v. Lewenthall, 57 M. 331, 34 Am. Rep. 449.
Pollard v. Phœnix Ins. Co., 63 M. 244, 56 Am. Rep. 805.
Phœnix Ins. Co. v. Pollard, 63 M. 641.
Deans v. Robertson, 64 M. 195, 1 So. 159.
People's Bank v. Alabama &c. R. Co., 65 M. 365, 4 So. 115.
Bowdre v. Carter, 64 M. 221, 1 So. 162.
Lowenstein v. Bew, 68 M. 265, 8 So. 674, 24 Am. St. 269.
Bank of Oxford v. Oxford, 70 M. 504, 12 So. 203.

Privilege tax. Restaurant. Partnership.
Carter v. State, 60 M. 456.

Privilege tax. Failure of one partner to pay.
McIver v. Clarke, 69 M. 408, 10 So. 581.

Void privilege tax. Trust deed. Unlawful detainer.
Williams v. Simpson, 70 M. 113, 11 So. 689.

Privilege tax. Failure to pay. Effect on contracts.
Cowan v. London Assurance Corporation, 73 M. 321, 19 So. 298.
Crum v. Carrington Shoe Co., 72 M. 458, 16 So. 674.

Privilege tax. Contract of delinquent, valid as to strangers.
Cunningham Woolen Co. v. Atlanta B. & L. Assn., 73 M. 516, 19 So. 234.

Note and renewals given for debt contracted in course of business of merchant, delinquent as to privilege tax, void.
Puckett v. Fore, 77 M. 391, 27 So. 381.

Amendatory, Laws 1875, p. 10, ch. 1, § 5. Contract made in 1905 in business delinquent as to privilege tax rendered enforceable by Code 1906, § 3894.
Sullivan v. Ammons, 95 M. 196, 48 So. 244.

Section 594.

Remedy for failure to pay privilege tax.
State v. Piazza, 66 M. 426, 6 So. 316.

Section 595.

Privilege tax. Restaurant. Partnership.
Carter v. State, 60 M. 456.

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Sections 597–608.
Taxation. Railroad property. Validity of tax sale and deed.
Illinois Cent. R. Co. v. Le Blanc, 74 M. 650, 21 So. 760.
See Yazoo &c. R. Co. v. Adams, 81 M. 90, 32 So. 937.

Sections 607, 608.
Privilege tax. Railroads. Exemption.
Vicksburg &c. R. Co. v. Bradley, 66 M. 518, 6 So. 321.
Lewis v. Vicksburg &c. R. Co., 67 M. 82, 6 So. 773.
Railroads. Commutation tax. Lands.
LeBlanc v. Illinois Cent. R. Co., 72 M. 669, 18 So. 381.

Sections 624–626.
Pauper. Poverty and contagion combined. Liability of county for medical attention. Practice in Supreme Court.
Jones v. De Soto County, 60 M. 409.

Section 626.
County. Pauper not in poorhouse.
Lee County v. Gilbert, 70 M. 791, 12 So. 593.

Section 629.
Pauper. Support. Liability of county.
Reynolds v. Alcorn County, 59 M. 132.

Sections 629, 631, 632.
Pauper. Poverty and contagion combined. Liability of county for medical attention. Practice in Supreme Court.
Jones v. De Soto County, 60 M. 409.

Section 637.
Poor orphans. Custody. Habeas corpus.
Lowndes County v. Leigh, 69 M. 754, 13 So. 854.

Section 689.
State board of education. Action for school funds.
State Board of Education v. Mobile &c. R., 71 M. 500, 14 So. 445.

Sections 713, 724, 725, 727.
School fund. Limit of taxation.
Foote v. Brown, 60 M. 155.

Section 726.
County treasurer. Bond for school fund.
Hall v. Lafayette County, 69 M. 529, 13 So. 38.

Section 732.
School lands. Lease by supervisors.
Bolivar County v. Coleman, 71 M. 832, 15 So. 107.
Sixteenth section. Lease, governed by law contained in Code 1880.
Moss Point Lumber Co. v. Harrison County, 89 M. 448, 42 So. 290, 873.

Section 741.
Sixteenth section school lands. Ejectment. Parties plaintiff.
Rabb v. Washington County, 62 M. 589.

Section 744.
School land. Suit for value of trees cut.
Chamberlain v. Lawrence County, 71 M. 949, 15 So. 40.

Sections 797, 801.
Paupers. Poverty and contagion combined. Compensation for medical attention. Liability of county.
Jones v. DeSoto County, 60 M. 409.

Section 823.
Strict conformity, essential to legal laying out of public road.
State v. Morgan, 79 M. 659, 31 So. 338.

Section 873.
Ferries. Jurisdiction of supervisors.
Sullivan v. Lafayette County, 58 M. 790.
Montjoy v. Pillow, 64 M. 705, 2 So. 108.
McCearly v. Swayze, 65 M. 351, 3 So. 657.

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Section 892.

Limitations. Action to recover property escheated to, and sold by, state.
Wise v. Wynn, 59 M. 588, 42 Am. Rep. 381.

Section 897.

"Unlawful detainer" (Code 1880, § 538), maintainable by state and its vendee.
Crittenden v. Leavenworth, 62 M. 32.
Leavenworth v. Crittenden, 62 M. 573.

Distress for rent due county from assignee of lessee of school land, maintainable by board of supervisors.
Lewis v. Washington County, 62 M. 160.

County liable for costs and damages caused by wrongful injunction.
Freeman v. Lee County, 66 M. 1, 5 So. 516.

Right of county to sue. Declaration.
Carroll County v. Georgia &c. R. Co., 11 So. 471.

Section 918.

Eminent domain. Whether constitutional, quære.
Pearson v. Johnson, 54 M. 259.

Amendatory, Code 1871, § 1884. Condemnation of private property. Condition precedent.
Cage v. Trager, 60 M. 563.

Section 920.

Eminent domain. Jurors. Competency.
Levee Board v. Allen, 60 M. 93.
Cage v. Trager, 60 M. 563.

Section 956.

Oysters. Counties bordering on Gulf of Mexico. Jurisdiction of supervisors. Constitutionality. Grant of private right, valid.
Barataria Canning Co. v. Ott, 84 M. 737, 37 So. 121.

Section 979.

Partition wall. Parol agreement.
Money v. Peavey, 70 M. 260, 12 So. 334.

Section 984.

Common inclosure. Liability of one common owner for turning in stock. Cattle of stranger. "Owner."
Montgomery v. Handy, 62 M. 16.
See Montgomery v. Handy, 63 M. 43.

Section 988.

Partition fence. Failure to keep in repair. Damages for killing of trespassing stock.
McCain v. White, 67 M. 243, 7 So. 222.

Section 989.

Railroad company. Liability for throwing down fence on right of way.
Fairchild v. New Orleans &c. R. Co., 62 M. 177.

Section 990.

Money lost on wager recoverable by loser. Judgment for winner subject to collateral attack. Unrepealed by Laws 1882, p. 140.
Campbell v. New Orleans Nat. Bank, 74 M. 526, 21 So. 400.

Section 993.

Abolished distinction between sealed and unsealed instruments. Prospective in operation.
Gibbs v. McGuire, 70 M. 646, 12 So. 829.

No difference as to showing truth concerning consideration, between sealed and unsealed instruments.
Wimberly v. Wortham, 3 So. 459.

Sections 994, 996.

Tax collector. Failure to affix signature to official bond, signed by sureties, &c.
McLeod v. State, 69 M. 221, 13 So. 268.

Section 997.

Surety. Discharge by act of creditor.
Smith v. Clopton, 48 M. 66.
Kiern v. Andrews, 59 M. 39.

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Section 998.

Surety. Judgment. Satisfaction.
Partee v. Matthews, 53 M. 140.
Yates v. Mead, 65 M. 89.

Judgment. Payment by surety.
Taylor v. Alliance Trust Co., 71 M. 694, 15 So. 121.

Section 1004.

Slander. Immunity of witnesses.
Verner v. Verner, 64 M. 321, 1 So. 52.

Actionable words. Bill of particulars. Issue. Defense. Truth of words spoken, mitigative fact. Special damages.
McLean v. Warring, 13 So. 236.

Section 1037.

Corporation. Unpaid subscription. Liability of stockholder.
Vick v. Lane, 56 M. 681.
Vick v. LaRochelle, 57 M. 602.
Kriger v. Hanover Nat. Bank, 72 M. 462, 16 So. 351.

Corporation. Deceased subscriber. Unpaid subscription. Recovery by creditor.
Robinett v. Starling, 72 M. 652, 18 So. 421.

Section 1047.

Railroad train. Speed within municipality. Injury to stock.
New Orleans &c. R. Co. v. Toulme, 59 M. 284.
Chicago &c. R. Co. v. Jones, 59 M. 465.
Illinois Cent. R. Co. v. Weathersby, 63 M. 581.
Louisville &c. R. Co. v. Saucier, 1 So. 511.
Louisville &c. R. Co. v. Caster, 5 So. 388.

Railroads. Rate of speed within corporate limits. Injuries to employes.
Dowell v. Vicksburg &c. R. Co., 61 M. 519.
Mobile &c. R. Co. v. State, 51 M. 137.
Illinois Cent. R. Co. v. Jordan, 63 M. 458.

Railroads. Rate of speed within municipal limits. Injuries. Contributory negligence.
Vicksburg &c. R. Co. v. McGowan, 62 M. 682.
Mobile &c. R. Co. v. Stroud, 64 M. 784, 2 So. 171.
Crawley v. Richmond &c. R. Co., 70 M. 340, 13 So. 74.
Strong v. Canton, 3 So. 465.
See Collins v. Illinois Cent. R. Co., 77 M. 855, 27 So. 837.

Railroads. Right to maintain, within municipal limits, maximum rate of speed.
Louisville &c. R. Co. v. French, 69 M. 121, 12 So. 338.
See Hamline v. Southern R. Co., 76 M. 410, 25 So. 295.

Railroads. Speed in towns. Negligence.
Alabama &c. R. Co. v. Phillips, 70 M. 14, 11 So. 602.
Home Insurance v. Louisville &c. R. Co., 70 M. 119, 12 So. 156.

Section 1048.

Railroads. Signals at crossings. "Highways."
Louisville &c. R. Co. v. French, 69 M. 121, 12 So. 338.
See Illinois Cent. R. Co. v. State, 71 M. 253, 14 So. 459.
Hamline v. Southern R. Co., 76 M. 410, 25 So. 295.

Section 1050.

Railroad crossings. Signboards. "Highways." Penalties.
Mobile &c. R. Co. v. State, 51 M. 137.
State Board of Education v. Mobile &c. R. Co., 71 M. 50, 14 So. 445.
See Hamline v. Southern R. Co., 76 M. 410, 25 So. 295.

Railroads. Highway crossings. Signboards. Penalties.
State Board of Education v. Mobile &c. R. Co., 72 M. 236, 16 So. 489.

Section 1053.

Furnishes statutory remedy for failure of railroad company to keep in order, bridge on highway across its tracks.
Vicksburg &c. R. Co. v. State, 64 M. 5, 8 So. 128.

Railroads. Grades, &c., at "highway" crossings. City street.
Hamline v. Southern R. Co., 76 M. 410, 25 So. 295.

Section 1054.

Railroad. Passenger. Freight train. Negligence.
New Orleans &c. R. Co. v. Hughes, 49 M. 258.

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Perkins v. Chicago &c. R. Co., 60 M. 726.
Mobile &c. R. Co. v. Gray, 62 M. 383.

Section 1059.

Railroads. Killing stock. Prima facie evidence.
Chicago &c. R. Co. v. Packwood, 59 M. 280.
Mobile &c. R. Co. v. Dale, 61 M. 206.
Louisville &c. R. Co. v. Thomas, 1 Miss. Dec. 317.
Bedford v. Louisville &c. R. Co., 65 M. 385, 4 So. 121.
New Orleans &c. R. Co. v. Bourgeois, 66 M. 3, 5 So. 629, 14 Am. St. 534.

Inapplicable in cases of suits by persons standing in relation of contract with carriers.
Chicago &c. R. Co. v. Trotter, 60 M. 442.
See Yazoo &c. R. Co. v. Humphrey, 83 M. 721, 36 So. 154.

Railroad. Injury to passenger. Negligence. Presumption.
Mobile &c. R. Co. v. Holt, 62 M. 170.

Railroads. Presumption of negligence.
Mobile &c. R. Co. v. Gray, 62 M. 383.
Vicksburg &c. R. Co. v. Hamilton, 62 M. 503.
Louisville &c. R. Co. v. Smith, 67 M. 15, 7 So. 212.
Kansas City &c. R. Co. v. Doggett, 67 M. 250, 7 So. 278.
Louisville &c. R. Co. v. Natchez &c. R. Co., 67 M. 399, 7 So. 350.
Short v. New Orleans &c. R. Co., 69 M. 848, 13 So. 826.

Running of trains. Negligence. Burden of proof.
Louisville &c. R. Co. v. Conroy, 63 M. 562, 56 Am. Rep. 835.
Illinois Cent. R. Co. v. Weathersby, 63 M. 581.

Railroad. Injury. Death. Presumption.
Vicksburg &c. R. Co. v. Phillips, 64 M. 693, 2 So. 537.

Sections 1065–1070.

Only statutory provisions on subject of right of way for telegraph lines.
Southern Tel. Co. v. Alabama &c. R. Co., 1 Miss. Dec. 489.

Sections 1073–1075.

Foreign insurance companies. Regulations.
Cowan v. London Assurance Corporation, 73 M. 321, 19 So. 298, 55 Am. St. 535.

Sections 1073, 1085, 1087.

Foreign insurance company. Agent. Service.
Continental Insurance Co. v. Mansfield, 45 M. 311.
Statham v. New York Life Ins. Co., 45 M. 581.
Sadler v. Mobile Life Ins. Co., 60 M. 391.

Sections 1085, 1086.

Regulation of foreign corporations. Constitutionality.
Moses v. State, 65 M. 56, 3 So. 140.

Section 1097.

License to retail is license to sell in any quantity. Petition.
Hearn v. Brogan, 64 M. 334, 1 So. 246.

Of such character that violation might be charged in statutory language.
Sullivan v. State, 67 M. 346, 7 So. 275.

Section 1098.

Sale of wine from grapes grown by manufacturer, in any quantity not less than pint, lawful without tax or license. Operation and effect of Laws 1882, pp. 10, 11, chaps. 6, 7.
Whittington v. State, 62 M. 796.

Section 1099.

Liquor license. Requisites of petition.
McGee v. Beall, 63 M. 455.

Sections 1100, 1103.

License to sell liquors. Residence of applicant.
Loeb v. Duncan, 63 M. 89.
McCreary v. Rhodes, 63 M. 308.
McGee v. Beall, 63 M. 455.
Rogers v. Hahn, 63 M. 578.
Collins v. Barrier, 64 M. 21, 8 So. 164.

Section 1100.

Granting of liquor license, not obligatory.
Perkins v. Ledbetter, 68 M. 327, 8 So. 507.

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Section 1102.

Applies to retailing as regulated by Code 1880, ch. 39. Municipal tax.
Moneghan v. Cannon, 2 Miss. Dec. 509.

Section 1103.

Liquor license. Petition against grant.
Corbett v. Duncan, 63 M. 84.

Ordinance declaring intention not to issue, within certain period, any license to sell liquors. Certiorari.
Lexington v. Sargent, 64 M. 621, 1 So. 903.

Liquor license. Withdrawal from counter petition.
Perkins v. Henderson, 68 M. 631, 9 So. 897.

Section 1104.

Liquors. Bond of retailer. Breach. Sale to intoxicated person.
McWilliams v. Phillips, 51 M. 196.
Albrecht v. State, 62 M. 516.
O'Flinn v. State, 66 M. 7, 5 So. 390.
Schullherr v. State, 68 M. 227, 8 So. 328.

Section 1105.

Liquor license. Absence of specification of particular house. Validity.
Goforth v. State, 60 M. 756.

Section 1108.

Debt for liquor, sold by other than licensed retailer. Deed of trust.
Sandford v. Starling &c. Co., 69 M. 204, 10 So. 449.

Section 1109.

Privilege tax upon retailers. Special remedy for collection.
State v. Piazza, 66 M. 426, 6 So. 316.

Debt for liquor, sold by other than licensed retailer. Deed of trust.
Sandford v. Starling &c. Co., 69 M. 204, 10 So. 449.

Privilege tax on liquor dealers. Mode of collection.
State v. Thibodeaux, 69 M. 92, 10 So. 58.
Thibodeaux v. State, 69 M. 683, 13 So. 352.

Intoxicating liquors. Retailer. Privilege tax. Assessment. Suit by revenue agent.
Clark v. Adams, 80 M. 219, 31 So. 746.

Section 1112.

Liquors. Unlawful retailing. Indictment. Burden of proof, &c.
Pond v. State, 47 M. 39.
Fairley v. State, 63 M. 333.
King v. State, 66 M. 502, 6 So. 188.
Pearson v. State, 66 M. 510, 6 So. 243.
Fahey v. State, 62 M. 402.
Ritcher v. State, 63 M. 304.
Sloan v. State, 65 M. 490, 4 So. 550.
Kohlbrunner v. State, 67 M. 368, 7 So. 288.

"Pint" stricken out and "gallon" inserted by Laws 1884, p. 18. Effect.
Whittington v. State, 62 M. 796.

Steward, of incorporated social club selling liquors to minor member, amenable as "person interested."
Nogales Club v. State, 69 M. 218, 10 So. 574.

Clerk's sale in violation of orders of non-consenting, unknowing, absent employer renders latter liable regardless of attempted rescission.
Teasdale v. State, 3 So. 245.

Section 1113.

Sale of liquors. Sunday. Drug store.
Elkin v. State, 63 M. 129.

Section 1114.

Indictment. Duplicity. "Vinous and spirituous liquors." Name of buyer.
Lea v. State, 64 M. 201, 1 So. 51.

Section 1115.

Sale of liquor to minor, Indian or drunkard.
Fahey v. State, 62 M. 402.
Ritcher v. State, 63 M. 304.
O'Flinn v. State, 66 M. 7, 5 So. 390.
Monaghan v. State, 66 M. 513, 6 So. 241.

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Section 1121.

Game of chance. Evidence. Billiards.
Wortham v. State, 59 M. 179.

Section 1124.

Negotiable notes. Defenses. Anti-commercial statute.
Harrison v. Pike, 48 M. 46.
Hibernian Bank v. Everman, 52 M. 500.
Hunt v. Shackleford, 55 M. 94.
Etheridge v. Gallagher, 55 M. 458.
Meggett v. Baum, 57 M. 22.
Savage v. Laclede Bank, 62 M. 586.
Brown v. Union Bank, 62 M. 754.
Union Nat. Bank v. Fraser, 63 M. 231.

Vendor of land. Assignment of lien.
Louisiana Nat. Bank v. Knapp, 61 M. 485.

Interposition of set-off as to remote indorser, against paper's subsequent holder, unauthorized.
Savage v. Laclede Bank, 62 M. 586.

Promissory note. Breach of warranty. Bona fide purchaser. Estoppel, &c.
Millsaps v. Merchants' &c. Bank, 69 M. 918, 13 So. 837.
Millsaps v. Merchants' &c. Bank, 71 M. 361, 13 So. 903.

Set-off. Judgment. Assignment.
Holly v. Cook, 70 M. 590, 13 So. 228.

Bond payable to bearer on condition, negotiable as at common law. Suit may be brought by bona fide holder in his own name.
Hart v. Taylor, 70 M. 655, 12 So. 553.

Section 1131.

Joint debtors. Partners. Judgment. Bar.
Hyman v. Stadler, 63 M. 362.

Section 1133.

Bill of exchange. Acceptance. Writing name across face.
Mechanics' Bank v. Yager, 62 M. 529.

Section 1134.

Bond of circuit clerk. Obligors. Joint and several liability.
Lewis v. State, 65 M. 468, 4 So. 429.

Joint and several liability. Partners.
Hyman v. Stadler, 63 M. 362.
Scharff v. Noble, 67 M. 143, 6 So. 843.

Section 1140.

Surety. Subrogation. Indorser of draft.
Yates v. Mead, 68 M. 787, 10 So. 75.

Benefits of Code 1880, § 998 extended to other joint execution debtors.
Taylor v. Alliance Trust Co., 71 M. 694, 15 So. 121.

Section 1141.

Usury. Cases.
Perkins v. Coleman, 51 M. 298.
Warren County v. Klein, 51 M. 807.
Thompson v. Matthews, 56 M. 368.
Chaffe v. Wilson, 59 M. 42.
O'Connor v. Clopton, 60 M. 349.
Meaders v. Gray, 60 M. 400, 45 Am. Rep. 414.
Tishimingo Savings Inst. v. Buchanan, 60 M. 496.
Polkinghorne v. Hendricks, 61 M. 366.
Wheeless v. Williams, 62 M. 369, 52 Am. Rep. 190.
Boyd v. Warmack, 62 M. 536.
Union Nat. Bank v. Fraser, 63 M. 231.
Warmack v. Boyd, 63 M. 488.
Rozelle v. Dickerson, 63 M. 538.
Clay County v. Chickasaw County, 64 M. 534, 1 So. 753.
Henderson v. Hartman, 65 M. 466, 4 So. 549.
Pass v. New England Security Co., 66 M. 365, 6 So. 239.
Smythe v. Allen, 67 M. 146, 6 So. 627.
Bass v. Patterson, 68 M. 310, 8 So. 849, 24 Am. St. 279.

Executed usurious contract. Only excess, over legal interest, recoverable.
Dickerson v. Thomas, 67 M. 777, 7 So. 503.

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Usury. Conflict of laws.
Commercial Bank v. Auze, 74 M. 609, 21 So. 754.

Prospective in operation. Complainant seeking to enjoin sale under deed of trust given to secure usurious debt need only tender principal.
Purvis v. Woodward, 78 M. 922, 29 So. 917.

Legal rate of interest. Usury. Repealed, Laws 1886, p. 35.
National Mut. B. & L. Assn. v. Pinkston, 79 M. 468, 30 So. 692, 31 So. 834.

Sections 1167, 1168.

Do not affect right of wife suing for alimony, permanent and pendente lite, to decree for latter.
Verner v. Verner, 62 M. 260.
See McFarland v. McFarland, 64 M. 449, 1 So. 508.

Section 1167.

Removed common-law disabilities of married women. Estate in entirety.
Gresham v. King, 65 M. 387, 4 So. 120.

Wife's contract, on sufficient consideration, relinquishing all claim to husband's estate, enforceable.
Wyatt v. Wyatt, 81 M. 219, 32 So. 317.

Rendered inoperative Code 1871, § 2323, providing that no act of husband should affect wife's interest in land.
Southworth v. Brownlow, 84 M. 405, 36 So. 522.

Section 1169.

Right of wife to devise her homestead.
Kelly v. Alred, 65 M. 495, 4 So. 551.

Section 1170.

Abolished estates by curtesy.
Hill v. Nash, 73 M. 849, 19 So. 707.

Sections 1172.

Right of husband to renounce will of wife.
Kelly v. Alred, 65 M. 495, 4 So. 551.

Sections 1173, 1174.

Husband and wife. Right of former to claim distributive share of estate of latter.
Kelly v. Alred, 65 M. 495, 4 So. 551.

Section 1175.

Devise of homestead by husband. Widow, owning separate estate, &c.
Osburn v. Sims, 62 M. 429.

Section 1177.

Husband as agent of wife. Scope of agency.
Ross v. Baldwin, 65 M. 570, 5 So. 111.

Transfers between husband and wife. Lease.
Chaffe v. Benoit, 60 M. 34.

Debts of wife. Plantation supplies.
Porter v. Staten, 64 M. 421, 1 So. 487.

"Means" of wife used in business.
Leinkauf v. Barnes, 66 M. 207, 5 So. 402.

Section 1178.

Transfers between husband and wife. Lease.
Chaffe v. Benoit, 60 M. 34.
Henry v. Dillard, 68 M. 536, 9 So. 298.

Husband and wife: transfers between. Rights of third persons.
Black v. Robinson, 62 M. 68.
Gregory v. Dodds, 60 M. 549.
Montgomery v. Scott, 61 M. 409.
Arnold v. Elkins, 67 M. 675, 7 So. 521.

Conveyance from wife to husband, not filed for record, invalid as to third persons.
Watkins v. Duvall, 69 M. 364, 13 So. 727.

Declares invalid all unrecorded transfers between husband and wife. Prospective in operation.
Walker v. Marseilles, 70 M. 283, 12 So. 211.

Preference in assignment by husband, in favor of wife. "In perfect good faith."
Perry-Mason Shoe Co. v. Sykes, 72 M. 390, 17 So. 171, 28 L. R. A. 277.

Section 1180.

Lease of land by agent, verbally authorized.
Lobdell v. Mason, 71 M. 937, 15 So. 44.

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Section 1188.

Parol lease of land.
McCroy v. Toney, 66 M. 233, 5 So. 392, 2 L. R. A. 847.

Adverse possession. Transfer of title.
Davis v. Davis, 68 M. 478, 10 So. 70.

Lease of land by agent, verbally authorized.
Lobdell v. Mason, 71 M. 937, 15 So. 44.

Section 1190.

Prohibits estates in fee tail.
Dibrell v. Carlisle, 48 M. 691.

Estates tail. Limitations over to heirs of donor.
Middlesex Banking Co. v. Field, 84 M. 646, 37 So. 139.

Section 1192.

Landlord and tenant. Void attornment of latter.
Tucker v. Whitehead, 58 M. 762.

Section 1195.

Quitclaim deed. After-acquired title.
Chapman v. Sims, 53 M. 154.
McInnis v. Pickett, 65 M. 354, 3 So. 660.
Bramlett v. Roberts, 68 M. 325, 10 So. 56.

Estoppel of husband and heirs by joinder of former with wife in non-warranty conveyance of latter's lands. "Acquired."
Leflore County v. Allen, 80 M. 298, 31 So. 815.

Section 1197.

Conveyance of land to husband and wife to be construed to create estate in common, unless, &c. Prospective in operation.
Gresham v. King, 65 M. 387, 4 So. 120.
See Middlesex Banking Co. v. Field, 84 M. 646, 37 So. 139.

Section 1196.

Deed. Implied warranty. "Grant, bargain, and sell."
Cunningham v. Dillard, 71 M. 61, 13 So. 882.

Section 1203.

Limitations on failure of issue.
Caldwell v. Willis, 57 M. 555.
Busby v. Rhodes, 58 M. 237.
See Middlesex Banking Co. v. Field, 84 M. 646, 37 So. 139.

Section 1204.

Action by mortgagor, after condition broken, for damages to property.
Illinois Cent. R. Co. v. Hawkins, 65 M. 200, 3 So. 410.

Trust estate. Execution. Chancery.
Leigh v. Harrison, 69 M. 923, 11 So. 604, 18 L. R. A. 49.

Section 1206.

Mortgage. Satisfaction on record.
Stadeker v. Jones, 52 M. 729.

Section 1209.

Deed. Absence of signature fatal to validity.
Jones v. Gurlee, 61 M. 423.

Section 1210.

Trust deed. Personalty. Record. Removal.
Elson v. Barrier, 56 M. 394.
Ladd v. Alcorn, 71 M. 395, 14 So. 266.

Section 1212.

Deed. Registration. Notice.
Taylor v. Lowenstein, 50 M. 278.
Claiborne v. Holmes, 51 M. 146.
Humphries v. Merrill, 52 M. 92.
Loughridge v. Bowland, 52 M. 546.
Mississippi Valley Co. v. Chicago &c. R. Co., 58 M. 846.
Nugent v. Priebatsch, 61 M. 402.
Chaffe v. Halpin, 62 M. 1.
Hiller v. Jones, 66 M. 636, 6 So. 465.

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Section 1213.
Deed, filed for record, notice of actual contents.
Mangold v. Barlow, 61 M. 593, 48 Am. Rep. 84.

Section 1221.
Deed. Record. Execution provable by one witness.
Morris v. Rucks, 62 M. 76.

Section 1235.
Estoppel of husband and heirs by joinder of former with wife in non-warranty conveyance of latter's lands. "Acquired."
Leflore County v. Allen, 80 M. 298, 31 So. 815.

Section 1244.
Exemption. Personal property. Title of debtor.
Steen v. Hamblett, 66 M. 112, 5 So. 524.

Exemption. Wages. "Laborer." Head of family.
Williams v. Link, 64 M. 641, 1 So. 907.
McLarty v. Tibbs, 69 M. 357, 12 So. 557.
Chandler v. White, 71 M. 161, 14 So. 454.
Chapman v. Berry, 73 M. 437, 18 So. 918.

Sections 1248, 1249.
Homestead exemptions in country.
Campbell v. Adair, 45 M. 170.
Thoms v. Thoms, 45 M. 263.
Lesley v. Phipps, 49 M. 790.
Edmonson v. Meacham, 50 M. 34.
Irwin v. Lewis, 50 M. 363.
Partee v. Stewart, 50 M. 717.
Hand v. Winn, 52 M. 784.
Letchford v. Cary, 52 M. 791.
Hill v. Franklin, 54 M. 632.
McGrath v. Sinclair, 55 M. 89.
King v. Sturges, 56 M. 606.
Henderson v. Still, 61 M. 391.
Jones v. Hart, 62 M. 13.
Rutherford v. Jamieson, 65 M. 219, 3 So. 412.
Parisot v. Tucker, 65 M. 439, 4 So. 113.
Berry v. Dobson, 68 M. 483, 10 So. 45.

Homestead exemptions in city.
State Nat. Bank v. Lyon, 52 M. 181.
Acker v. Trueland, 56 M. 30.
Baldwin v. Tillery, 62 M. 378.
Bernheim v. Andrews, 65 M. 28, 3 So. 75.
Parisot v. Tucker, 65 M. 439, 4 So. 113.
Rhyne v. Guevara, 67 M. 139, 6 So. 736.
Fitzgerald v. Rees, 67 M. 473, 7 So. 341.
Powers v. Sample, 69 M. 67, 12 So. 337.
Pearson v. Miller, 71 M. 379, 14 So. 731, 42 Am. St. 470.

Section 1251.
Allotment of homestead. Execution sale.
Rhyne v. Guevara, 67 M. 139, 6 So. 736.
Richie v. Duke, 70 M. 66, 12 So. 208.

Section 1255.
Landlord and tenant. Exemption.
Patrick v. Rembert, 55 M. 87.
Ransom v. Duff, 60 M. 901.

Amended, Laws 1884, p. 84. Exempt property. Remedy of seller of personalty.
Frank &c. Co. v. Robinson, 65 M. 162, 3 So. 253.
See Graham v. Thornton, 9 So. 292.

Section 1256.
Homestead. Abandonment. Intent.
Moore v. Bradford, 70 M. 70, 11 So. 63.

Section 1258.
Homestead. Joinder of wife in conveyance.
Campbell v. Adair, 45 M. 170.
Thompson v. Tillotson, 56 M. 36.
Billingsley v. Niblett, 56 M. 537.
Majors v. Majors, 58 M. 806.

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Wilson v. Gray, 59 M. 525.
Smith v. Sherck, 60 M. 491.
Cummings v. Busby, 62 M. 195.
Duncan v. Moore, 67 M. 136, 7 So. 221.

Homestead. Conveyance. Failure of wife to sign. Growing trees.
McKenzie v. Shows, 70 M. 388, 12 So. 336, 35 Am. St. 654.

Section 1260.

Homestead. Joinder of husband in conveyance.
Kelly v. Alred, 65 M. 495, 4 So. 551.

Section 1261.

Life insurance. Exemption of proceeds.
Yale v. McLaurin, 66 M. 461, 5 So. 689.
Rice v. Smith, 72 M. 42, 16 So. 417.
Jones v. Patty, 73 M. 179, 18 So. 794.

Life insurance policy. Ownership. Pledge.
Jackson Bank v. Williams, 77 M. 398, 26 So. 965, 78 Am. St. 530.

Section 1266.

Nuncupative will. Land.
Sadler v. Sadler, 60 M. 151.
Honea v. Page, 60 M. 248.

Section 1267.

Nuncupative will. Time within which to prove.
George v. Greer, 53 M. 495.

Section 1270.

Descent and distribution.
Wilson v. Cox, 49 M. 538.
Carroll v. McPike, 53 M. 569.
Partee v. Kortrecht, 54 M. 666.
Speed v. Kelly, 59 M. 47.
Jahier v. Rascoe, 62 M. 699.

Section 1277.

Homestead. Descent.
Norris v. Callahan, 59 M. 140.
Osburn v. Sims, 62 M. 429.
Parisot v. Tucker, 65 M. 439, 4 So. 113.

Descent of homestead to husband.
Kelly v. Alred, 65 M. 495, 4 So. 551.

Descent of exempt property. "Children."
Peeler v. Peeler, 68 M. 141, 8 So. 392.

Section 1279.

Year's support for widow. Residence.
Barber v. Ellis, 68 M. 172, 8 So. 390.

Section 1292.

Parol lease of land.
McCroy v. Toney, 66 M. 233, 5 So. 392, 2 L. R. A. 847.

Statute of frauds. Lease. Agency.
Lobdell v. Mason, 71 M. 937, 15 So. 44.

Section 1293.

Sale. Reservation of title. Recording.
Tufts v. Stone, 70 M. 54, 11 So. 792.

Section 1294.

Fraudulent conveyances. Subsequent creditors.
Hilliard v. Cagle, 46 M. 309.
Prestidge v. Cooper, 54 M. 74.
Cook v. Ligon, 54 M. 652.
Thompson v. Hester, 55 M. 656.

Section 1295.

Fraudulent sale of personal property.
Smith v. Sparkman, 55 M. 649.
Stonewall v. Peek, 63 M. 342.
Frank v. Eltringham, 65 M. 281, 3 So. 655.

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Section 1296.

Trust in land. Deed. Mortgage.
Miazza v. Yerger, 53 M. 135.
Klein v. McNamara, 54 M. 90.
Cameron v. Lewis, 56 M. 76.
Barkwell v. Swan, 69 M. 907, 13 So. 809.

Section 1297.

Death of husband. Support of family. Applies only to persons resident in this state.
Barber v. Ellis, 68 M. 172, 8 So. 390.

Section 1298.

Contracts during infancy: mode of ratification.
Edmonds v. Mister, 58 M. 765.

Section 1299.

Statute of frauds. Trusts. Parol evidence to prove absolute deed, mortgage.
Heirmann v. Stricklin, 60 M. 234.
See Fultz v. Peterson, 78 M. 128, 28 So. 829.

Statute of frauds. Deed absolute, as mortgage. Parol evidence. Fraud. "Parted with possession."
Culp v. Wooten, 79 M. 503, 31 So. 1.

Section 1300.

Sign. "Business." Principal and agent. Partnership. Apparent ownership. Scope of statute.
Gumbel v. Koon, 59 M. 264.
Quin v. Myles, 59 M. 375.

Statute of frauds. Business sign.
Schoolfield v. Wilkings, 60 M. 238.

Property used in business. Sign.
Shannon v. Blum, 60 M. 828.

Business conducted by one for secret benefit of another. Sign, not conclusive as to ownership of goods.
Wolf v. Kahn, 62 M. 814.

Partnership. Business sign.
Loeb v. Morton, 63 M. 280.
Yale v. Taylor Manufacturing Co., 63 M. 598.
See Willis v. Memphis Grocery Co., 19 So. 101.

Trust deed. Creditors. Priority.
Dodds v. Pratt, 64 M. 123, 8 So. 167.

Sign. Right of creditors.
Paine v. Hall Safe &c. Co., 64 M. 175, 1 So. 56.
Van Range Co. v. Allen, 7 So. 499.

Fraudulent sale. Rescission.
Frank &c. Co. v. Robinson, 65 M. 162, 3 So. 253.

Trader. Possession of property.
Hall's Self-Feeding Cotton Gin Co. v. Berg, 65 M. 184, 3 So. 372.

Sign. Business owned by wife and managed by husband.
Hamblet v. Steen, 65 M. 474, 4 So. 431.
Evans v. Henley, 66 M. 148, 5 So. 522.
See Steen v. Hamblet, 66 M. 112, 5 So. 524.

Business sign. Property in possession of debtor without consent of owner.
Adams v. Berg, 67 M. 234, 7 So. 225.

Seller as clerk. Absence of sign.
Buffkin v. Lyon, 68 M. 255, 10 So. 38.
Carberry v. Burns, 68 M. 573, 9 So. 290.

Sign. "And Co." Controversy between creditors.
Kinney v. Paine, 68 M. 258, 8 So. 747.

Trader. "Conducting business."
Harris v. Robson, 68 M. 506, 9 So. 829.

Sale to trader. Title reserved. Assignment.
Gayden v. Tufts, 68 M. 691, 10 So. 53.

Transaction of business without sign. Silent partner.
Howe v. Kerr, 69 M. 311, 13 So. 730.

Conditional sale. Recorded instrument.
Tufts v. Stone, 70 M. 54, 11 So. 792.

Trader. Business sign, &c. Constitutionality.
Brister v. Joseph Bowling Co., 29 So. 830.

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Section 1301.

Lien of landlord. Judgment. Priority.
Okolona Savings Inst. v. Trice, 60 M. 262.

Landlord and tenant. Lien.
Fitzgerald v. Fowlkes, 60 M. 270.
Roberts v. Sims, 64 M. 597, 2 So. 72.

Attachment for rent.
Cohn v. Smith, 64 M. 816, 2 So. 244.
Gross v. Bartley, 66 M. 116, 5 So. 225.
Newman v. Bank of Greenville, 66 M. 323, 5 So. 753.

Landlord. Lien. Supplies for preceding year.
Lumbley v. Gilruth, 65 M. 23, 3 So. 77.

Landlord's lien. Debt. Supplies.
Ellis v. Jones, 70 M. 60, 11 So. 566.
Trimble v. Durham, 70 M. 295, 12 So. 207.
Paxton v. Kennedy, 70 M. 865, 12 So. 546.

Sections 1301, 1304, 1305.

Rent. Grounds for attachment.
Henry v. Davis, 60 M. 212.

Section 1302.

Landlord. Attachment for rent. Affidavit.
Hollingsworth v. Willis, 64 M. 152, 8 So. 170.
Cassedy v. Mayer, 64 M. 356, 1 So. 510.

Right of mayor as ex officio justice to issue attachment for rent.
Smith v. Jones, 65 M. 276, 3 So. 740.

Attachment for rent. Defective affidavit. Jurisdiction. Amendment.
Pate v. Shannon, 69 M. 372, 13 So. 729.

Attachment for rent unmaintainable by assignee of note given by tenant.
Gross v. Bartley, 66 M. 116, 5 So. 225.

Section 1304.

Attachment for rent. Replevin. Avowry and justification. Writ before rent due. Affidavit of landlord.
Dudley v. Harvey, 59 M. 34.

Section 1305.

Landlord and tenant. Attachment for rent. Venue.
Honea v. Page, 60 M. 248.

Section 1306.

Seizure for rent after removal. Contents of affidavit.
Henry v. Davis, 60 M. 212.

Section 1308.

Attachment for rent. Privity of estate. Assignee, &c.
Patty v. Bogle, 59 M. 491.

Section 1310.

Rent. Distress. Irregularities.
Dudley v. Harvey, 59 M. 34.

Section 1311.

Attachment for rent. Double damages.
Kyzer v. Middleton, 61 M. 360.

Attachment. No rent due. Damages.
Hawkins v. James, 69 M. 361, 13 So. 813.

Section 1312.

Attachment for rent. Replevin.
McKinney v. Green, 52 M. 70.
Maxey v. White, 53 M. 80.
Kendrick v. Watkins, 54 M. 495.
Hauser v. Robbins, 61 M. 551.

Section 1315.

Replevin. Damages.
Kyzer v. Middleton, 61 M. 360.

Section 1317.

Attachment for rent. Privity of estate. Assignee, &c.
Patty v. Bogle, 59 M. 491.

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Attachment for rent. Claim. Replevin.
Paine v. Hall Safe &c. Co., 64 M. 175, 1 So. 56.
Attachment for rent. Claimant's remedy.
Watkins v. Duvall, 69 M. 364, 13 So. 727.

Section 1318.
Attachment. Rent. Claimant. Notice.
Pierce v. Watkins, 74 M. 394, 21 So. 148.

Section 1323.
Action for use and occupation.
Newberg v. Cowan, 62 M. 570.

Section 1324.
Attachment for rent unmaintainable by assignee of note given by tenant.
Gross v. Bartley, 66 M. 116, 5 So. 225.

Section 1327.
Rent. Right of personal representative of deceased, &c.
Tucker v. Whitehead, 58 M. 762.
Johns v. McDaniel, 60 M. 486.

Section 1333.
Tenant holding over: proceedings against.
Usher v. Moss, 50 M. 208.

Section 1342.
Tenant holding over. Stay of proceedings.
Flanneken v. Wright, 64 M. 217, 1 So. 157.

Section 1343.
Ejecting tenant. Appeal.
Flanneken v. Wright, 64 M. 217, 1 So. 157.
Tenant holding over. Appeal. Rents.
Paxton v. Oliver, 70 M. 570, 12 So. 799.

Sections 1345, 1347, 1348.
Forms have reference respectively to Code 1880, §§ 1301, 1304, 1305.
Henry v. Davis, 60 M. 212.

Section 1360.
Laborer's lien assignable.
Kerr v. Moore, 54 M. 286.
Lien on crop. What "labor" includes.
Lumbley v. Thomas, 65 M. 97, 5 So. 823.
Lien of overseer.
Weise v. Rutland, 71 M. 933, 15 So. 38.

Section 1362.
Lien of landlord. Purchaser of agricultural products. Applied by Laws 1884, p. 80, to Code 1880, § 1301.
Cohn v. Smith, 64 M. 816, 2 So. 244.

Sections 1363, 1364.
Laborer's lien. Remedy to enforce.
Kerr v. Moore, 54 M. 286.
Hartsell v. Myers, 57 M. 135.
May v. Williams, 61 M. 125, 48 Am. Rep. 80.

Section 1369.
Proceeding to enforce laborer's lien, both in rem and in personam.
May v. Williams, 61 M. 125.

Section 1371.
Employer's lien. Appeal. Certiorari.
Burrow v. Sanders, 57 M. 211.

Section 1378.
Mechanic's lien. Cases.
Myers v. Buchanan, 46 M. 397.
Sharpe v. Spengler, 48 M. 360.
Kerr v. Moore, 54 M. 286.
Baum v. Covert, 62 M. 113.
Priebatsch v. Church, 66 M. 345, 6 So. 237.
Kingsland &c. Co. v. Massey, 69 M. 296, 13 So. 269.

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Public buildings contracted for by board of supervisors, not subject to lien.
Panola County v. Gillen, 59 M. 198.

Lien on steamboat. Electric light plant as "material furnished."
Mulholland v. Thompson-Houston Electric Light Co., 66 M. 339, 6 So. 211.

Section 1379.

Mechanic's lien. Effect of contract.
Herrin v. Warren, 61 M. 509.

Section 1381.

Public buildings contracted for by board of supervisors, not subject to lien.
Panola County v. Gillen, 59 M. 198.

Subcontractor not entitled to lien.
Rivers v. Mulholland, 62 M. 766.

Section 1384.

Mechanic's lien: how and when enforced.
Christian v. O'Neal, 46 M. 669.
Dinkins v. Bowers, 49 M. 219.
Ehlers v. Elder, 51 M. 495.
O'Leary v. Burns, 53 M. 171.
Duff v. Snider, 54 M. 245.
Noble v. Terrell, 64 M. 830, 2 So. 14.

Section 1385.

Mechanic's lien. Necessary parties to proceeding to enforce.
Buntyn v. Shippers' Compress Co., 63 M. 94.

Section 1391.

Mechanic's lien. Venue of suit to enforce.
Watkins v. Owens, 47 M. 593.

Mechanic's lien. Waiver.
Priebatsch v. Third Baptist Church, 66 M. 345, 6 So. 237.

Section 1402.

Supreme Court. Return day.
New York Hospital v. Knox, 57 M. 600.
Childs v. Rowell, 58 M. 512.

Section 1404.

Supersedeas. Issuance by supreme judge.
Wilson v. Pugh, 61 M. 449.
Buckley v. George, 71 M. 580, 15 So. 46.

Section 1405.

Jurisdiction of Supreme Court.
Planters' Ins. Co. v. Cramer, 47 M. 200.
Brown v. Carraway, 47 M. 668.
Hall v. Wells, 54 M. 289, 306.

Section 1407.

Supreme Court. Appeal. Bond.
Hudson v. Gray, 58 M. 589, 591.

Supreme Court. Defective appeals. Amendment.
State v. Coahoma County, 64 M. 358, 1 So. 501.

Section 1412.

Supreme Court. Jurisdiction.
State v. Booker, 61 M. 16.

Section 1415.

Rendition of judgment by Supreme Court on reversal, following failure of trial court to render same.
Rigby v. Hardy, 4 So. 114.

Section 1416.

Supreme Court. Record to be sent up. Dismissal.
Martin v. Phelps, 53 M. 134.

Section 1421.

Supreme Court. Supersedeas. Discharge.
Hanon v. Weil, 69 M. 476, 13 So. 878.
Alabama &c. R. Co. v. Bolding, 69 M. 264, 13 So. 846.

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Section 1422.

Injunction. Supreme Court.
Johnson v. Devens, 60 M. 200.

Supreme Court practice. Damages on affirmance.
Tigner v. McGehee, 60 M. 242.
Clark v. German Security Bank, 61 M. 614.

Section 1433.

Supreme Court. Objections not made below.
Ex parte Phillips, 57 M. 357.
Spivey v. State, 58 M. 743.
Fleming v. State, 60 M. 434.

Applicability. Errors cured by verdict.
Whitten v. State, 61 M. 717.
Hambrick v. Dent, 70 M. 59, 11 So. 608.

Supreme Court. Record. Omission. Presumption.
Hunt v. State, 61 M. 577.
Bryant v. State, 65 M. 435, 4 So. 343.

Judgment against one of several defendants. Failure to except.
Duncan v. Scott County, 64 M. 38, 8 So. 204. Inadvertence in application to civil case?—ED.

Failure to prove venue. Objection.
Lea v. State, 64 M. 201, 1 So. 51.
See James v. State, 77 M. 370, 26 So. 929, 78 Am. St. 527.

Variance as to name of person assaulted, unobjected to in trial court, will not be considered on appeal.
Wood v. State, 64 M. 761, 2 So. 247.

Criminal law. Indictment. Record.
Lusk v. State, 64 M. 845, 2 So. 256.

Criminal law. Errors. Special exception.
Bryant v. State, 65 M. 435, 4 So. 343.

Criminal prosecution. Arraignment. Objection. Distinguished from Code 1871, § 2884 (Code 1857, § 7, art. 3, p. 573).
Arbuckle v. State, 80 M. 15, 31 So. 437.

Section 1440.

Appeal. Parties who may avail of error committed.
Tabler v. Mitchell, 62 M. 437.
Terry v. Curd &c. Mfg. Co., 66 M. 394, 6 So. 229.
Burks v. Burks, 66 M. 494, 6 So. 244.

Section 1442.

Costs of appeal. Mandate.
Mobile &c. R. Co. v. Watly, 69 M. 475, 12 So. 558.

Section 1483.

Circuit judges. Interchange. Presumption.
Fletcher v. State, 60 M. 675.
Guice v. State, 60 M. 714.

Section 1493.

Circuit court. Jurisdiction.
Planters' Ins. Co. v. Cramer, 47 M. 200.
Askew v. Askew, 49 M. 301.
Poston v. Mhoon, 49 M. 620.
Bell v. West Point, 51 M. 262.
Martin v. Harding, 52 M. 694.
Martin v. Harvey, 54 M. 685.
Fenn v. Harrington, 54 M. 733.
Spratley v. Kitchens, 55 M. 578.
Hall v. Lyon, 59 M. 218.
Montross v. State, 61 M. 429.
McLendon v. Pass, 66 M. 110, 5 So. 234.
Bernheimer v. Martin, 66 M. 486, 6 So. 326.

Section 1496.

Adoption does not confer heirship without specification of such intent.
Beaver v. Crump, 76 M. 34, 23 So. 432.

Section 1497.

Judgment below. Jurisdiction. Costs.
Fenn v. Harrington, 54 M. 733.

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Shackelford v. Levy, 63 M. 125.
Kansas City &c. R. Co. v. Mabry, 67 M. 131, 7 So. 224.

Section 1499.
Railroad company suable in any county in which any part of its line may be.
Louisville &c. R. Co. v. Saucier, 1 So. 511.

Section 1502.
Attachment. Undue influence, prejudice, &c. Change of venue.
Baum v. Burns, 66 M. 124, 5 So. 697.

Section 1507.
Stock law. Damage. Assignment.
Hunt v. Shackleford, 55 M. 94.
Lowenburg v. Jones, 56 M. 688, 31 Am. Rep. 379.
Chicago &c. R. Co. v. Packwood, 59 M. 280.
Pollard v. Thomas, 61 M. 150.
Montgomery v. Handy, 63 M. 43.

Section 1510.
Death of minor. Suit for damages. Mother.
Chicago &c. R. Co. v. Doyle, 60 M. 977.
Natchez &c. R. Co. v. Cook, 63 M. 38.
Amos v. Mobile &c. R. Co., 63 M. 509.

Injury causing death. Action by administrator.
Vicksburg &c. R. Co. v. Phillips, 64 M. 693, 2 So. 537.

Action for death. Compromise by widow.
Natchez Cotton Mills v. Mullins, 67 M. 672, 7 So. 542.

Action for death. Damages.
Mobile &c. R. Co. v. Watly, 69 M. 145, 13 So. 825.
Illinois Cent. R. Co. v. Pendergrass, 69 M. 425, 12 So. 954.

Wrongful death. Action by next of kin.
McVey v. Illinois Cent. R. Co., 73 M. 487, 19 So. 209.

Negligence. Actions for injuries causing death. Statutory utterance of Lord Campbell's act. See Code 1892, § 663.
Bussey v. Gulf &c. R. Co., 79 M. 597, 31 So. 212.

Section 1511.
Misjoinder. Failure to object.
Stauffer v. Garrison, 61 M. 67.
Walker v. Hall, 66 M. 390, 6 So. 318.
Jackson v. Dunbar, 68 M. 288, 10 So. 38.

Section 1515.
Death of one or more plaintiffs.
American Burial Case Co. v. Shaughnessy, 59 M. 398.

Section 1519.
Justice of peace. Service on partners. Certiorari to circuit court.
Tabler v. Bryant, 62 M. 350.

Section 1522.
Action: when begun. Limitations.
Kelly v. Harrison, 69 M. 856, 12 So. 261.

Section 1525.
Summons issued during term of court, returnable instanter, nullity.
Joiner v. Delta Bank, 71 M. 382, 14 So. 464.
See Sheffield v. Friedberg, 84 M. 188, 36 So. 242.

Section 1527.
Scire facias. Return, "Executed by reading," discloses invalid service.
Thomas v. State, 62 M. 184.

Section 1528.
Garnishment. Service. Return.
Benson v. Holloway, 59 M. 358.
Semmes v. Patterson, 65 M. 6, 3 So. 35.

Scire facias. Return "Executed" imports legal service.
Thomas v. State, 62 M. 184.

Garnishment. Service. Return.
Faison v. Wolf, 63 M. 24.

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Section 1529.
Railroads. Service on agent.
Alabama &c. R. Co. v. Bolding, 69 M. 255, 13 So. 846.

Section 1530.
Infant. Service of process.
McIlvoy v. Alsop, 45 M. 365.
Erwin v. Carson, 54 M. 282.
Moody v. McDuff, 58 M. 751.
See Gibson v. Currier, 83 M. 234, 35 So. 315, 102 Am. St. 442.

Section 1531.
Suit against lunatic. Service.
Potts v. Hines, 57 M. 735.
Acquisition of jurisdiction of infant by personal service.
Jones v. Mathews, 4 So. 547.

Section 1533.
Service of process. Return may be questioned.
Meyer v. Whitehead, 62 M. 387.

Section 1534.
Summons. What record must show.
McNair v. Kaiser, 62 M. 783.

Section 1535.
Scire facias. Return "Executed by reading," discloses invalid service.
Thomas v. State, 62 M. 184.

Section 1536.
Abolishes particular forms of actions. Assumpsit to recover value of trees cut, &c.
Evans v. Miller, 58 M. 120, 38 Am. Rep. 313n.
Declaration containing "sufficient matter of substance for the court to proceed upon the merits," is good. Form of action, immaterial.
Paxton v. Archer, 2 Miss. Dec. 611.

Section 1540.
Note sued on, and filed with declaration becomes part of record.
Hamer v. Rigby, 65 M. 41, 3 So. 137.
See Tierney v. Duffy, 59 M. 364.
Chicago &c. R. Co. v. Provine, 61 M. 288.

Section 1542.
Res adjudicata. Action on bond.
State v. Morrison, 60 M. 74.

Section 1548.
Pleas in bar pleaded together.
State v. Morgan, 59 M. 349.
Bennett v. Holloway, 55 M. 211.

Section 1550.
Pleading. Special matter.
New Orleans &c. R. Co. v. Wallace, 50 M. 244.
Tittle v. Bonner, 53 M. 578.
Fitch v. Asher, 56 M. 571.
Grayson v. Brooks, 64 M. 410, 1 So. 482.

Section 1551.
Set-off. Materiality.
Myers v. Estill, 47 M. 4.
Casper v. Thigpen, 48 M. 635.
Jones v. Howard, 53 M. 707.
Raymond v. State, 54 M. 562, 28 Am. Rep. 382.
Hunt v. Shackleford, 55 M. 94.
Cobb v. Wilson, 60 M. 343.
Denney v. Wheelwright, 60 M. 733.
Peyton v. Planters, 63 M. 410.
Peine v. Lewis, 64 M. 96, 8 So. 207.
Wilkinson v. Searles, 70 M. 392, 13 So. 470.

Section 1552.
Mutual dealings. Death.
Boles v. Hyman, 57 M. 330.

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Section 1556.
Pleading. Several replications.
Hartford Fire Ins. Co. v. Green, 52 M. 332.

Section 1560.
Action against railroad company for death of minor. Declaration. General demurrer.
Lynn v. Illinois Cent. R. Co., 63 M. 157.

Section 1562.
Demurrer to first plea confessed and demurrer to second, sustained. Judgment, not awardable to plaintiff.
State v. Morgan, 59 M. 349.

Section 1567.
Special demurrer abolished.
State v. Swinney, 60 M. 39, 45 Am. Rep. 405n.
Polkinghorne v. Hendricks, 61 M. 366.
See Merchants' &c. Bank v. Calmes, 82 M. 603, 35 So. 161.

Section 1571.
Notice of nonjoinder.
Walker v. Hall, 66 M. 390, 6 So. 318.

Section 1575.
Judgment of court of special jurisdiction: how pleaded.
State v. Bowen, 45 M. 347.

Section 1577.
Replevin by trustee in deed of trust. Failure to include costs in amount paid into court.
Collier v. White, 67 M. 133, 6 So. 618.

Section 1578.
Replevin. Affidavit by defendant. Request that claimant be summoned. Judgment by default against plaintiff.
Ettringham v. Handy, 60 M. 334.

Section 1581.
Pleadings. Amendment.
Marx v. Trussell, 50 M. 498.
Parisot v. Helm, 52 M. 617.
State v. Powers, 52 M. 198.
Bloom v. McGrath, 53 M. 249.
Dyer v. Brittan, 53 M. 270.
McCleary v. Anthony, 54 M. 708.
Duff v. Snyder, 54 M. 245.
Rodgers v. Kline, 56 M. 808, 31 Am. Rep. 389.
Allen v. Standifer, 57 M. 612.
Green v. Boon, 57 M. 617.
Metcalf v. McCutchen, 60 M. 145.
Noble v. Terrell, 64 M. 830, 2 So. 14.
Garman v. State, 66 M. 196, 5 So. 385.
Hirsch v. Shafter, 66 M. 439, 6 So. 229.

Section 1585.
Extends Code 1880, § 1767, to justices' courts.
Smith v. Newlon, 62 M. 230.

Section 1595.
Execution for costs. Abuse of process.
Hall v. Moore, 70 M. 75, 11 So. 655.

Section 1602.
Claim originating during lifetime of deceased. Owner incompetent witness to establish, &c.
Boylan v. Holt, 47 M. 277.
Hedges v. Aydelott, 46 M. 99.
Witherspoon v. Blewett, 47 M. 570.
Reinhardt v. Evans, 48 M. 250.
Buckingham v. Walker, 48 M. 609.
Sweatman v. Parker, 49 M. 19.
Wood v. Stafford, 50 M. 370.
Jacks v. Bridewell, 51 M. 881.
Rushing v. Rushing, 52 M. 329.
O'Leary v. Burns, 53 M. 171.
Green v. Mizelle, 54 M. 220.

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Buckingham v. Wesson, 54 M. 526.
Rothschild v. Hatch, 54 M. 554.
Strickland v. Hudson, 55 M. 235.
Love v. Stone, 56 M. 449.
McCutchen v. Rice, 56 M. 455.
Jones v. Sherman, 56 M. 559.
Gordon v. McEachin, 57 M. 834.
Fennell v. McGowan, 58 M. 261.
Bookout v. Shannon, 59 M. 378.
Harper v. Lacey, 62 M. 5.
Combs v. Black, 62 M. 831.
Snell v. Fewell, 64 M. 655, 1 So. 908.
Cole v. Gardner, 67 M. 670, 7 So. 500.
Jackson v. Smith, 68 M. 53, 8 So. 258.
McDonald v. McDonald, 68 M. 689, 9 So. 896.
Hewlett v. George, 68 M. 703, 9 So. 885, 13 L. R. A. 682.
Johnson v. Martin, 68 M. 330, 8 So. 847.
Jones v. Warren, 70 M. 227, 14 So. 25.
Cockrell v. Mitchell, 15 So. 41.

Section 1603.

Accused as competent witness.
Howze v. State, 59 M. 230.
Williamson v. State, 59 M. 235.
Owens v. State, 59 M. 547.
Thomas v. State, 61 M. 60.
Buckley v. State, 62 M. 705.
Hill v. State, 64 M. 431, 1 So. 494.
Bell v. State, 66 M. 192, 5 So. 389.
Woods v. State, 67 M. 575, 7 So. 495.

Imperative in forbidding any and all comment, friendly or otherwise, upon failure of accused to testify.
Eubanks v. State, 7 So. 462.
Yarbrough v. State, 70 M. 593, 12 So. 551.

Section 1604.

Failure of defendant husband to introduce wife cannot be discussed by counsel or considered by jury.
Johnson v. State, 63 M. 313.
Cole v. State, 75 M. 142, 21 So. 706.

Section 1607.

Witness. Credibility. Conviction.
Helm v. State, 67 M. 562, 7 So. 487.
See Lewis v. State, 85 M. 35, 37 So. 497.

Section 1611.

Admissions of divorce defendant as competent evidence.
Wright v. Wright, 2 Miss. Dec. 667.

Sections 1614, 1620.

Depositions. Authentication. Objections.
Ratliff v. Thomson, 61 M. 71.

Section 1622.

Evidence. Records from other states.
Johnson v. Martin, 68 M. 330, 8 So. 847.
See Hope v. Hurt, 59 M. 174.

Section 1623.

Receipt for fees paid for entry of land as homestead, not certificate.
Westbrook v. Block, 2 Miss. Dec. 720.

Section 1626.

Burden of overcoming counter affidavit, on plaintiff.
Bailey v. Henry, 1 Miss. Dec. 565.

Section 1627.

Suit on account. Affidavit.
Reinhardt v. Carter, 49 M. 315.
Bloom v. McGrath, 53 M. 249.
Bower v. Henshaw, 53 M. 345.
Tichenor v. Woodburn, 54 M. 589.
Rose v. Watson, 54 M. 673.

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Ware v. McQuillan, 54 M. 703.
Aaron v. Podesta, 60 M. 82.

Affidavit. Actions ex delicto.
Illinois Cent. R. Co. v. Andrews, 61 M. 474.

Suit on verified open account. Counter affidavit. Affirmative defense in confession and avoidance.
Aaron v. Keller, 2 Miss. Dec. 710.

Sworn account. Right to judgment. Waiver.
Covel v. Smith, 68 M. 296, 8 So. 850.

Section 1628.

Certificate as to missing papers.
Tigner v. McGehee, 60 M. 185.

Section 1629.

Certificate or attestation of person purporting to be public officer of another state, to be deemed prima facie evidence of his official character here.
Hope v. Hurt, 59 M. 174.

Section 1633.

Objection that foreign administrator has not complied with statute authorizing him to bring suit here. Verification.
Hope v. Hurt, 59 M. 174.

Section 1634.

Partnership denied only by special plea.
Hirsch v. Shafer, 66 M. 439, 6 So. 229.

Section 1636.

Protest of note. Evidence.
Stiles v. Inman, 55 M. 469.

Section 1643.

Circuit court. Right, on motion, to strike bill of discovery, vague, uncertain, and filed without leave.
Northrop v. Flaig, 57 M. 754.

Section 1649.

Tax title. Deed as evidence.
Hardie v. Chrisman, 60 M. 671.

Section 1661.

Does not apply to member of regular panel for week.
Louisville &c. R. Co. v. Mask, 64 M. 738, 2 So. 360.

Qualification of jurors. Constitution 1890.
Nail v. State, 70 M. 32, 11 So. 793.

Sections 1680, 1681.

Selection of jurors. Constitutionality.
Cooper v. State, 59 M. 267.

Section 1693.

Three juries not prohibited.
Barnes v. State, 60 M. 355.

Section 1703.

Process. Return. Default judgment.
McAdory v. Turner, 56 M. 666.
Betts v. Baxter, 58 M. 329.
Heirmann v. Stricklin, 60 M. 234.
Moore v. Hoskins, 66 M. 496, 6 So. 500.

Sections 1705, 1706.

Motion for new trial improper, in case tried without jury. Bill of exceptions.
Quinn v. Myles, 59 M. 375.

Section 1707.

Judgment, in case taken under advisement, cannot be rendered in vacation.
Wilson v. Rodewald, 61 M. 228.

Section 1714.

Instructions: how given. Criminal law.
Watkins v. State, 60 M. 323.
Edwards v. State, 47 M. 581.

Instructions: when part of the record.
Peden v. State, 61 M. 267.

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Instructions: when to be given.
Bangs v. State, 61 M. 363.
Forbids instructions on weight of evidence.
French v. Sale, 63 M. 386.
Instruction on weight of evidence.
Kearney v. State, 68 M. 233, 8 So. 292.
Instructions, unavailable on appeal, unless they bear clerk's signature and notation as to disposition.
Hansford v. State, 11 So. 106.

Section 1715.
Bill of exceptions.
Vicksburg &c. R. Co. v. Ragsdale, 51 M. 447.
Kimball v. Mitchell, 57 M. 632.
Bridges v. Kuykendall, 58 M. 827.
Giegolt v. Joor, 60 M. 817.
Dreyfus v. Cage, 62 M. 605.
Helm v. State, 66 M. 537, 6 So. 322.
Illinois Cent. R. Co. v. Bowles, 71 M. 994, 16 So. 235.

Section 1717.
Bill of exceptions, signed by attorneys.
Dreyfus v. Cage, 62 M. 605.

Section 1718.
Bill of exceptions. Presentation.
Allen v. Levy, 59 M. 613.
Jones v. Williams, 62 M. 183.
Saucier v. Amari, 63 M. 276.
Illinois Cent. R. Co. v. Bowles, 71 M. 994, 16 So. 235.

Section 1719.
Two verdicts for defendant set aside for errors of law and two, upon facts. Fifth new trial can be granted to plaintiff for error of law, only.
Parham v. Stith, 61 M. 199.

Section 1720.
New trials: granting, assignable for error.
Rankin v. Johnson, 56 M. 125.

Sections 1723, 1724, 1725.
Trial by referees.
Anding v. Levy, 60 M. 487.

Section 1724.
Trial by referee. Accounts.
Marlar v. State, 62 M. 677.

Section 1727.
What cured by verdict.
Phillips v. Cooper, 50 M. 722.
Grubbs v. Collins, 54 M. 485.
Noble v. Terrell, 64 M. 830, 2 So. 14.
Trustees v. Gilman, 55 M. 148.
Hamer v. Rigby, 65 M. 41, 3 So. 137.
Dismissal. Verdict. Jeofails.
American Burial Case Co. v. Shaughnessey, 59 M. 398.
Jeofails. Action on assigned claim.
Beck v. Rosser, 68 M. 72, 8 So. 259.

Section 1728.
Judgment on confession.
James v. Woods, 65 M. 528, 5 So. 106.

Section 1730.
Judgment: when final.
Boykin v. State, 50 M. 375.

Sections 1732, 1733.
Replevin. Failure to seize. Judgment.
Krosmopolski v. Paxton, 58 M. 581.
Lynch v. Thompson, 61 M. 354.
Dreyfus v. Cage, 62 M. 733.

Section 1734.
Confession of judgment.
Black v. Pattison, 61 M. 599.

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Section 1736.
Judgment. Enrollment. Partnership. Individual property.
Hughes v. Lacock, 63 M. 112.

Sections 1736, 1737.
Judgment. Lien. Priority.
Scharff v. Zimmerman, 60 M. 760.

Section 1737.
Lien of enrolled judgment.
Mitchell v. Wood. 47 M. 231.
Foute v. Fairman, 48 M. 536.
Dabney v. Stackhouse, 49 M. 513.
Cayce v. Stovall, 50 M. 396.
Cooper v. Turnage, 52 M. 431.
Cahn v. Person, 56 M. 360.
Johnson v. Edde, 58 M. 664.
Virden v. Robinson, 59 M. 28.
Clark v. Duke, 59 M. 575.
Nugent v. Priebatsch, 61 M. 402.

Section 1738.
Priority of judgments in foreign county, determined by time of filing abstracts in such county.
Hamilton-Brown Shoe Co. v. Walker, 67 M. 197, 6 So. 713.

Section 1743.
Execution issued seventeen days before return term not void, although received by sheriff ten days after issuance.
Skinner v. Wilson, 61 M. 90.

Section 1744.
Death of one defendant. Execution.
Faison v. Johnson, 70 M. 214, 12 So. 152.

Section 1747.
Foreign administrator: when not entitled to enforce judgment here.
Jackson v. Scanland, 65 M. 481, 4 So. 552.

Section 1751.
Execution after death of defendant.
Alsop v. Cowan, 66 M. 451, 6 So. 208.

Section 1753.
Amended, Laws 1890, p. 66. Enrolled judgment. Execution to another county.
Smith v. Mixon, 73 M. 581, 19 So. 295.

Section 1754.
Action upon indemnifying bond.
Gibson v. Lock, 58 M. 298.
Brinker v. Leinkauf, 64 M. 236, 1 So. 170.
Smokey v. Peters-Calhoun Co., 66 M. 471, 5 So. 632, 14 Am. St. 575.
Marshall v. Stewart, 67 M. 494, 7 So. 284.

Section 1758.
Railroad cross-ties are not "perishable goods."
Goodman v. Moss, 64 M. 303, 1 So. 241.

Sections 1762, 1763.
Process. Duty of officer to examine judgment roll.
Hall v. Meridian, 56 M. 674.
Johnson v. Edde, 58 M. 664.
Aaron v. Warner, 62 M. 370.

Section 1765.
Judgment against attorney garnishee because of his having for collection judgment in favor of defendant, error.
Mayes v. Phillips, 60 M. 547.

Section 1767.
Execution. Return nulla bona. Suggestion of fraudulent conveyance. Issue. Jurisdiction of justice of peace. Constitutionality.
Smith v. Newlon, 62 M. 230.

Execution. Return nulla bona. Affidavit of fraudulent conveyance. Instruction. Bona fide purchaser. Intent of grantor.
Ladnier v. Ladnier, 64 M. 368, 1 So. 492.

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Section 1770.

Levy of execution on undivided interest in personalty without taking actual possession. Claim of co-owner.

Willis v. Loeb, 59 M. 169.

See Blumenfield v. Seward, 71 M. 342, 14 So. 442.

Section 1774.

Claim of property levied on under execution.

Higdon v. Vaughn, 58 M. 572.
Bowen v. Bonner, 45 M. 10.
Willis v. Loeb, 59 M. 169.
Clark v. Clinton, 61 M. 337.
Andrews v. McLeod, 66 M. 348.

Attachment: any number of claims to property may be interposed.

Dreyfus v. Mayor, 69 M. 282, 12 So. 267.

Distress. Claimant's affidavit.

Watkins v. Duval, 69 M. 364, 13 So. 727.

Attachment for rent. Claim of third person. Sale of property. "Expensive to keep or perishable."

Weis v. Basket, 71 M. 771, 15 So. 659.

Trust deed on personalty. Levy of execution after condition broken. Claim of beneficiary.

Trice v. Walker, 71 M. 968, 15 So. 787.

See Thomas v. Shell, 76 M. 556, 24 So. 876.

Sections 1774, 1775.

Execution. Claim of property levied on. Second levy, not abandonment of first.

Davis v. Netterville, 68 M. 429, 10 So. 32.

Section 1777.

Claimant's issue. Burden of proof on plaintiff in execution. Costs.

Clarke v. Parker, 63 M. 549.

Section 1814.

Claims against estate of deceased: clerk may allow and register.

Allen v. Hillman, 69 M. 225, 13 So. 871.

Section 1822.

"Register of claims," intended to show all claims proved and allowed against any estate, &c.

Allen v. Hillman, 69 M. 225, 13 So. 871.

Section 1829.

Chancery. Jurisdiction.

Smith v. Everett, 50 M. 575.
Bank of Mississippi v. Duncan, 52 M. 740.
Georgia Pac. R. Co. v. Brooks, 66 M. 583, 6 So. 467.
Wathen v. Glass, 54 M. 382.
Robinson v. Burritt, 66 M. 356, 6 So. 206.
Eyrich v. Capital State Bank, 67 M. 60, 16 So. 615.

Section 1831.

Chancery jurisdiction. Injunction against taxes.

Anderson v. Ingersoll, 62 M. 73.
Meridian v. Ragsdale, 67 M. 86, 6 So. 619.
Ball v. Meridian, 67 M. 91, 6 So. 645.

Chancery jurisdiction. Privilege tax.

Portwood v. Baskett, 64 M. 213, 1 So. 105.

Section 1832.

Chancery. Attachment against nonresidents.

Statham v. New York Life Ins. Co., 45 M. 581, 7 Am. Rep. 737.
Allen v. Montgomery, 48 M. 101.
Robinson v. Burritt, 66 M. 356, 6 So. 206.

Garnishment. Municipal corporation.

Dollman v. Moore, 70 M. 267, 12 So. 23.

Section 1833.

Clouds on title. Removal. Chancery jurisdiction.

Carlisle v. Tindall, 49 M. 229.
Irwin v. Lewis, 50 M. 363.
Handy v. Noonan, 51 M. 166.
Griffin v. Harrison, 52 M. 824.
Shivers v. Simmons, 54 M. 520, 28 Am. Rep. 372n.

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Wofford v. Bailey, 57 M. 239.
Cook v. Friley, 61 M. 1.
Nugent v. Powell, 63 M. 99.
Fox v. Coon, 64 M. 465, 1 So. 629.
People's Bank v. West, 67 M. 729, 7 So. 513, 8 L. R. A. 727n.
Gambrell Lumber Co. v. Saratoga Lumber Co., 87 M. 773, 40 So. 485.

Section 1834.
Cancery jurisdiction. Matters pertaining to estates.
Bank of Mississippi v. Duncan, 52 M. 740.
Brunini v. Pera, 54 M. 649.
Buie v. Pollock, 55 M. 309.
Pate v. Taylor, 66 M. 97, 5 So. 515.
Whitfield v. Evans, 56 M. 488.
Clopton v. Haughton, 57 M. 787.
Turner v. Turner, 57 M. 775.
Hunt v. Potter, 58 M. 96.
Brasfield v. French, 59 M. 632.

Sections 1843–1845.
Chancery jurisdiction. Vacating fraudulent conveyances.
Citizens' Mut. Ins. Co. v. Ligon, 59 M. 305.
Hierman v. Stricklin, 60 M. 234.
Frank v. Robinson, 65 M. 162, 3 So. 253.
Citizens' Bank v. Buddig, 65 M. 284, 4 So. 94.
McBride v. State, 70 M. 716, 12 So. 699.

Sections 1843, 1845.
Filing of bill to set aside fraudulent conveyance, fixes lien. Priority over attachment antecedently levied.
People's Bank v. West, 67 M. 729, 7 So. 513, 8 L. R. A. 727n.

Section 1847.
Chancery. Venue of suits.
Oliver v. Loye, 59 M. 320.
Nugent v. Powell, 63 M. 99.
Pate v. Taylor, 66 M. 97, 5 So. 515.

Section 1855.
Affidavit by attorney for publication for nonresident defendant in chancery. Form of oath.
Burks v. Burks, 66 M. 494, 6 So. 244.

Section 1857.
Judgment. Service in another state.
Cudabac v. Strong, 67 M. 705, 7 So. 543.

Section 1873.
Chancery. Answer.
McAllister v. Clopton, 51 M. 257.
Mead v. Day, 54 M. 58.
Davis v. Lumpkin, 57 M. 506.
Salmon v. Smith, 58 M. 399.
Colbert v. Henley, 64 M. 374, 1 So. 631.
Carpenter v. Edwards, 64 M. 595, 1 So. 764.

Section 1874.
Waiver of verified answer. Effect.
Holmes v. Lemon, 15 So. 141.

Section 1875.
Chancery. Answer. Cross-bill.
Gilmer v. Felhour, 45 M. 627.
Bishop v. Miller, 48 M. 364.
Burford v. Kersey, 48 M. 642.
Griswold v. Simmons, 50 M. 137.
Thomason v. Neely, 50 M. 310.
Jacks v. Bridewell, 51 M. 881.
Buckingham v. Wesson, 54 M. 526.
Belcher v. Wilkinson, 54 M. 677.
Dewees v. Dewees, 55 M. 315.

Section 1880.
Chancery. Filing plea.
Smith v. Cozart, 45 M. 698.

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Section 1881.
Chancery. Amendment.
Walker v. Brown, 45 M. 615.
Hanserd v. Gray, 46 M. 75.
Smith v. Harrington, 49 M. 771.
Kimbrough v. Curtis, 50 M. 117.
Miazza v. Yerger, 53 M. 135.
Ward v. Whitfield, 64 M. 754, 2 So. 493.
Jeffries v. Jeffries, 66 M. 216, 5 So. 112.

Directs allowance of all amendments necessary to present fairly merits of cause. Interference by Supreme Court. Abuse of discretion.
Robertson v. Duncan, 2 Miss. Dec. 148.

Section 1883.
Chancery. Amendment. Notice.
Albright v. Flowers, 52 M. 246.
Davis v. Davis, 62 M. 818.
See Canton Cotton Warehouse Co. v. Potts, 68 M. 637, 10 So. 59.

Section 1886.
Chancery pleadings. Multifariousness.
Columbus Banking &c. Co. v. Humphries, 64 M. 258, 1 So. 232.
Georgia Pac. R. Co. v. Brooks, 66 M. 583, 6 So. 467.
Foster v. Jones, 17 So. 893.

Section 1887.
Amendment of bill after sustaining of demurrer for multifariousness.
Foster v. Jones, 17 So. 893.

Section 1889.
Chancery. When defendant shall plead, answer, or demur.
Pittman v. McClellan, 55 M. 299.
Yost v. Alderson, 58 M. 40.
Peterson v. Kittredge, 65 M. 33, 3 So. 65, 5 So. 284.
Jones v. Hervey, 66 M. 99, 5 So. 517.

Setting aside pro confesso. Presumption, on appeal, of showing as to "good cause."
Bryant v. Rosenbaum, 62 M. 191.

Section 1890.
Chancery pleading. Additional time.
Memphis &c. R. Co. v. Owens, 60 M. 227.

Section 1892.
Averments. Specific denials.
Colbert v. Henley, 64 M. 374, 1 So. 631.

Allegation of bill, not denied.
Bennett v. Chaffe, 69 M. 279, 13 So. 731.

Section 1893.
Chancery. Answer. Waiver.
Hart v. Bloomfield, 66 M. 100, 5 So. 620.

Section 1897.
Receivers. New bond.
Smith v. Harrington, 49 M. 771.

Section 1902.
Decree. Refunding bond. Void sale.
Carter v. Brandy, 71 M. 240, 15 So. 790.

Section 1914.
Injunction. Dissolution.
Hiller v. Cotten, 54 M. 551.
Carraway v. Odeneal, 56 M. 223.
Adams v. Kyzer, 61 M. 407.

Notice to complainant of motion to dissolve injunction.
Strong v. Harrison, 62 M. 61.

Section 1915.
Injunction. Dissolution.
O'Conner v. Starke, 59 M. 481.

Section 1917.
Injunction. Dissolution. Effect.
Maury v. Smith, 46 M. 81.

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Bass v. Nelms, 56 M. 502.
Strong v. Harrison, 62 M. 61.

Section 1918.
Injunction. Damages. Appeal.
Burns v. Dreyfus, 69 M. 211, 11 So. 107, 30 Am. St. 539.

Section 1919.
Decree dissolving injunction and awarding damages, interlocutory decree. Appeal.
Wilson v. Pugh, 61 M. 449.

Does not change rule that action cannot be maintained on injunction bond until final determination of case.
Goodbar v. Dunn, 61 M. 624.

Injunction. Decree of dissolution. Damages. Action on bond.
Davis v. Hart, 66 M. 642, 6 So. 318.

Injunction. Interlocutory decree. Damages. Appeal.
Armstrong v. Fusz, 16 So. 532.

Section 1933.
Account ordered in vacation.
Gaines v. Coney, 51 M. 323.

Section 1934.
Chancery. Proceedings without notice.
Griswold v. Simmons, 50 M. 137.
Brooks v. Robinson, 54 M. 272.

Section 1935.
Decree in personam. Foreclosure.
Weir v. Field, 67 M. 292, 7 So. 355.

Section 1941.
When depositions may be taken in chancery.
Hart v. Bloomfield, 66 M. 100, 5 So. 620.

Section 1943.
Interrogatories for party. When filed.
McLean v. Letchford, 60 M. 169.

Section 1945.
Chancery. Oral testimony.
Ogden v. Guice, 56 M. 330.

Section 1949.
Chancery. Two witnesses. Rule modified.
Jacks v. Bridewell, 51 M. 881.
Waller v. Shannon, 53 M. 500.
Toulme v. Clark, 64 M. 471, 1 So. 624.
Snell v. Fewell, 64 M. 655, 1 So. 908.

Answer. Evidence. Two witnesses.
Kyle v. Rhodes, 71 M. 487, 15 So. 40.

Jurat by agent not professing any special knowledge of facts stated in bill, insufficient.
Holmes v. Lemon, 15 So. 141.

Sections 1950, 1951.
Oral testimony in chancery courts. Notice. Code 1892, § 1764.
Dickerson v. Askew, 82 M. 436, 34 So. 157.

Section 1955.
Decree. Rights of infant saved.
Sledge v. Boone, 57 M. 222.
Enochs v. Harrelson, 57 M. 465.
Mayo v. Clancy, 57 M. 674.
McLemore v. Chicago &c. R. Co., 58 M. 514.
Vaughn v. Hudson, 59 M. 421.
Johns v. Harper, 61 M. 142.

Section 1961.
Wills. Contest. Construction.
Schlottmen v. Hoffman, 73 M. 188, 18 So. 893, 55 Am. St. 527.

Section 1969.
Will. Probate. Evidence.
Tucker v. Whitehead, 59 M. 594.

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Section 1970.

Proponent of alleged will, to cite all who have availed of provisions, by filing caveat against probate.

Tucker v. Whitehead, 59 M. 594.

Sections 1976, 1978.

Conditions precedent to right of foreign executor to maintain ejectment here.

Sims v. Hodges, 65 M. 211, 3 So. 457.

Section 1981.

Applies to executor or administrator with will annexed.

Ellis v. Witty, 63 M. 117.

Section 1983.

Domestic qualification of foreign executor condition precedent to right to necessary possession of realty.

Sims v. Hodges, 65 M. 211, 3 So. 457.

Section 1984.

Directions of will to be followed.

Jelks v. Barrett, 52 M. 315.
Buckingham v. Wesson, 54 M. 526.
Standifer v. Grantham, 62 M. 412.
Columbus Banking &c. Co. v. Humphries, 64 M. 258, 1 So. 232.

Power confided to executor virtute officii executable by administrator c. t. a.

Cohea v. Johnson, 69 M. 46, 13 So. 40.

Section 1993.

Jurisdiction in administration.

Rea v. Englessing, 56 M. 463.
Temples v. Cain, 60 M. 478.

Section 1995.

Does not apply to administrator with will annexed.

Ellis v. Witty, 63 M. 117.

Section 1998.

Administrator. Suit on bond of predecessor.

Weir v. Monahan, 67 M. 434, 7 So. 291.

Section 2025.

Liability of guardian's surety, is debt.

Savings B. & L. Ass'n v. Tartt, 81 M. 276, 32 So. 115.

Section 2026.

Probate and registration of claims. Account, on books of partnership, against deceased partner.

Jones v. Warren, 70 M. 227, 14 So. 25.

Sections 2026, 2028.

Claims against estate. Registration.

Nagle v. Ball, 71 M. 330, 13 So. 929.
Jones v. Bank of Carrollton, 71 M. 1023, 16 So. 344.
Cockrell v. Seasongood, 33 So. 76.

Section 2028.

Estate. Surplus. Sale of land.

Ales v. Plant, 61 M. 259.
Abbay v. Hill, 64 M. 340, 1 So. 484.

Estate. Claim against. Liability.

Harris v. Hutcheson, 65 M. 9, 3 So. 34.

Claims against estate of deceased to be registered, &c.

Allen v. Hillman, 69 M. 225, 13 So. 871.

Unpaid subscription to corporation. Registration of "claim" against estate of deceased subscriber.

Robinett v. Starling, 72 M. 652, 18 So. 421.

Section 2029.

Bill of review. Probated account.

Bell v. Faison, 53 M. 354.
Anderson v. Cameron, 63 M. 114.

Section 2047.

Estate. Sale of land. Registration.

Allen v. Hillman, 69 M. 225, 13 So. 871.

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Section 2052.
Void sale. Purchase money. Charge.
Weaver v. Norwood, 59 M. 665.

Section 2059.
Estate. Insolvency. Presentation of claims.
Greener v. Neal, 61 M. 204.

Section 2062.
Claims. Registration. Limitation.
Matthews v. Matthews, 66 M. 239, 6 So. 201.
Allen v. Hillman, 69 M. 225, 13 So. 871.

Section 2069.
Administrator's discharge. Presumption.
Barr v. Sullivan, 75 M. 536, 23 So. 772.

Section 2070.
Final accounts: hearing and adjudication.
Hines v. Noah, 52 M. 192.
Tell v. Styles, 60 M. 849.

Section 2075.
Proceeding to surcharge and falsify final account of executor. Sufficiency of evidence.
Stewart v. Buck, 2 Miss. Dec. 440.

Limits, by analogy, bill to annul decree in suit to recover legacy. Not extended by legacy's attempted recovery.
Brooks v. Spann, 63 M. 198.

Section 2076.
Distribution. Right to compel.
Eyrich v. Capital State Bank, 67 M. 60, 6 So. 615.

Sections 2078, 2079.
Death. Action by administrator.
Vicksburg &c. R. Co. v. Phillips, 64 M. 693, 2 So. 537.

Survival of actions. Instantaneous death.
Illinois Cent. R. Co. v. Pendergrass, 69 M. 425, 12 So. 954.

Section 2079.
Instantaneous death. Action for injuries causing same, unmaintainable by personal representative.
McVey v. Illinois Cent. R. Co., 73 M. 487, 19 So. 209.

Section 2080.
Death of wrongdoer. Damages.
Hewlett v. George, 68 M. 703, 9 So. 885.

Section 2086.
Suits against administrator.
Adams v. Williams, 57 M. 38.
Rosenthal v. Enevoldsen, 61 M. 532.

Administrator. Suit against. Limitation.
Anderson v. Newman, 60 M. 532.

Section 2091.
Foreign administrator. Suit here.
Hope v. Hurt, 59 M. 174.

Does not apply or have relation to realty.
Sims v. Hodges, 65 M. 211, 3 So. 457.

Foreign administrator. Right to enforce judgment here. Unauthorized execution. Subsequent qualification. Statute of limitations.
Jackson v. Scanland, 65 M. 481, 4 So. 552.
See Murphy v. Klein, 71 M. 908, 15 So. 658.

Section 2095.
Did not confer upon testatrix, power to designate husband as guardian of minor children.
Edwards v. Kelly, 83 M. 144, 35 So. 418.

Section 2096.
Guardian to accept and qualify.
Gregory v. Field, 63 M. 323.

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Section 2097.
Appointment of guardian by court.
Duke v. State, 57 M. 229.

Section 2098.
Bond and oath of guardian.
Klaus v. State, 54 M. 644.

Section 2099.
When guardian not entitled to ward.
McDowell v. Bonner, 62 M. 278.

Section 2101.
Removing guardian.
State v. Hull, 53 M. 626.
Fant v. McGowan, 57 M. 779.
McWilliams v. Norfleet, 60 M. 987.

Section 2103.
Guardian. Accounts. Exceeding income.
Boyd v. Hawkins, 60 M. 277.

Section 2105.
Surplus money of ward.
Boyd v. Hawkins, 60 M. 277.

Section 2107.
Limitations do not run against action on bond of guardian, for failure to deliver property, until final account and discharge.
Nunnery v. Day, 64 M. 457, 1 So. 636.
Bell v. Rudolph, 70 M. 234, 12 So. 153.
Dunn v. Clinghan, 93 M. 310, 47 So. 503.

Sections 2109, 2111.
Maintenance of ward.
Wiggle v. Owen, 45 M. 691.
Boyd v. Hawkins, 60 M. 277.
Darter v. Speirs, 61 M. 148.
Ex parte George, 63 M. 143.

Section 2112.
Guardian. Sale of ward's property.
West v. Robertson, 67 M. 213, 7 So. 224.

Section 2113.
Sale of land for benefit of ward. Failure to summon relatives. Validity of decree.
Fitzpatrick v. Beal, 62 M. 244.

Section 2114.
Applies only where ward holds as heir or devisee, jointly with others.
Fitzpatrick v. Beal, 62 M. 244.

Section 2117.
Guardian. Chancery clerk appointed.
Faust v. Murphy, 71 M. 120, 13 So. 862.
Guardian and ward. Chancery clerk as guardian.
Ames v. Williams, 72 M. 760, 17 So. 762.

Section 2120.
Guardian may sell land by order of court.
Saunders v. Mitchell, 61 M. 321.

Section 2128.
Suit by foreign guardian of lunatic, to obtain personal property held by resident guardian. Discretion of court.
Watt v. Allgood, 62 M. 38.

Section 2135.
Board of supervisors. Meetings. Minutes.
Brigins v. Chandler, 60 M. 862.
Corburn v. Crittenden, 62 M. 125.

Section 2142.
Board of supervisors. Minutes. Duty of clerk.
Beck v. Allen, 58 M. 143.

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Section 2144.
Boards of supervisors. Jurisdiction and powers.
Allgood v. Hill, 54 M. 666.
Paxton v. Baum, 59 M. 531.
Jefferson County v. Grafton, 74 M. 435, 21 So. 247, 60 Am. St. 516, 36 L. R. A. 798.

Section 2149.
Board of supervisors. Court-house.
Benton County v. Patrick, 54 M. 240.

Section 2150.
Boards of supervisors. Power to levy special tax. Const. 1869, art. 12, § 16. "Other necessary conveniences."
Beck v. Allen, 58 M. 143.

Sections 2153, 2154.
County taxes: when and how levied.
Gamble v. Witty, 55 M. 26.
McReady v. Lansdale, 58 M. 877.
Havard v. Day, 62 M. 748.

Section 2154.
Board of supervisors. Failure to levy taxes at prescribed time. Remedy.
Beck v. Allen, 58 M. 143.

Section 2158.
County funds: how appropriated.
Howe v. State, 53 M. 57.
Paxton v. Baum, 59 M. 531.

Section 2159.
Claims against county. Audit. Allowance.
Arthur v. Adam, 49 M. 404.
Howe v. State, 53 M. 57.
Beck v. Allen, 58 M. 143.
Honea v. Monroe County, 63 M. 171.
Clay County v. Chickasaw County, 64 M. 534, 1 So. 753.
Land v. Allen, 65 M. 455, 4 So. 117.

Section 2160.
Board of supervisors. Claims. Allowance, dollar for dollar.
Warren County v. Klein, 51 M. 807.
Howe v. State, 53 M. 57.
Limitation on rule that judgment of allowance by county board could not be collaterally impeached.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

Section 2168.
Requires clerk of supervisors to charge sheriff with amount of "jury-taxes and amercements, fines," &c. Not repugnant to Const. 1890, § 261.
State v. Stone, 69 M. 375, 11 So. 4.

Section 2172.
Imposes penalty on officer failing to report to clerk, money payable into county treasury. Not repugnant to Const. 1890, § 261.
State v. Stone, 69 M. 375, 11 So. 4.

Section 2173.
Clerk to credit to state school fund money received by treasurer. Annual report. Not repugnant to Const. 1890, § 261.
State v. Stone, 69 M. 375, 11 So. 4.

Section 2175.
Claims against county. Presentation. Allowance.
Lawrence County v. Brookhaven, 51 M. 68.
Taylor v. Marion County, 51 M. 731.
Klein v. Warren County, 51 M. 878.
Polk v. Tunica County, 52 M. 422.
State v. Banks, 66 M. 431, 6 So. 184.
Brabham v. Hinds County, 54 M. 363, 28 Am. Rep. 352.
Freeman v. Lee County, 66 M. 1, 5 So. 516.

Section 2176.
Board of supervisors. Employing counsel.
Marion County v. Taylor, 55 M. 184.

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Section 2177.
Supervisors. Illegal allowance. Liability.
Paxton v. Baum, 59 M. 531.

Section 2179.
Boards of supervisors. Contracts for public work. Code 1892, § 340.
Madison County v. Stewart, 74 M. 160, 20 So. 857.

Section 2190.
Justices of peace. Civil jurisdiction.
Shattuck v. Miller, 50 M. 386.
Ash v. Lee, 51 M. 101.
Jackson v. Whitfield, 51 M. 202.
Bell v. West Point, 51 M. 262.
State v. Luckey, 51 M. 528.
Martin v. Hardin, 52 M. 694.
Higgins v. Deloach, 54 M. 498.
Fenn v. Harrington, 54 M. 733.
Pittman v. Chrisman, 59 M. 124.
Ross v. Natchez &c. R. Co., 61 M. 12.
Griffin v. McDaniel, 63 M. 121.
Louisville &c. R. Co. v. McCollister, 66 M. 106, 5 So. 695.
McLendon v. Pass, 66 M. 110, 5 So. 234.
Bernheimer v. Martin, 66 M. 486, 6 So. 326.
Drysdale v. Biloxi Canning Co., 67 M. 534, 7 So. 541.

Justice of peace. Penal statute. Appeal.
Western Union Tel. Co. v. Sullivan, 70 M. 447, 12 So. 460.

Section 2191.
Jurisdiction of justice. Attachment. Non-resident.
Griggs v. Jesse French Piano Co., 70 M. 211, 14 So. 24.

Section 2193.
Justice of peace to keep "docket."
Hughston v. Cornish, 59 M. 372.

Section 2194.
Justice's court. Notice. Trial.
Rice v. Locke, 59 M. 189.
Goodbar v. Owen, 70 M. 840, 12 So. 556.

Section 2196.
Action on note. Filing copy.
Duncan v. Scott County, 64 M. 38, 8 So. 204.

Section 2200.
Execution. Levy by special appointee.
Spears v. Robinson, 71 M. 774, 15 So. 111.

Section 2205.
Set-off. What amount may be proved.
Swain v. Gilder, 61 M. 667.

Section 2211.
Justice's court. Sale of land. Transcript.
Hughston v. Cornish, 59 M. 372.
Dunlap v. Fant, 74 M. 197, 20 So. 874.

Section 2216.
Criminal law. Gaming. Jurisdiction of justice of peace.
Johnson v. State, 59 M. 543.

Jurisdiction of justices extends to all misdemeanors.
Sloan v. State, 65 M. 490, 4 So. 550.

Section 2217.
Justice of peace. Absence of affidavit. Judgment on appearance and confession only. no defense to subsequent prosecution.
Bigham v. State, 59 M. 529.

Section 2221.
Justice of the peace. Criminal cases. Disposition of felony.
Ex parte Burke, 58 M. 50.

Section 2227.
Justice's court. Execution. Claim.
Bernheimer v. Martin, 66 M. 486, 6 So. 326.

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Section 2230.
Justices of peace. Fines and penalties assessed. Report and payment. Not repugnant to Const. 1890, § 261.
State v. Stone, 69 M. 375, 11 So. 4.

Section 2241.
Appeal from justice of the peace. Transcript.
Hughston v. Cornish, 59 M. 372.

Section 2265.
Justice of peace. Trial in vacation. Waiver. Absence of parties.
Rice v. Locke, 59 M. 189.

Unlawful detainer before justice. Record showing rendition of judgment several days after return day. Presumption in Supreme Court.
Leavenworth v. Crittenden, 62 M. 573.

Continuance by operation of law of suits and proceedings "remaining undecided" at any term of court.
Moore v. Hoskins, 66 M. 496, 6 So. 500.

Sections 2267, 2272.
Circuit judge cannot appoint receiver in case pending in chancery court.
Alexander v. Manning, 58 M. 634.

Section 2276.
Only change made by Code 1892, § 926, one of regularity and method in financial administration.
Jones v. Lee County, 12 So. 341.

Section 2279.
Officers pro tempore.
Ex parte Lehman, 60 M. 967.

Section 2282.
Parol evidence is inadmissible to contradict minutes as to day of adjournment of court.
Jones v. Williams, 62 M. 183.
See Childress v. Carley, 92 M. 571, 46 So. 164.

Section 2286.
Summons issued during term of court, returnable instanter, not amendable.
Joiner v. Delta Bank, 71 M. 382, 14 So. 464.

Section 2290.
Process. Interested party not to serve.
Dyson v. Baker, 54 M. 24.

Section 2292.
Trial. Term of court. Extending.
Whitten v. State, 61 M. 717.
Smith v. State, 61 M. 754.
Helm v. State, 66 M. 537, 6 So. 322.

Section 2293.
Circuit court. Power to restore destroyed records. Retirement of presiding judge, no defense.
Welch v. Smith, 65 M. 394, 4 So. 340.
Miller v. Reynolds, 4 So. 341.

Section 2294.
Justice of peace may administer oath whenever necessary or proper in any proceeding, in any court, or under any law of state.
Cassedy v. Mayer, 64 M. 356, 1 So. 510.
See Johnson v. Walker, 86 M. 757, 39 So. 49, 109 Am. St. 733n, 1 L. R. A. (N. S.) 470.

Section 2295.
Form of oath by attorney for client.
Burks v. Burks, 66 M. 494, 6 So. 244.

Section 2305.
Bonds. Voluntary obligation.
Carothers v. Leigh, 60 M. 258.
Clark v. Clinton, 61 M. 337.
Forbes v. Navra, 63 M. 1.

Bond. Sufficiency. "Legal proceedings."
State v. Depeder, 65 M. 26, 3 So. 80.

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Section 2309.

Appeal lies from decision in election contest, rendered by circuit judge in vacation.
Perkins v. Carraway, 59 M. 222.

Denies right of appeal from judgment by consent or confession. Does not apply to case in justice's court.
James v. Woods, 65 M. 528, 5 So. 106.

Sections 2310, 2311.

Chancery. Order overruling demurrer to bill. Appeal during same term as matter of right.
McKee v. Coffee, 58 M. 653.

Section 2311.

Appeal from interlocutory order.
Holiman v. Dibrell, 57 M. 96.
Wilson v. Pugh, 61 M. 449.
O'Conner v. Starke, 59 M. 481.

Appeal. Decree in vacation.
Neel v. Neel, 61 M. 630.

Appeal. Interlocutory order.
Clay County v. Chickasaw County, 63 M. 289.
Ward v. Whitfield, 64 M. 754, 2 So. 493.

Appointment of receiver. Appeal.
Hanon v. Weil, 69 M. 476, 13 So. 878.

Appeal. Interlocutory decree. Supersedeas.
Buckley v. George, 71 M. 580, 15 So. 46.

Section 2312.

Habeas corpus. Appeal by city.
Ex parte Taylor, 58 M. 478, 38 Am. Rep. 336.

Section 2314.

Appeal before sentence, premature.
Lemly v. State, 69 M. 628, 12 So. 559.

Section 2317.

Petition for appeal from order overruling demurrer to bill, to be addressed to clerk.
McKee v. Coffee, 58 M. 653.

Section 2319.

Appeal. Joining in. Return day.
Weir v. Killian, 59 M. 520.

Section 2322.

Order overruling demurrer to bill in chancery. Approval of bond in open court as showing that appeal was taken during same term.
McKee v. Coffee, 58 M. 653.

Sections 2324, 2325.

Attachment. Appeal. Bond.
Pfiefer v. Hartman, 60 M. 505.

Section 2332.

Supreme Court. Appeal. Bond.
Hudson v. Gray, 58 M. 589.

Appeal bond. Several appellants.
Terry v. Curd &c. Mfg. Co., 66 M. 394, 6 So. 229.

Section 2333.

Appeal by state. Civil cases. Bond.
State v. Coahoma County, 64 M. 358, 1 So. 501.

Section 2334.

Appeal by executor. Bond: when required.
Hudson v. Gray, 58 M. 589, 591.

Section 2335.

Bond or affidavit for appeal.
Lum v. State, 66 M. 389, 5 So. 689.

Appeal. Jail fees. Bond.
Warren County v. Worrell, 67 M. 154, 6 So. 629.

Section 2339.

Criminal appellant, complying with Code 1880, § 2335, may be released on bail.
Lum v. State, 66 M. 389, 5 So. 689.

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Section 2341.
Bail after conviction: when proper.
Hill v. State, 64 M. 431, 1 So. 494.

Section 2344.
Appeal. Summons.
New York Hospital v. Knox, 57 M. 600.
Neel v. Neel, 61 M. 630.

Section 2351.
Supervisors. Assessment. Appeal.
Simmons v. Scott County, 68 M. 37, 8 So. 259.
See Jennings v. Coahoma County, 79 M. 523, 31 So. 107.

Section 2353.
Appeal from justice. Copy of record to be transmitted to clerk of circuit court.
Hughston v. Cornish, 59 M. 372.
Appeal to circuit court. Bond. Irregularity. Amendment.
Gaddis v. Palmer, 60 M. 758.
Leavenworth v. Crittenden, 62 M. 573.
James v. Woods, 65 M. 528, 5 So. 106.

Section 2354.
Replevin before justice of peace without jurisdiction. Dismissal of writ in circuit court.
Richardson v. Davis, 59 M. 15.
Appeal. Stare decisis.
Davis v. Holberg, 59 M. 362.
Appeal to circuit court. Damages.
Eaton v. Barnhill, 68 M. 305, 8 So. 849.
Appeal to circuit court. Trial. Dismissal. Supreme Court. Jurisdiction.
Wimbush v. Chenault, 58 M. 234.
Heggie v. Stone, 70 M. 39, 12 So. 253.
Ward v. Scott, 57 M. 826.
Goodbar v. Owen, 70 M. 840, 12 So. 556.
Davis v. Holberg, 59 M. 362.
Kiernan v. Germaine, 62 M. 75.
Western Union Tel. Co. v. Sullivan, 70 M. 447, 12 So. 460.
Callahan v. Newell, 61 M. 437.
Illinois Cent. R. Co. v. Andrews, 61 M. 474.

Section 2355.
Appeal to circuit court. Time.
Smith v. Boykin, 61 M. 110.

Sections 2355, 2356.
Appeal to circuit court. Default of appellant. Procedendo to justice. Forfeiture upon appeal bond.
Ex parte v. Caldwell, 62 M. 774.
Thomas v. State, 68 M. 91, 8 So. 647.

Section 2357.
Appeal from justice of the peace. Transcript.
Hughston v. Cornish, 59 M. 372.

Section 2360.
Appeal by defendant from decree of chancery court. Reversal. Liability for costs, of surety of complainant.
Martin v. Kelly, 59 M. 652.
Security for costs. Affidavit. Waiver.
Baggett v. Watson, 70 M. 64, 11 So. 679.

Section 2366.
Security for costs: when not required.
Albrecht v. State, 62 M. 516.

Section 2368.
Costs. "Pauper's oath."
Woods v. Davidson, 57 M. 206.

Sections 2368, 2369.
Poverty affidavit, answers for prepayment of costs and rule to give security for costs.
Eakin v. Gwin, 1 Miss. Dec. 30.

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Section 2374.
Costs discretionary in chancery.
Sledge v. Obenchain, 59 M. 616.

Section 2376.
Costs in action ex delicto.
Kansas City &c. R. v. Mabry, 67 M. 131, 7 So. 224.

Section 2384.
Appeal to circuit court. Costs.
Callahan v. Newell, 61 M. 437.

Section 2386.
Special provision for costs.
Clarke v. Parker, 63 M. 549.

Section 2412.
Arbitration and award. Judgment.
Hollingsworth v. Willis, 64 M. 152, 8 So. 170.

Section 2414.
Attachment: to what demands applicable.
Nethery v. Belden, 66 M. 490, 6 So. 464.
State v. Fortinberry, 54 M. 316.
Hambrick v. Wilkins, 65 M. 18, 3 So. 67, 7 Am. St. 631.

Section 2415.
Attachment. Grounds. Non-residence.
Morgan v. Nunes, 54 M. 308.

Attachment. Omits clause, "with intent to give an unfair preference," found in Code 1871, § 1420.
Eldridge v. Phillipson, 58 M. 270.

Attachment. Fraudulent contracting of debt.
Marqueze v. Sontheimer, 59 M. 430.
Hambrick v. Wilkins, 65 M. 18, 3 So. 67, 7 Am. St. 631.
Hughes v. Lake, 63 M. 552.

Attachment. Removal of property out of state.
Pickard v. Samuels, 64 M. 822, 2 So. 250.
Lowenstein v. Bew, 68 M. 265, 8 So. 674, 24 Am. St. 269.
Crow v. Lemon &c. Co., 69 M. 799, 11 So. 110.

Attachment. Removal of property without state. Intent.
Stephenson v. Sloan, 65 M. 407.

Attachment. Sufficiency of affidavit.
Carlisle v. Gunn, 68 M. 243, 8 So. 743.

Section 2418.
Attachment writ. How returnable. Jurisdiction.
Barnett v. Ring, 55 M. 97.
Smith v. Mulhern, 57 M. 591.
Armitage v. Rector, 62 M. 600.
Baum v. Burns, 66 M. 124, 5 So. 697.

Section 2421.
Attachment. Duplicate and alias writs.
Baum v. Burns, 66 M. 124, 5 So. 697.

Section 2422.
Writ, failing to notify garnishee to answer in writing, will not support default judgment against him.
Work &c. Co. v. Waggoner, 82 M. 591, 35 So. 338.

Sections 2422, 2423.
Attachment. Garnishment. Summons.
Semmes v. Patterson, 65 M. 6, 3 So. 35.

Section 2423.
Attachment writ. How served. Levy.
Boone v. McIntosh, 62 M. 744.
Scharff v. Chaffe, 68 M. 641, 9 So. 897.

Sections 2424, 2425.
Attachment. Levy on land. Summons.
People's Bank v. West, 67 M. 729, 7 So. 513, 8 L. R. A. 727n.
Drysdale v. Biloxi Canning Co., 67 M. 534, 7 So. 541.
Sherman v. Union Nat. Bank, 66 M. 648, 6 So. 501.

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Section 2426.
Writ of attachment returnable to circuit court. Levy by constable on land. Absence of indorsement by sheriff.
Spengler v. O'Shea, 65 M. 75, 3 So. 378.

Section 2428.
Attachment. Bond by defendant.
Forbes v. Navra, 63 M. 1.

Sections 2429–2432.
Attachment. Judgment for defendant. Damages.
Betancourt v. Maduel, 69 M. 839, 11 So. 111.

Section 2430.
Wrongful attachment. "Actual damages."
Marqueze v. Sontheimer, 59 M. 430.

Section 2432.
Attachment. Voluntary dismissal. Damages.
Dean v. Stephenson, 61 M. 175.

Section 2434.
Attachment. Separate issues. Plea. Waiver. Circuit court. Jurisdiction.
Bates v. Crow, 57 M. 676. Repealed, Laws 1884, p. 76; revived, Code 1892, § 172. —Ed.

Discharge of attachment by finding for defendant on plea in abatement. Release of property and garnishees.
Pfiefer v. Hartman, 60 M. 505.

Section 2435.
Attachment. Appeal. Preservation of lien.
Pfiefer v. Hartman, 60 M. 505.
Lowenstein v. Powell, 68 M. 73, 8 So. 269.

Section 2436.
Attachment. Judgment by default.
Terry v. Curd &c. Mfg. Co., 66 M. 394, 6 So. 229.

Section 2437.
Attachment. Non-resident. Publication.
Drysdale v. Biloxi Canning Co., 67 M. 534, 7 So. 541.

Section 2438.
Attachment. Non-resident. Personal judgment.
Cudabac v. Strong, 67 M. 705, 7 So. 543.

Section 2442.
Garnishment. Receipts after answer.
Columbus &c. Banking Co. v. Hirsh, 61 M. 74.

Sections 2442, 2443.
Garnishment. Service. Judgment by default.
Faison v. Wolf, 63 M. 24.

Section 2443.
Garnishment. Void return.
Acme Lumber Co. v. Frances Vandergrift Shoe Co., 70 M. 91, 11 So. 657.

Section 2444.
Garnishment. Time of answer.
Columbus &c. Banking Co. v. Hirsh, 61 M. 74.

Sections 2445–2451.
Garnishment. Precatory trust.
Red v. Powers, 69 M. 242, 13 So. 586.

Section 2446.
Judgment when garnishee fails to answer.
Little v. Nelson, 61 M. 672.

Section 2448.
Attorney's fees to garnishees.
Senior v. Brogan, 66 M. 178, 6 So. 649.
Bernheim v. Brogan, 66 M. 184, 6 So. 649.

Sections 2448, 2449.
Costs in favor of garnishee.
Clark v. Gresham, 67 M. 203, 7 So. 223.

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Section 2449.
Garnishment. Claim. Interpleader.
Dodds v. Gregory, 61 M. 351.
Porter v. West, 64 M. 548, 8 So. 207.
Garnishment. Answer. Judgment.
Pollard v. Mobile Savings Bank, 60 M. 946.
Requirement as to payment of money into court as condition precedent to interpleader, dispensed with by Code 1892, § 2143.
Fewell v. American Surety Co., 80 M. 782, 28 So. 755.

Section 2459.
Attachment. Debt not due. Venue.
Yale v. McDaniel, 69 M. 337, 12 So. 556.
Attachment. Debt due in part. Amendment.
Weissinger v. Studebaker Mfg. Co., 73 M. 480, 18 So. 915.

Section 2460.
Attachment. Claimant's issues.
Higdon v. Vaughn, 58 M. 572.
Dreyfus v. Mayer, 69 M. 282, 12 So. 267.
French v. Sale, 60 M. 516.
Ott v. Smith, 68 M. 773, 10 So. 70.

Section 2462.
Perishable property. Attachment. Sale.
Goodman v. Moss, 64 M. 303, 1 So. 241.
See Weis v. Basket, 71 M. 771, 15 So. 659.

Section 2464.
Attachment bond and affidavit. Irregularity. Amendment.
Atkinson v. Foxworth, 53 M. 741.
Field v. McKinney, 60 M. 763.
Boisseau v. Kahn, 62 M. 757.
Dunlap v. Clay, 65 M. 454, 4 So. 118.

Section 2466.
Attachment. Death of defendant. Trial of plea in abatement. Revivor. Final judgment.
Lowenberg v. Tironi, 62 M. 19.

Section 2467.
Judgment in attachment. Publication.
Sale v. French, 61 M. 170.
Cudabac v. Strong, 67 M. 705, 7 So. 543.
Tabler v. Mitchell, 62 M. 437.

Section 2475.
Jurisdiction of justice. Attachment. Non-resident.
Griggs v. Jesse French Piano &c. Co., 70 M. 211, 14 So. 24.

Section 2483.
Ejectment. Pleading and practice.
Powell v. Watson, 66 M. 176, 5 So. 513.

Section 2486.
Ejectment. Both special and general pleas not to be filed.
Powell v. Watson, 66 M. 176, 5 So. 513.

Section 2491.
Bill of particulars in ejectment.
Gillum v. Case, 67 M. 588, 7 So. 551.

Section 2512.
Ejectment. Mesne profits.
Dean v. Tucker, 58 M. 487.
Citizens' Bank v. Costanera, 62 M. 825.
Holmes v. McGee, 64 M. 129, 8 So. 169.
Improvements: how estimated.
Miller v. Ingram, 56 M. 510.
Johnson v. Futch, 57 M. 73.
Pass v. McLendon, 62 M. 580.

Section 2519.
Habeas corpus. Poor orphan. Supervisors.
Lowndes County v. Leigh, 69 M. 754, 13 So. 854.

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Section 2520.

Habeas corpus. When not applicable.
Shattuck v. State, 51 M. 50, 24 Am. Rep. 624.
Ex parte Meyer, 57 M. 85.
Ex parte Phillips, 57 M. 357.

Section 2534.

Habeas corpus. Judgment a bar.
Ex parte Pattison, 56 M. 161.
Ex parte Bridewell, 57 M. 177.
Ex parte Nichols, 62 M. 158.
Ex parte Hamilton, 65 M. 98, 3 So. 68.

Sections 2542–2551.

Mandamus. Swamp land patent. Institution of proceeding in name of state ex rel. "Matter affecting the public interest." Trial in vacation.
Myers v. State, 61 M. 138.

Section 2553.

Partition by decree.
Hill v. Gregory, 56 M. 341.
Belew v. Jones, 56 M. 342.
Medford v. Frazier, 58 M. 241.
Nugent v. Powell, 63 M. 99.
Black v. Washington, 65 M. 60, 3 So. 140.

Partition. Unassigned dower.
Gilleylen v. Martin, 73 M. 695, 19 So. 482.

Section 2564.

Partition. Commissioners. Field-book and map. Report and decree.
Mansfield v. Olsen, 4 So. 545.

Section 2568.

Reviewing decree. Limitation. Infant.
Martin v. Gilleylen, 70 M. 324, 12 So. 254.

Partition. Conclusiveness of decree.
Foster v. Gulf Coast Canning Co., 71 M. 624, 15 So. 931.

Decree ordering partition and that confirming report of commissioners made evidence of title.
Foster v. Jones, 17 So. 893.

Section 2576.

Partition. Conflicting claims.
Nugent v. Powell, 63 M. 99.
Cooper v. Fox, 67 M. 237, 7 So. 342.
Claughton v. Claughton, 70 M. 384, 12 So. 340.

Partition proceedings. Disputed titles. Parties. Conclusiveness of decree.
Foster v. Jones, 17 So. 893.

Section 2577.

Partition. Solicitor's fee.
Potts v. Gray, 60 M. 57.
Hoffman v. Smith, 61 M. 544.

Section 2580.

Partition of personalty. Trustee.
Porter v. Stone, 70 M. 291, 12 So. 208.

Section 2587.

Right to public office. Private proceeding.
Andrews v. Covington, 69 M. 740, 13 So. 853.

Section 2598.

Penalized carrying of concealed weapons. Clerical mistake in amendatory act, Laws 1888, p. 89. Evidence. Question for jury.
Earhart v. State, 67 M. 325, 7 So. 347.

Section 2608.

Quo warranto. How trial in vacation obtained.
Bowen v. Gilleylen, 58 M. 813.

Appeal lies from decision in election contest, rendered by circuit judge in vacation.
Perkins v. Carraway, 59 M. 222.

Section 2613.

Replevin. Generally.
Heard v. James, 49 M. 236.

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Buck v. Payne, 52 M. 271.
Saunders v. Jordan, 54 M. 428.
Morin v. Bailey, 55 M. 570.
Griffin v. Lancaster, 59 M. 340.
Power v. Telford, 60 M. 195.
Miller v. McGehee, 60 M. 903.
McGill v. Howard, 61 M. 411.
Phillips v. Gastrell, 61 M. 413.
Meyer v. Mosler, 64 M. 610, 1 So. 837.
Andrews v. McLeod, 66 M. 348, 6 So. 181.
Hoff v. Rogers, 67 M. 208, 7 So. 358, 19 Am. St. 301.

Section 2616.

Replevin. Bond. Liability on.
Phillips v. Cooper, 59 M. 17.
Tyler v. Davis, 63 M. 345.

Section 2618.

Replevin. Sale of property pendente lite.
Riggs v. Coker, 69 M. 266, 13 So. 814.

Attachment for rent. Claim of property by third person. Sale.
Weis v. Basket, 71 M. 771, 15 So. 659.

Section 2619.

Replevin. Recovery. Value. Res adjudicata.
Krosmopolski v. Paxton, 58 M. 581.

Applies only where defendant secretes or refuses to deliver property, on demand by officer.
Meyer v. Mosler &c. Co., 64 M. 610, 1 So. 837.

Section 2623.

Replevin. Judgment.
Bates v. Snider, 59 M. 497.
Cowden v. Lockridge, 60 M. 385.
Taylor v. Morton, 61 M. 24.

Writ of inquiry in replevin.
Bernheimer v. Martin, 66 M. 486, 6 So. 326.

Section 2624.

Replevin. Judgment. Execution.
Andrews v. McLeod, 66 M. 348, 6 So. 181.

Section 2628.

Replevin. Claimant's issue.
Ettringham v. Handy, 60 M. 334.
Andrews v. McLeod, 66 M. 348, 6 So. 181.

Section 2633.

Prohibits replevin, for property seized under attachment and execution.
Griffin v. Lancaster, 59 M. 340.

Replevin. Property in custodia legis.
Pollock v. Stovall, 60 M. 266.
State v. Booker, 61 M. 16.
Armistead v. Bernard, 62 M. 180.
Woolner v. Spaulding, 65 M. 204, 3 So. 583.
Conn v. Bernheimer, 67 M. 498, 7 So. 345.

Replevin. Claimant's issue. Amendment.
Clark v. Clinton, 61 M. 337.

Replevin. When not maintainable.
Woolner v. Spalding, 65 M. 204, 3 So. 583.

Prohibits replevin in certain cases.
Andrews v. McLeod, 66 M. 348, 6 So. 181.
Bernheimer v. Martin, 66 M. 486, 6 So. 326.

Section 2634.

Replevin. Jurisdiction of justice of peace. Venue.
Richardson v. Davis, 59 M. 15.

Section 2645.

Unlawful entry and detainer.
Wolf v. Angevine, 57 M. 767.
Benjamin v. Reach, 65 M. 347, 3 So. 657.
Blake v. McCray, 65 M. 443, 4 So. 339.

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Parker v. Eason, 68 M. 290, 8 So. 844.
Young v. Barr, 69 M. 879, 13 So. 816.

Unlawful detainer. Trust deed. Purchaser.
Marks v. Howard, 70 M. 445.

Sections 2646, 2647.

Unlawful entry and detainer. Complaint. Warrant.
Brown v. Ashford, 56 M. 677.
See McLemore v. Scales, 68 M. 47, 8 So. 844.

Section 2651.

Unlawful detainer. Trial. Waiver.
Warren v. African Baptist Church, 50 M. 223.
Leavenworth v. Crittenden, 62 M. 573.
McLemore v. Scales, 68 M. 47, 8 So. 844.

Sections 2653, 2657.

Unlawful detainer by vendee of state. Right to recover compensation for use and occupation.
Leavenworth v. Crittenden, 62 M. 573.

Section 2657.

Proceedings against tenant. Appeal. Recovery of rent.
Paxton v. Oliver, 70 M. 570, 12 So. 799.

Section 2658.

Appeal from justice. Bond, reciting erroneous judgment date. Cure in circuit court.
Leavenworth v. Crittenden, 62 M. 573.

Section 2664.

Limitation of actions. Lands.
Ryan v. Mississippi &c. R. Co., 62 M. 162.
Davis v. Davis, 68 M. 478, 10 So. 70.

Sections 2664, 2668.

Ejectment will not lie by county, after ten years, against holder, under void lease by supervisors, of land never devoted to public purpose, &c.
Warren County v. Lamkin, 93 M. 123, 46 So. 497, 22 L. R. A. (N. S.) 920n.

Section 2665.

Limitation of actions. Trusts.
Cooper v. Cooper, 61 M. 676.
See Stanton v. Helm, 87 M. 287, 39 So. 457.

Section 2666.

Title under mortgagee. Ten years.
Little v. Teague, 60 M. 115.

Section 2668.

Ejectment. Adverse possession.
Jones v. Brandon, 59 M. 585.
Davis v. Davis, 68 M. 478, 10 So. 70.

Section 2669.

Statute of limitations. Inapplicable under facts.
Lyebrook v. Hall, 73 M. 509, 19 So. 348.

Section 2670.

Actions to be brought in three years.
Musgrove v. Jackson, 59 M. 390.
Floyd v. Pearce, 57 M. 140.

Limitations. Implied contracts.
Foote v. Farmer, 71 M. 148, 14 So. 445.

Sections 2670, 2672.

Limitations. Suit for privilege taxes due Yazoo-Mississippi Delta Levee District. Penalty.
Adams v. Illinois Cent. R. Co., 71 M. 752, 15 So. 640.

Section 2671.

Mutual and open current account. Limitations.
Hendricks v. Robinson, 56 M. 694, 31 Am. Rep. 382.
Abbey v. Owens, 57 M. 810.
Abbay v. Hill, 64 M. 340, 1 So. 484.
Allen v. Hillman, 69 M. 225, 13 So. 871.

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Section 2673.

Limitations. Trust fund, deliverable on marriage of ward. Death of trustee.
North v. James, 61 M. 761.

Limitations. Personal injuries.
Bell v. Kansas City &c. R. Co., 68 M. 19, 8 So. 508.

Section 2674.

Judgment. Action on. Limitation.
Stith v. Parham, 57 M. 289.
Jackson v. Scanland, 65 M. 481, 4 So. 552.
Murphy v. Klein, 71 M. 908, 15 So. 658.

Execution for costs. Limitations.
Seavy v. Bennett, 64 M. 735, 2 So. 177.

Section 2675.

Limitation of actions. Judgments rendered by foreign courts of record. Debtor never in this state.
Kennard v. Alston, 62 M. 763.

Section 2676.

Limitations. Suit against executor.
Gibbs v. Bunch, 63 M. 47.

Section 2677.

Saving in favor of those under disabilities.
North v. James, 61 M. 761.

Section 2678.

Absence of intended defendant from state. Effect upon running of limitations.
State v. Furlong, 60 M. 839.
Lindenmayer v. Gunst, 70 M. 693, 13 So. 252, 35 Am. St. 685.

Limitation of actions. Foreign judgment debtor never in this state.
Kennard v. Alston, 62 M. 763.

Limitations. Absence from state.
Weille v. Levy, 74 M. 34, 20 So. 3, 60 Am. St. 500.

Limitation of actions. Absence from state. Suit to foreclose mortgage.
Hunt v. Belknap, 78 M. 76, 28 So. 751.

Section 2679.

Limitation of actions. Concealed fraud.
State v. Furlong, 60 M. 839.

Statute of limitations. Attorney and client. Trust. Concealed fraud.
Hudson v. Kimbrough, 74 M. 341, 20 So. 885.

Sections 2680, 2681.

Limit, by analogy, bill to annul decree in suit to recover legacy. Not extended by legacy's attempted recovery.
Brooks v. Spann, 63 M. 198.

Section 2681.

Limitations. Bill of review.
Martin v. Gilleylen, 70 M. 324, 12 So. 254.
Young v. Walker, 70 M. 813, 12 So. 546, 901.

Section 2683.

Limitations. Death before bar complete.
Weir v. Monahan, 67 M. 434, 7 So. 291.
Allen v. Hillman, 69 M. 225, 13 So. 871.
Hughston v. Nail, 73 M. 284, 18 So. 920.

Limitation of actions. Death of creditor. Administration.
Hambrick v. Jones, 64 M. 240, 8 So. 176.

Section 2684.

Statute of limitations. Action barred in another state, barred here.
Hunt v. Belknap, 78 M. 76, 28 So. 751.

Section 2686.

Limitations. New promise.
Hart v. Boyt, 54 M. 547.
Trustees v. Gilman, 55 M. 148.
Eckford v. Evans, 56 M. 18.
Floyd v. Pearce, 57 M. 140.
Fletcher v. Gillan, 62 M. 8.
Bomar v. Peine, 64 M. 99, 8 So. 166.

Digitized by Google

Jackson v. Scanland, 65 M. 481.
Heflin v. Kinard, 67 M. 522, 7 So. 493.
Allen v. Hillman, 69 M. 225, 13 So. 871.

Limitations. Mortgagee in possession.
Little v. Teague, 60 M. 115.

Limitations. Former action.
Young v. Walker, 70 M. 813, 12 So. 546, 901.

Section 2687.

Damages in attachment. Set-off. Limitations.
Feld v. Coleman, 72 M. 545, 17 So. 378.

Section 2688.

Limitation of action. Payment of interest or part of principal. Verbal acknowledgment, &c. Written forbearance signed by creditor.
Perry v. Ellis, 62 M. 711.

Limitation of actions. New promise. Sufficiency.
Allen v. Hillman, 69 M. 225, 13 So. 871.

Judgment not contract. New promise. Limitations.
Berkson v. Cox, 73 M. 339, 18 So. 934, 55 Am. St. 539.

Section 2690.

Provisions of chapter of which this section is part, not to apply to moneyed corporations.
Butts v. Vicksburg &c. R. Co., 63 M. 462.

Section 2692.

Application. When limitation to commence.
Jacks v. Bridewell, 51 M. 881.
Bridgeforth v. Payne, 62 M. 777.
Hambrick v. Jones, 64 M. 240, 8 So. 176.
Wilkerson v. Hudson, 71 M. 130, 13 So. 866.

Limitations. Suit against executor. Right to plead bar.
Gibbs v. Bunch, 63 M. 47.

Limitations. Prospective in operation.
Newman v. Foster, 1 So. 505.

Section 2693.

Limitations. Lands sold under decree.
Jeffrey v. Dowdle, 61 M. 504.
Sanders v. Sorrell, 65 M. 288, 3 So. 661.
Bradley v. Villere, 66 M. 399, 6 So. 208.
Martin v. Gilleylen, 70 M. 324, 12 So. 254.

Does not govern suit to cancel as cloud, title acquired at partition sale, filed by person not party to chancery proceedings.
Foster v. Gulf Coast Canning Co., 71 M. 624, 15 So. 931.

Section 2693.

Purchaser of land sold under decree of chancery court cannot defend upon two years' statute unless he has made actual payment of purchase money.
Gibson v. Currier, 83 M. 234, 35 So. 315, 102 Am. St. 442.

Limitation of actions. Judicial sales. Two years' possession. "Good faith." Inapplicable under facts.
Shannon v. Summers, 86 M. 619, 38 So. 345.

Limitation of actions. Property sold by order of chancery court, &c. Prospective in operation.
Jordan v. Bobbitt, 91 M. 1, 45 So. 311.

Section 2694.

Debt barred against trustee, barred against cestui que trust.
Harris v. Phelps, 2 Miss. Dec. 173.

Limitation of actions. Money of wife loaned by husband. Ignorance of borrower. Rule as to trustee and beneficiary, abolished.
Perry v. Ellis, 62 M. 711.

Limitation of actions. Guardian and ward.
Ellis v. McGee, 63 M. 168.

Limitation of actions. Applies only where legal title or right of action is in guardian or trustee and mere equitable right in beneficiary.
Weir v. Monahan, 67 M. 434, 7 So. 291.

Limitations. Trustee barred, beneficiary barred.
Heflin v. Kinard, 67 M. 522, 7 So. 493.

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Barr v. Lewis, 71 M. 727, 15 So. 796.
Nelson v. Ratliff, 72 M. 656, 18 So. 487.

Section 2696.
Trusts. Limitation of actions.
Templeton v. Tompkins, 45 M. 424.
Cooper v. Cooper, 61 M. 676.
See Stanton v. Heim, 87 M. 287, 39 So. 457.
Limitations. Express trust.
Abbay v. Hill, 64 M. 340, 1 So. 484.
Statute of limitations. Inapplicable under facts.
Lyebrook v. Hall, 73 M. 509, 19 So. 348.

Section 2697.
Seduction not punishable under this section.
Lampton v. State, 11 So. 656.

Section 2698.
Homicide. Aiding and abetting.
Wynn v. State, 63 M. 260.

Section 2700.
Offense. "Cohabit." Habitual sexual intercourse.
Granberry v. State, 61 M. 440.
Brown v. State, 8 So. 257.
Unlawful cohabitation. Evidence. Sufficiency.
Stewart v. State, 64 M. 626, 2 So. 73.
Unlawful cohabitation. Indictment.
Newman v. State, 69 M. 393, 10 So. 580.

Section 2701.
Incest. Indictment. "Feloniously."
Newman v. State, 69 M. 393, 10 So. 580.

Section 2703.
Alteration of records. Indictment.
Harrington v. State, 54 M. 490.
See Finch v. State, 64 M. 461, 1 So. 630.
Sullivan v. State, 67 M. 346, 7 So. 275.

Section 2710.
Arson. Indictment. Malice.
Maxwell v. State, 68 M. 339, 8 So. 546.

Section 2711.
Assault and battery with intent to kill.
Porter v. State, 57 M. 300.
Aldridge v. State, 59 M. 250.
Reed v. State, 62 M. 405.
McGehee v. State, 62 M. 772.
Grogan v. State, 63 M. 147.
Bateman v. State, 64 M. 233, 1 So. 172.
Wood v. State, 64 M. 761, 2 So. 247.

Section 2713.
Larceny. Attempt to steal. Evidence. Instruction.
Williams v. State, 63 M. 58.

Section 2750.
Fighting in public place. Right of self-defense.
Hunter v. State, 62 M. 540.

Section 2757.
Suit for county on bond of circuit clerk. Grounds.
Lewis v. State, 65 M. 468, 4 So. 429.

Section 2767.
Disturbing public worship. Indictment in words of statute alone, subject to quashal.
Conerly v. State, 66 M. 96, 5 So. 625.

Section 2769.
Disturbing the peace. Indictment.
Finch v. State, 64 M. 461, 1 So. 630.

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Sections 2769, 2770.
Designed to prevent disturbance of peace of families. Offense. Affidavit subject to quashal.
Brooks v. State, 67 M. 577, 7 So. 494.

Section 2770.
Abusive language. Indictment.
Quin v. State, 65 M. 479, 4 So. 548.

Section 2787.
Embezzlement. Guardian. Officer. Offense altogether different from that described by Code 1892, § 1063.
State v. Gillis, 75 M. 331, 24 So. 25.

Sections 2787-2790.
Embezzlement. Indictment.
Hemingway v. State, 68 M. 371, 8 So. 317.

Section 2790.
Embezzlement. Fraud in office.
Bracey v. State, 64 M. 17, 8 So. 163.

Section 2791.
Aiding escape. Indictment.
Holland v. State, 60 M. 939.

Section 2811.
Obtaining money under false pretenses.
Smith v. State, 55 M. 513.
Bracey v. State, 64 M. 26, 8 So. 163.

Section 2814.
Concealing assets of bank.
Hughes v. Lake, 63 M. 552.

Section 2844.
Gambling. Wagers.
Lea v. State, 64 M. 294, 1 So. 244.

Section 2848.
Permitting gaming. "Lessee or occupant."
Diebel v. State, 68 M. 725, 9 So. 354.

Section 2851.
Gaming. Selling chance in raffle.
Kirk v. State, 69 M. 215, 10 So. 577.

Section 2857.
Gaming. Former conviction. Identity.
Pope v. State, 63 M. 53.

Section 2858.
Directory. Jurisdiction of justice of peace to try charge of gaming.
Johnson v. State, 59 M. 543.

Section 2871.
Obstructing highway.
Vicksburg &c. R. Co. v. State, 64 M. 5, 8 So. 128.

Section 2875.
Homicide. Murder defined.
Cannon v. State, 57 M. 147.
Hawthorne v. State, 58 M. 778.
Scott v. State, 60 M. 268.
Pickens v. State, 61 M. 52.
Thomas v. State, 61 M. 60.
Ingram v. State, 62 M. 142.
Bishop v. State, 62 M. 289.
Lamar v. State, 63 M. 265.
Virgil v. State, 63 M. 317.
Crum v. State, 64 M. 1, 1 So. 1, 60 Am. Rep. 44.

Section 2877.
Homicide. Penalty for murder.
Ex parte Fortenberry, 53 M. 428.
Green v. State, 55 M. 454.

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Walton v. State, 57 M. 533.
Spain v. State, 59 M. 19.
Fleming v. State, 60 M. 434.
Penn v. State, 62 M. 450.

Section 2878.
Merely declaratory of common law as to right to kill fleeing felon.
Jackson v. State, 66 M. 89, 5 So. 690, 14 Am. St. 542.

Necessity of homicide to prevent felonious killing of third person, interposed as defense. Instruction.
Brabston v. State, 68 M. 208, 8 So. 326.

Section 2879.
Criminal law. Homicide. Excusable.
Ayers v. State, 60 M. 709.
Wood v. State, 64 M. 761, 2 So. 247.

Defines excusable homicide.
Brabston v. State, 68 M. 208, 8 So. 326.

Section 2901.
Grand larceny.
Stokes v. State, 58 M. 677.
Littlejohn v. State, 59 M. 273.
Watkins v. State, 60 M. 323.
Warden v. State, 60 M. 638.
Alexander v. State, 60 M. 953.
Beatty v. State, 61 M. 18.
Matthews v. State, 61 M. 155.
Snowden v. State, 62 M. 100.
William v. State, 63 M. 58.
Golden v. State, 63 M. 466.
Delk v. State, 64 M. 77, 1 So. 9, 60 Am. Rep. 46.

Section 2907.
Receiving stolen goods.
Frank v. State, 67 M. 125, 6 So. 642.

Section 2909.
Removing mortgaged property.
Polk v. State, 65 M. 433, 4 So. 540.

Section 2916.
Libel. Justifiable ends.
Rattray v. State, 61 M. 377.

Section 2917.
Malicious mischief. Prosecution. Tender, or assumpsit in satisfaction of award. Instruction.
Murphy v. State, 62 M. 97.

Section 2918.
Cruelty to animals. Criminal prosecution. Evidence. Instruction. Intent and purpose.
Stephens v. State, 65 M. 329, 3 So. 458.

Section 2921.
Perjury.
Nelson v. State, 47 M. 621.
Brown v. State, 57 M. 424.
Vance v. State, 62 M. 137.
Morgan v. State, 63 M. 162.
Lea v. State, 64 M. 278, 1 So. 235.
Bain v. State, 67 M. 557, 7 So. 408.

Section 2941.
Shooting on highway.
Woods v. State, 67 M. 575, 7 So. 495.

Section 2942.
Attempt to rape female under age of ten years. Indictment. Proof.
Bonner v. State, 65 M. 293, 3 So. 663.
See Alfred v. State, 32 So. 54.

Section 2949.
Sunday. Transacting business.
Merchants' Wharfboat Association v. Wood, 64 M. 661, 2 So. 76.

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Block v. McMurry, 56 M. 217, 31 Am. Rep. 357.
McKee v. Jones, 67 M. 405, 7 So. 348.

Sunday. Telegraph company. Message.
Western Union Tel. Co. v. McLaurin, 70 M. 26, 13 So. 36.

Section 2950.

Druggist may keep store open on Sunday.
Elkin v. State, 63 M. 129.

Section 2951.

Playing at cards or dice on Sunday, not indictable act.
Rucker v. State, 67 M. 328, 7 So. 223.

Section 2953.

Sale of liquors. Sunday. Drug-store.
Elkin v. State, 63 M. 129.

Keeping bar open on Sunday.
Miller v. State, 68 M. 533, 9 So. 289.

Section 2969.

Vagrancy. Prostitute. Sufficiency of circumstantial evidence.
Peabody v. State, 72 M. 104, 17 So. 213.

Section 2974.

Using profane language. Indictment.
Walton v. State, 64 M. 207, 8 So. 171.

Section 2976.

Obstructing justice. Indictment.
Perrow v. State, 67 M. 365, 7 So. 349.

Section 2980.

Trespass on land. Notification.
Knight v. State, 64 M. 802, 2 So. 252.

Trespass on inclosed land.
Hester v. State, 67 M. 129, 6 So. 687.

Section 2983.

Exhibition of pistol, actual use to intimidate and knowledge by victim of assailant's armed condition, non-essential to offense.
Lawson v. State, 62 M. 556.

Section 2985.

Carrying concealed weapons. "Traveling."
McGuirk v. State, 64 M. 209, 1 So. 103.

Carrying concealed weapons. Operation and effect of amendment Laws 1888, p. 89.
Lindzey v. State, 65 M. 542, 5 So. 99, 7 Am. St. 674.
Hodnett v. State, 66 M. 26, 5 So. 518.

Carrying concealed weapons. Parent in pursuit of fugitive or abducted daughter, on "journey."
Haywood v. State, 66 M. 402, 6 So. 237.

Carrying concealed weapons. Striking out of words "an attack" by amendatory act, Laws 1888, p. 89, clerical mistake.
Earhart v. State, 67 M. 325, 7 So. 347.

Concealed weapons. Intent not material.
Strahan v. State, 68 M. 347, 8 So. 844.

Concealed weapons. Threatened attack.
Sudduth v. State, 70 M. 250, 11 So. 680.

Section 2996.

Homicide. Death in another county. Reward.
Newton County v. Wells, 67 M. 151, 6 So. 614.

Section 2998.

Acquittal on account of variance, insufficient to support plea of former jeopardy to subsequent indictment.
Sims v. State, 66 M. 33, 5 So. 525.

Section 3001.

Indictment. Formalities dispensed with.
Smith v. State, 58 M. 867.

Section 3006.

Indictment. Presentment. "Filed."
Smith v. State, 58 M. 867.

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Cooper v. State, 59 M. 267.
Holland v. State, 60 M. 939.
Williamson v. State, 64 M. 229, 1 So. 171.
Lea v. State, 64 M. 294, 1 So. 244.

Section 3013.
Indictment. Time, not essence.
Smith v. State, 58 M. 867.
Holland v. State, 60 M. 939.
Hodnett v. State, 66 M. 26, 5 So. 518.

Section 3016.
Requisites of indictment in homicide.
Moore v. State, 59 M. 25.
Scott v. State, 60 M. 268.

Section 3025.
Arrest. Trespass, against mayor of town, for false imprisonment.
Wilcox v. Williamson, 61 M. 310.

Section 3026.
Arrest without warrant. Fugitive. Fresh pursuit.
White v. State, 70 M. 253, 11 So. 632.

Section 3035.
Fugitive. Arrest. Reward.
Ex parte Gore, 57 M. 251.
Ittawamba County v. Candler, 62 M. 193.
Wilson v. Wallace, 64 M. 13, 8 So. 128.
Newton County v. Wells, 67 M. 151, 6 So. 614.
Oktibbeha County v. Cottrell, 70 M. 117, 12 So. 156.

Section 3040.
Obligation of surety on bail bond.
Lee v. State, 51 M. 665.
Tedford v. State, 67 M. 363, 7 So. 352.

Section 3043.
Recognizance. Scire facias. Service.
Saffold v. State, 60 M. 928.
See Smith v. State, 76 M. 728, 25 So. 491.
Enacted for protection of state. Judgment may be taken against surety on forfeited bail bond, alone.
Thompson v. State, 7 So. 403.

Section 3057.
Fee for defending prisoner.
Dismukes v. Noxubee County, 58 M. 612, 38 Am. Rep. 339.

Section 3059.
Murder trial. Continuance.
Fletcher v. State, 60 M. 675.
Penn v. State, 62 M. 450.
Lamar v. State, 63 M. 265.

Section 3061.
Venue: change of.
Rattray v. State, 61 M. 377.
Bishop v. State, 62 M. 289.

Section 3063.
Change of venue. Procedure.
Williamson v. State, 64 M. 229, 1 So. 171.

Section 3069.
Persons indicted for unlawful cohabitation cannot demand severance as of right because of difference in race and color.
Stewart v. State, 64 M. 626, 2 So. 73.

Section 3071.
Criminal law. Witness. Co-defendant.
Evans v. State, 61 M. 157.

Section 3072.
Jurors. Criminal cases. Competency. Conscientious scruples.
Jones v. State, 57 M. 684.
Spain v. State, 59 M. 19.

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Jurors. Criminal cases. Opinion: when same does not render venireman incompetent.
Penn v. State, 62 M. 450.

Opinion of juror. Qualification.
Green v. State, 72 M. 522, 17 So. 381.

Section 3075.

Trial in absence of accused.
Fugler v. State, 58 M. 829.

Appeal to circuit court. Trial de novo in absence of defaulting appellant.
Thomas v. State, 68 M. 91, 8 So. 647.

Section 3077.

Number of counsel to be heard.
Wingo v. State, 62 M. 311.
See Senior v. Brogan, 66 M. 178, 6 So. 649.

Section 3078.

Conviction of constituent offense.
Bedell v. State, 50 M. 492.
Moore v. State, 59 M. 25.
Scott v. State, 60 M. 268.

Larceny. Attempt to steal. Evidence. Instruction.
Williams v. State, 63 M. 58.

Section 3080.

Assault and battery. Justification. Insult.
Wood v. State, 64 M. 761, 2 So. 247.

Section 3081.

Assault with intent to kill. Amendment of indictment. Name of party assaulted.
Wood v. State, 64 M. 761, 2 So. 247.

Trespass on land. Amendment of indictment. Name of owner.
Knight v. State, 64 M. 802, 2 So. 252.

Murder. Amendment of indictment. Name of deceased.
Miller v. State, 68 M. 221, 8 So. 273.

Section 3083.

Sentence upon conviction.
Green v. State, 55 M. 454.
Walton v. State, 57 M. 533.
Spain v. State, 59 M. 19.
Fleming v. State, 60 M. 434.
Penn v. State, 62 M. 450.

Section 3092.

Death sentence. Place of execution.
Ex parte Fleming, 60 M. 910.

Section 3095.

Sentence not executed.
Ex parte Bell, 56 M. 282.
Ex parte Fleming, 60 M. 910.

Section 3099.

Indictment. Common law. Fatal defect.
Wile v. State, 60 M. 260.

Section 3105.

Definition of "crime." Witness. Conviction.
Helm v. State, 67 M. 562, 7 So. 487.
See Lewis v. State, 85 M. 35, 37 So. 497.

Section 3118.

Justice of peace. Committing court.
Hastings v. State, 59 M. 541.

Section 3154.

County convicts. Medical bill.
Thurmond v. Carter, 59 M. 127.

Section 3158.

Receipt for convicts. Duty of clerk. Operation and effect of Laws 1894, p. 74.
Murch v. Warren County, 73 M. 356, 18 So. 540.

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Sections 3158, 3160, 3161, 3162, 3167.
County contractor. Prisoners. Escape.
State v. Banks, 66 M. 431, 6 So. 184.

CODE 1892.

Chapter 8.
General assignments.
Lowenstein v. Hooker, 71 M. 102, 14 So. 531.
Memphis Grocery Co. v. Leach, 71 M. 959, 15 So. 113.

Assignment for benefit of creditors. Assignee—receiver. Charges. Allowances. Compensation.
Perry-Mason Shoe Co. v. Sykes, 72 M. 390, 17 So. 171.

General assignment: what constitutes. Distinct conveyances.
Sells v. Rosedale Grocery &c. Co., 72 M. 590, 17 So. 236.

Assignment for creditors. Partial, by terms, as general. Property omitted. Preferences.
Newman v. Black, 73 M. 239, 18 So. 543.

Equitable administration of estates assigned generally for benefit of creditors. Distribution. Priorities.
Mahorner v. Forcheimer, 73 M. 302, 18 So. 570.

Assignment for benefit of creditors. Receiver. Costs and fees.
Pittman v. Hopkins, 74 M. 563, 21 So. 606.

Assignment for benefit of creditors. Several instruments. Personal decrees.
Pollock v. Sykes, 74 M. 700, 21 So. 780.

Assignment for benefit of creditors. Receiver. Sale.
Weems v. Love Mfg. Co., 74 M. 831, 21 So. 915.

Landlord's rights under Laws 1894, p. 44, ch. 52, undefeated by general assignment.
Rice v. Harris, 76 M. 422, 24 So. 880.

Assignment for benefit of creditors. Cross-petition. Complaint. Election.
Metcalfe v. Merchants' &c. Bank, 89 M. 649, 41 So. 377.

Assignment and conveyance. "General assignment."
Mayer v. McRea, 16 So. 875.

Chapter 23.
County convicts. Repealed by Laws 1894, p. 67, ch. 76, § 2.
Reabold v. State, 73 M. 236, 18 So. 929.

Convicts. Maltreatment.
State v. Jenkins, 73 M. 523, 19 So. 206.

Changes law concerning convicted misdemeanants. Inapplicable under Code 1892, § 814, where contracts are in existence, during life of same.
Ex parte Hill, 12 So. 902.

Chapter 25.
Corporation created under, can only exercise power prescribed thereby.
Woodberry v. McClury, 78 M. 831, 29 So. 514.

Chapter 37.
Dram shops. In force and effect as part of Code 1892.
Hunt v. Wright, 70 M. 298, 11 So. 608.

Dram shops. Indictment. Sale.
West v. State, 70 M. 598, 12 So. 903.

Dram shops. Election. Appeal. Petition.
Ferguson v. Monroe County, 71 M. 524, 14 So. 81.

Right to sell hoppenweis, hop tea, and white hops on payment of dealer's license under Laws 1896, p. 39, ch. 35.
Harland v. Adams, 76 M. 308, 24 So. 262.
See Armour v. Meridian, 24 So. 533.

Supervisors' record must show affirmatively that petitioners comprised one-third of qualified electors in county.
Lester v. Miller, 76 M. 309, 24 So. 193.

Chapter 40.
Eminent domain. Special court cannot determine question of right of railroad company to condemn land. Code 1906, ch. 43.
Vinegar Bend Lumber Co. v. Oak Grove &c. R. Co., 89 M. 84, 43 So. 292.
Vinegar Bend Lumber Co. v. Oak Grove &c. R. Co., 89 M. 117, 43 So. 299.

Chapter 43.
Applies expressly to chancery courts.
Wanita Woolen Mills v. Rollins, 75 M. 253, 22 So. 819.

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Chapter 55.
Garnishment. Wages of laborer. Exempt property. Rights of debtor. Payment by garnishee.
Chapman v. Berry, 73 M. 437, 18 So. 918, 55 Am. St. 542.

Chapter 65.
Foreign insurance companies authorized, on certain prescribed conditions, to take risks and transact business in this state.
Pervangher v. Union Casualty &c. Co., 81 M. 32, 32 So. 909.

Chapter 73.
Provides scheme for regulation, sale, and disposition of public lands of state.
Holder v. Wineman, 76 M. 824, 25 So. 481.

Chapter 75.
Lien products seizable by employe only in quantity sufficient to satisfy debt. Seizure of residue by employer's other debtors.
Starling v. Wyatt, 27 So. 526.

Chapter 79.
Lien on personalty for purchase price.
Fidelity &c. Co. v. B. F. Sturtevant Co., 86 M. 509, 38 So. 783.

Chapter 81.
Lien on water craft: debts of independent contractor.
Valverde v. Spottswood, 77 M. 912, 28 So. 720.

Chapter 83.
Actions mentioned are those referred to by words "any of the personal actions before mentioned," in Code 1892, § 2746.
Foster v. Yazoo &c. R. Co., 72 M. 886, 18 So. 380.

Chapter 85.
Does not affect right of creditor filing bill to vacate fraudulent conveyance, to lien, &c., as provided by Code 1892, § 503.
Fernwood Lumber Co. v. Meehan-Rounds Lumber Co., 85 M. 54, 37 So. 502.

Chapter 89.
Mandamus against supervisors to compel allowance of account. Award as to particular items.
Chatters v. Coahoma County, 73 M. 351, 19 So. 107.

Chapter 93.
City of Jackson is subject to provisions.
Jackson v. Shlomberg, 70 M. 47, 11 So. 721.

Municipality. Rejection of chapter. Time for certification of resolution.
State v. Govan, 70 M. 535, 12 So. 959.

Municipality, governed by provisions, has exclusive jurisdiction over streets within corporate limits. Ordinance as defense to indictment under Code 1892, § 1145.
Blocker v. State, 72 M. 720, 18 So. 388.

Municipalities. Local improvements.
Nugent v. Jackson, 72 M. 1040, 18 So. 493.

Mayor is not member of board of aldermen. Right to vote, &c.
Bousquet v. State, 78 M. 478, 29 So. 399.

Municipality. Election to come under provisions. Effect upon original charter.
Harris v. Water Valley, 78 M. 659, 29 So. 401.

Municipality not governed by provisions. Amendment of charter prior to Laws 1900, p. 79. Day for tax sale.
O'Flinn v. McInnis. 80 M. 125, 31 So. 584.
See Brown v. Sharp, 31 So. 712.

Municipality. Use of name. Injunction.
Gulf &c. R. Co. v. Seminary, 81 M. 237, 32 So. 953.

Municipality coming under provisions, not required to republish ordinances.
Chrisman v. Jackson, 84 M. 787, 37 So. 1015.

Municipality. Special charter. Amendment. Limit on bond issue.
Love v. Yazoo City, 91 M. 535, 44 So. 835.

Chapter 101.
Convicts. Maltreatment.
State v. Jenkins, 73 M. 523, 19 So. 206.

Chapter 108.
Privilege taxes. In force and effect as part of Code 1892.
Hunt v. Wright, 70 M. 298, 11 So. 608.

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Chapter 116.

Repeal. Action by revenue agent.
State v. Fragiacomo, 71 M. 417, 15 So. 798.

Went into effect April 2, 1892.
Herndon v. Mayfield, 79 M. 533, 31 So. 103.

Chapter 117.

Provides for erection of causeways, cutting down of hills, making of other conveniences, and payment of damages sustained thereby.
Rainey v. Hinds County, 78 M. 308, 28 So. 875.

Chapter 123.

Board of supervisors. School lands. Suit to quiet title.
Jones v. Madison County, 72 M. 777, 18 So. 87.
See Lauderdale County v. East Miss. Mills, 18 So. 94.

Sixteenth section. Presumption of lease. Tax deed.
Leflore County v. Bush, 76 M. 551, 25 So. 351.

Chapter 126.

State revenue agent. Effective immediately by Laws 1892, p. 60. Repeals Laws 1890, p. 11. Abatement of actions pending under latter.
State v. Order of Elks, 69 M. 895, 13 So. 255.

State revenue agent. Taxes. Power to assess and sue.
State v. Hill, 70 M. 106, 11 So. 789.
State v. Tonella, 70 M. 701, 14 So. 17, 22 L. R. A. 346.
McBride v. State, 70 M. 716, 12 So. 699.

Laws 1894, p. 29, in effect, part of chapter. State revenue agent. Assessment for back taxes. Appeal without bond.
State v. Kuhn, 72 M. 276, 16 So. 598.
See State v. Rigby, 16 So. 599.

Chapter 134.

Revised and amended Laws 1884, p. 31, ch. 23, &c. Telephone company. Discrimination in rates. Remedy.
Cumberland Tel. &c. Co. v. State, 54 So. 446.

Chapter 140.

Trusts and combines. Manufacturer may confine sales of products in given territory to single dealer.
Houck & Co. v. Wright, 77 M. 476, 27 So. 616.

Revised and amended Laws 1890, p. 55, ch. 36, &c. Telephone company. Discrimination in rates. Remedy.
Cumberland Tel. &c. Co. v. State, 54 So. 446.

Chapter 142.

Mayor who is justice of peace within municipality's territorial limits is justice of peace of county. Unlawful detainer.
Nickles v. Kendricks, 73 M. 711, 19 So. 582.

Unlawful entry and detainer. Fatal variance. Evidence. Proof. Question for jury, &c.
Paden v. Gibbs, 88 M. 274, 40 So. 871.

Section 2.

Adoption of code. Statutes.
Nugent v. Jackson, 72 M. 1040, 18 So. 493.

Sections 2, 3.

Local revenue act for Bolivar county, Laws 1890, p. 124, not repealed by Code 1892.
Jones v. Melchior, 71 M. 115, 13 So. 857.

Section 3.

Repeal of former acts and parts of acts.
Vicksburg v. Sun Mut. Ins. Co., 72 M. 67, 16 So. 257.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

Maltreatment of convicts. Repeal.
State v. Jenkins, 73 M. 523, 19 So. 206.

Repealed Code 1880.
State v. Gillis, 75 M. 331, 24 So. 25.

Section 4.

Taking effect. Former rights not affected.
State v. Hill, 70 M. 106, 11 So. 789.

Repeal. Rights and defenses reserved.
Wilkerson v. Hudson, 71 M. 130, 13 So. 866.

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Judah v. Brothers, 71 M. 414, 14 So. 455.
State v. Fragiacomo, 71 M. 417, 15 So. 798.
Lemonius v. Mayer, 71 M. 514, 14 So. 33.
State v. Gillis, 75 M. 331, 24 So. 25.

Preserves, unaffected by changes made by code, any former cause of action or defense.
Goodman v. Durant B. & L. Assn., 71 M. 310, 14 So. 146.

Section 5.

Has reference only to crimes and forfeitures, and penalties connected with them, or growing out of some offense.
Goodman v. Durant B. & L. Assn., 71 M. 310, 14 So. 146.

Offenses previous to adoption. Saving clause. Completed offenses.
State v. Gillis, 75 M. 331, 24 So. 25.

Section 8.

Local revenue act for Bolivar county, Laws 1890, p. 124, not repealed by Code 1892.
Jones v. Melchior, 71 M. 115, 13 So. 857.

Adoption of code. Private and local laws not affected.
Vicksburg v. Sun Mut. Ins. Co., 72 M. 67, 16 So. 257.

Private and local laws omitted from Code 1892, unaffected by adoption, unless, &c. Laws 1884, p. 318, in full force and effect.
Madison County v. Stewart, 74 M. 160, 20 So. 857.

Laws 1890, p. 386, ch. 250, § 8, authorizing salary to members of board of supervisors of Madison county, not repealed by Code 1892.
Adams v. Dendy, 82 M. 135, 33 So. 843.

Section 10.

Actionable words. Bill of particulars. Issue. Defense. Truth of words spoken, mitigative fact. Special damages.
McLean v. Warring, 13 So. 236.

Sections 31, 32.

Semble, that verdict finding defendant, accused of murder, not guilty on ground of insanity, and certifying him to be still insane and dangerous, is not reviewable on appeal.
Caffey v. State, 78 M. 645, 29 So. 396.

Section 32.

Appeals from justice's court. Plea of guilty.
Niblett v. State, 75 M. 105, 21 So. 799.
See Jenkins v. State, — M. —, 54 So. 158.

Circuit court judgment against county, allowing $40 claim, appealable.
Marshall County v. Rivers, 88 M. 45, 40 So. 1007.

Attempted appeal. Record. "Final judgment of a circuit court." Dismissal.
Nelson v. Henderson, 16 So. 911.

Section 33.

Appeal without bond by county from decree overruling demurrer to bill in equity. Time limit. Citation in error.
Harrison County v. Rogers, 85 M. 578, 38 So. 310.

Section 34.

Interlocutory order or decree. Appeal. Clerk of chancery court without power to grant.
Gilleylen v. Martin, 73 M. 695, 19 So. 482.

Inapplicable to order sustaining exceptions to answer for failure to disclose defense.
Wallace v. Bobbitt, 79 M. 402, 30 So. 693.

Does not authorize grant, by chancellor, of appeal from order refusing to remove cause to federal court.
Vicksburg Waterworks Co. v. Vicksburg, 79 M. 510, 31 So. 1.

Interlocutory decree placing exempt property in hands of receiver, appealable.
Levy v. Rossel, 82 M. 68, 33 So. 651.

Remand of case by Supreme Court non-effective as bar to subsequent appeal. Decree as to appellate adjudication, appealable.
State v. Woodruff, 83 M. 107, 35 So. 422.

Denial of petition to become party, non-appealable.
Bush v. Quick, 90 M. 32, 43 So. 70.

Order for inspection of books of account (Code 1892, § 927), non-appealable.
Equitable Assur. Soc. v. Clark, 28 So. 798.

Sections 36, 39.

Appeal cannot be prosecuted by municipality from judgment of circuit court, discharging alleged violator of ordinance.
Water Valley v. Davis, 73 M. 521, 19 So. 235.

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Section 39.

Appeal by state. Granting new trial.
State v. McDowell, 72 M. 138, 17 So. 213.

Appeal by state. Granting bail.
State v. Shrader, 72 M. 541, 18 So. 454.

Cross appeal by state.
Thomas v. State, 73 M. 46, 19 So. 195.

Reversal of judgment of quashal. Remand. New trial on revitalized indictment.
State v. Bacon, 77 M. 366, 27 So. 563.

Order for new trial because of argument of district attorney, not appealable by state.
State v. Thompson, 86 M. 201, 38 So. 321.

State cannot appeal from discharge of defendant on motion to exclude.
State v. Willingham, 86 M. 203, 38 So. 334.

Section 46.

Filing of bond stops limitations against appeal.
Adams Lumber Co. v. Stevenson, 89 M. 678, 42 So. 796.

Section 59.

Interlocutory order or decree. Appeal: clerk of chancery court without power to grant.
Gilleylen v. Martin, 73 M. 695, 19 So. 482.

Section 61.

Dismissal of appeal where appellant, filing poverty affidavit, has not complied with Code 1892, § 64.
Roberts v. Port Gibson, 89 M. 75, 42 So. 540.

Section 64.

Dismissal of appeal for non-compliance by appellant, filing poverty affidavit under Code 1892, § 61.
Roberts v. Port Gibson, 89 M. 75, 42 So. 540.

Section 66.

Condition of family of convicted felon, and deprivation of patients of his services as physician, no grounds for bail.
Winegarden v. State, 87 M. 264, 39 So. 1013.

Section 75.

Supreme Court cannot, on appeal from decree enjoining enforcement of judgment, examine record filed on appeal in cause in which judgment enjoined, was rendered.
Keystone Lumber &c. Co. v. Devine, 18 So. 925.

Section 79.

Appeal to circuit court. Local option election.
Ferguson v. Monroe County, 71 M. 524, 14 So. 81.

Has no application on appeal to circuit court from judgment of municipal authorities extending corporate limits. Trial de novo.
Yerger v. Greenwood, 77 M. 378, 27 So. 620.

Bill of exceptions to supervisors' order signable only by president of board. Mandamus. Code 1892, § 737, inapplicable.
Roach v. Tallahatchie County, 78 M. 303, 29 So. 93.

Bond unnecessary on appeal from supervisors to circuit court.
Monroe County v. Strong, 78 M. 565, 29 So. 530.

Judgments, of boards of supervisors, in general. Appeals.
Jennings v. Coahoma County, 79 M. 523, 31 So. 107.
See Kuhn v. Warren County, — M. —, 54 So. 442.

Appeal to circuit court from municipal board. Bill of exceptions. Oral testimony.
Greenwood v. Henderson, 84 M. 802, 37 So. 745.

Claim against municipality. Appeal from judgment of mayor and board of aldermen Remedy not exclusive.
Pyland v. Purvis, 87 M. 433, 40 So. 7.

Circuit court judgment against county, allowing $40 claim, appealable.
Marshall County v. Rivers, 88 M. 45, 40 So. 1007.

Section 80.

Assessment. Appeal from order raising. Damages.
Atkinson &c. Co. v. Pike County, 73 M. 348, 18 So. 924.

Board of supervisors. Assessment. Appeal.
Tunica County v. Tate, 78 M. 294, 29 So. 74.
Madison County v. Frazier, 78 M. 880, 29 So. 765.

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Appeal to circuit court to review tax assessment. Dismissal for insufficient bond. Amendment.
Bank of Oxford v. Lafayette County, 79 M. 152, 29 So. 825.

Applies specifically to appeals from judgments, of boards of supervisors, relating to taxes.
Jennings v. Coahoma County, 79 M. 523, 31 So. 107.
See Kuhn v. Warren County, — M. —, 54 So. 442.

Section 81.

Time limitation on appeals to circuit court, inapplicable to criminal cases.
Ex parte Grubbs, 80 M. 288, 31 So. 741.

Unlawful entry and detainer. Appeal. Trial anew on merits.
Harvey v. Clark, 81 M. 166, 32 So. 906.

Section 82.

Bond on appeal from justice's judgment, in penalty less than specified minimum, amendable.
Denton v. Denton, 77 M. 375, 27 So. 383.

Criminal appeals to circuit court, as regards time limitation, not governed by this section.
Ex parte Grubbs, 80 M. 288, 31 So. 741.

Justice of peace. Appeal. Excessive bond.
Redus v. Gamble, 85 M. 165, 37 So. 1010.

Sections 82–84.

Review in Supreme Court of cause originating in magistrate's court. Sufficiency of record.
Parrott v. Poppenheimer, 16 So. 911.

Sections 83, 84.

Papers on appeal from justice are insufficient unless record shows rendition of judgment and execution of appeal bond.
Ball v. Sledge, 82 M. 747, 35 So. 214.

Section 84.

Execution of bond on appeal from justice and transmission of record to circuit court continues pendency of suit.
Rowe v. Cannon, 84 M. 101, 36 So. 146.

Writ from circuit court to bring up record in appealed case.
Redus v. Gamble, 85 M. 165, 37 So. 1010.

Death of justice. Delay. Dismissal of appeal.
Brennan v. Straas, 85 M. 341, 37 So. 956.

Section 85.

Appeal to circuit court. Trial. Damages.
Louisville &c. R. Co. v. Pool, 72 M. 487, 16 So. 753.

Appeal. Attachment for rent. Amount in controversy. Jurisdiction.
Biddle v. Paine, 74 M. 494, 21 So. 250.

Appeal to circuit court. Trial de novo.
Redus v. Gamble, 85 M. 165, 37 So. 1010.

Circuit court judgment against county, allowing $40 claim, appealable.
Marshall County v. Rivers, 88 M. 45, 40 So. 1007.

Section 86.

Appeal in criminal case. Amendment of affidavit.
Burnett v. State, 72 M. 994, 18 So. 432.

Governs criminal appeals from justices' courts to circuit court. "Next term of circuit court."
Ex parte Grubbs, 80 M. 288, 31 So. 741.

Appeal bond in tort invalid as appeal bond in criminal prosecution, notwithstanding predication of both actions of same act.
Redus v. Gamble, 85 M. 165, 37 So. 1010.

Miscarriage of bond on appeal from conviction of crime in mayor's court. Condition precedent to admission of parol proof of execution.
Polk v. Seminary, 89 M. 293, 42 So. 129.

Habeas corpus. Petition. Maximum bond.
Ex parte Gibson, 12 So. 209.

Section 89.

Certiorari. Justice of the peace. Practise.
Evans v. Southern R. Co., 74 M. 230, 21 So. 15.

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Assesment for back taxes by railroad commission. Certiorari.
Yazoo &c. R. Co. v. Adams, 77 M. 764, 25 So. 355.

Circuit court without jurisdiction on certiorari from justice, not having jurisdiction of defendant's person.
McDugle v. Filmer, 79 M. 53, 29 So. 996, 89 Am. St. 582.

Time limitation prescribed applies to civil and criminal cases.
Ex parte Grubbs, 80 M. 288, 31 So. 741.

Writ to require justice to send record to circuit court, not certiorari. Bond.
Redus v. Gamble, 85 M. 165, 37 So. 1010.

Non-effective as to certiorari to correct mistaken finding of fact by railroad commission.
Gulf &c. R. Co. v. Adams, 85 M. 772, 38 So. 348.

Section 90.

Railroad commission. Assessment for back taxes. Certiorari.
Yazoo &c. R. Co. v. Adams, 77 M. 764, 25 So. 355.

Railroad commission, inferior tribunal. Certiorari lies to correct mistaken finding of fact, notwithstanding Code 1892, § 89.
Gulf &c. R. Co. v. Adams, 85 M. 772, 38 So. 348.

Section 91.

Failure to file additional appeal bond ordered on penalty of dismissal: jurisdiction in circuit court until final judgment dismissing appeal.
Nickles v. Kendrick, 76 M. 334, 24 So. 534.

Appeal from justice's court to circuit court of county having two judicial districts. Bond, reciting appeal to wrong district, amendable by leave, &c.
Nations v. Lovejoy, 80 M. 401, 31 So. 811.

Section 93.

Appeal, without bond, by county, from decree overruling demurrer to bill in equity. Time limit. Citation in error.
Harrison County v. Rogers, 85 M. 578.

Circuit court judgment against county, allowing $40 claim, appealable.
Marshall County v. Rivers, 88 M. 45, 40 So. 1007.

Section 112.

Arbitration and award. Irregularities of arbitrators.
Rand v. Peel, 74 M. 305, 21 So. 10.

Sections 117, 118, 119.

Assignment for creditors. Assignee as receiver.
Weimer v. Scales, 74 M. 1, 19 So. 588.

Sections 117, 121–123.

Assignment for creditors. Administration in chancery court. Distribution. Priorities.
Mahorner v. Forcheimer, 73 M. 302, 18 So. 570.

Sections 117–124.

Assignment for creditors. Receiver. Costs and fees.
Pittman v. Hopkins, 74 M. 563, 21 So. 606.

Assignment for creditors. Several instruments. Personal decrees.
Pollock v. Sykes, 74 M. 700, 21 So. 780.

Assignment for creditors. Receiver. Sale.
Weems v. Love Manufacturing Co., 74 M. 831, 21 So. 915.

Section 119.

Assignee-receiver. Charges, allowances, and compensation.
Perry-Mason Shoe Co. v. Sykes, 72 M. 390, 17 So. 171, 28 L. R. A. 277.

Section 121.

Assignment for creditors. Administration in chancery. Intervention.
Lowenstein v. Hooker, 71 M. 102, 14 So. 531.

Cross-petitioning creditors. Assignment set aside and prior liens secured. Attorney's fees.
Perry-Mason Shoe Co. v. Sykes, 72 M. 390, 17 So. 171.

Creditor cannot, on appeal, first question validity, for non-compliance with Code 1892, § 124, of preference in assignment.
Lowenstein v. Leach, 16 So. 493.

Section 124.

General assignments. Schedule.
Memphis Grocery Co. v. Leach, 71 M. 959, 15 So. 113.

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Assignment for benefit of creditors. Preferences. Schedules.
Sells v. Rosedale Grocery &c. Co., 72 M. 590, 17 So. 236.

Assignment for creditors. When general.
Newman v. Black, 73 M. 239, 18 So. 543.

Non-affective as to general assignment without preferences.
Kaufman v. Simon, 80 M. 189, 31 So. 713.

Preference in assignment cannot be questioned for first time on appeal, for non-compliance with this section by creditor proceeding under Code 1892, § 121.
Lowenstein v. Leach, 16 So. 493.

Section 127.

Attachment against partner. Separate action.
Cohen v. Gamble, 71 M. 478, 15 So. 236.

Section 129.

Attachment. Dealing in futures. Undisclosed principal.
Dillard v. Brenner, 73 M. 130, 18 So. 933.

Attachment. Removal from state. Insufficiency of evidence.
Bamberger v. Merchants' &c. Bank, 73 M. 572, 19 So. 296.

Sections 134–136.

Garnishment. Power of clerk to issue. Alias writ.
Kelly Banking Co. v. J. M. Robinson-Norton Co., 71 M. 141, 13 So. 932.

Sections 134, 136.

Attachment. Garnishment thereon.
First Nat. Bank of Nashville v. First Nat. Bank, 72 M. 258, 16 So. 904.

Section 143.

Attachment against non-resident. Judgment by default. Failure to make affidavit for publication of notice.
McKinney v. Adams, 95 M. 832, 50 So. 474.

Section 147.

Lien of attachment not displaced by execution of forthcoming bond.
Smith v. Lacey, 86 M. 295, 38 So. 311, 109 Am. St. 707.

Section 159.

Burden of proof on trial of claimant's issue, on attachment plaintiff.
Bernheim v. Dibrell, 11 So. 795.

Section 166.

Judgment for defendant on bond, renderable in attachment suit.
Carrier v. Poulas, 87 M. 595, 40 So. 164.

Section 174.

Attachment. Intervention. Issues.
First Nat. Bank v. Cochran, 71 M. 175, 14 So. 439.
First Nat. Bank v. Solomon, 71 M. 889, 16 So. 302.

Section 194.

Conveyance of land by attorney,
Lobdell v. Mason, 71 M. 937, 15 So. 44.

Section 230.

Auditor. Warrants. "Except in those cases specifically provided for by law," has no place under Const. 1890, §§ 63, 64.
State v. Cole, 81 M. 174, 32 So. 314.

Section 249.

Governs jurisdiction and venue of preliminary bastardy proceedings.
Johnson v. Walker, 86 M. 757, 39 So. 49, 109 Am. St. 733n, 1 L. R. A. (N. S.) 470.

Section 250.

Costs on dismissal in circuit court, of bastardy proceedings.
Norton v. Wicker, 87 M. 365, 39 So. 809.

Section 252.

Bastardy proceedings. Failure to join formal issue provided, not fatal. Waiver.
Johnson v. Walker, 86 M. 757, 39 So. 49, 109 Am. St. 733n, 1 L. R. A. (N. S.) 470.

Section 257.

Makes dying declarations of mother in bastardy proceedings, original and substantive evidence.
Johnson v. Walker, 86 M. 757, 39 So. 49, 109 Am. St. 733n, 1 L. R. A. (N. S.) 470.

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Section 258.

Bastardy proceedings. Instruction, as to damages, in exact statutory language, correct.
Johnson v. Walker, 86 M. 757, 39 So. 49, 109 Am. St. 733n, 1 L. R. A. (N. S.) 470.

Section 261.

Judgment ordering payment of money by father for support and maintenance of bastard child, not "debt" within Const. 1890, § 30.
Ex parte Bridgeforth, 77 M. 418, 27 So. 622.

Section 275.

Supervisor's bond with penalty, erroneous through mistake, validated by Code 1892, § 3055.
State v. Smith, 87 M. 551, 40 So. 22.

Section 278.

Supervisors. Meetings. "At the court-house."
Harris v. State, 72 M. 960, 18 So. 387, 33 L. R. A. 85n.

Section 280.

Supervisors. Power to adjourn to fixed date.
Madison County v. Powell, 75 M. 762, 23 So. 425.

Section 289.

Full jurisdiction over roads, &c., in boards of supervisors. Complement found in Code 1892, § 2947.
Blocker v. State, 72 M. 720, 18 So. 388.

Supervisors cannot declare private dam, nuisance.
Lilies v. Cawthorne, 78 M. 559, 29 So. 834.

Section 292.

Supervisors' refusal to act concerning public work, costing $900. Claim's disallowance, condition precedent to contractor's appeal to circuit court.
Young v. Leflore County, 81 M. 466, 33 So. 410.

Claims against counties: modes of enforcement.
Pyland v. Purvis, 87 M. 433, 40 So. 7.

Section 293.

"Or" should read "and." Special counsel may be employed for civil suits and designated criminal actions.
Warren County v. Booth, 81 M. 267, 32 So. 1000.

Supervisors may employ special counsel for school land actions.
Warren County v. Dabney, 81 M. 273, 32 So. 908.

Section 296.

Chancery clerk entitled to official business postage.
Downing v. Hinds County, 84 M. 29, 36 So. 73.

Section 301.

Amended, Laws 1898, p. 59. Boards of supervisors. Record of deeds. Abstract books. Fees of chancery clerks. Const. 1890, § 90, par. o.
Yazoo &c. R. Co. v. Edwards, 78 M. 950, 29 So. 770.

Section 304.

Board of supervisors. Authority to sell land.
Jefferson County v. Grafton, 74 M. 435, 21 So. 247, 60 Am. St. 516, 36 L. R. A. 798.

Section 318.

County warrants. Registration.
Jones v. Melchior, 71 M. 115, 13 So. 857.

Section 322.

Limitation on rule that judgment of allowance by county board could not be collaterally impeached.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

Code 1871, § 1382, changed. "Cash compensation." Allowances on other than cash basis, unlawful.
Monroe County v. Strong, 78 M. 565, 29 So. 530.

Section 340.

This section did not repeal act of 1884, in relation to public roads in Madison county.
Madison County v. Stewart, 74 M. 160, 20 So. 857.
Madison County v. Collier, 79 M. 220, 30 So. 610.

Advertisement for bids for court-house stating same to be built according to adopted plans and specifications, sufficient.
Dixon v. Greene County, 76 M. 794, 25 So. 665.

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Supervisors must advertise for bids for fenders and clusters of piles above and below bridge, wholly disconnected therefrom.
Marion County v. Foxworth, 83 M. 677, 36 So. 36.

Section 342.
For security of board alone. Non-affective as to right of person holding claim.
Young v. Leflore County, 81 M. 466, 33 So. 410.

Section 344.
Board of supervisors. Unauthorized contracts void.
State v. Vice, 71 M. 912, 15 So. 129.
County not liable for work authorized by single supervisor.
Groton Bridge & Mfg. Co. v. Warren County, 80 M. 214, 31 So. 711.

Sections 345, 347, 361.
Middle line of Mississippi river marks jurisdiction of courts of bordering counties.
Cook v. State, 81 M. 146, 32 So. 312.

Section 458.
Authorizes chancellors to alternate and make temporary exchanges, &c. Constitutionality.
First Nat. Bank v. Bloch, 82 M. 197, 33 So. 849.

Section 463.
Chancery clerk. Papers in cause. "Filing." Withdrawal. Copy.
Meridian National Bank v. Hoyt, 74 M. 221, 21 So. 12, 60 Am. St. 504, 36 L. R. A. 796.

Section 486.
Does not authorize personal decree against non-resident defendant in chancery attachment.
Rothrock Const. Co. v. Port Gibson Mfg. Co., 80 M. 517, 32 So. 116.
Sales. Attachment. Non-resident. National bank. Chancery.
Searles v. Smith Grain Co., 80 M. 688, 32 So. 287.
Attorney's fees, &c., non-recoverable upon mere dissolution of chancery attachment.
Bonds v. Garvey & Co., 87 M. 335, 39 So. 492.

Section 487.
Does not authorize personal decree against non-resident defendant in chancery attachment.
Rothrock Const. Co. v. Port Gibson Mfg. Co., 80 M. 517, 32 So. 116.

Sections 493–497.
Emancipation of minor does not empower him to demand conveyance of lands to be made upon his reaching majority.
Ray v. Kelly, 82 M. 597, 35 So. 165.

Section 494.
Father absolutely necessary party defendant to proceedings. Failure to summon and non-appearance render removal decree, void.
Lake v. Perry, 95 M. 550, 49 So. 569.

Section 498.
Without application to suit for recovery of money paid at confessedly void tax sale.
Moores v. Flurry, 87 M. 707, 40 So. 226.
Bill not making person, appearing as owner at time of tax sale, party, should be dismissed on refusal of complainant to amend.
Smith v. Denny, 90 M. 434, 43 So. 479.

Section 499.
Confirming title. Disclaimer. Costs.
Osborn v. Hinds County, 71 M. 19, 14 So. 457.
Chancery. Quieting title. Defective bill.
Gambrell Lumber Co. v. Saratoga Lumber Co., 87 M. 773, 40 So. 485.

Section 500.
Bill to remove cloud from title. Perfect legal or equitable title in complainant.
Gentry v. Gamblin, 79 M. 437.
Complainant in bill to remove clouds must allege and prove perfect legal or equitable title in himself. "Real owner."
Jones v. Rogers, 85 M. 802, 38 So. 742.
Chancery. Removal of cloud from title. Showing necessary to be made by bill.
Gambrell Lumber Co. v. Saratoga Lumber Co., 87 M. 773, 40 So. 485.

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Suit to remove clouds. Complainant must allege and prove that he has perfect legal or equitable title.
Stevens Lumber Co. v. Hughes, 38 So. 769.

Section 501.
Removal of clouds. Deraignment. School lands.
Wright v. Lauderdale County, 71 M. 800, 15 So. 116.
Bill to remove cloud from title. Deraignment of title.
Long v. Stanley, 79 M. 298, 30 So. 823.

Section 503.
Chancery jurisdiction. Vacating fraudulent conveyances.
McBride v. State Rev. Agent, 70 M. 716, 12 So. 699.
Creditor's bill. Chancery jurisdiction.
Browne v. Hernsheim, 71 M. 574, 14 So. 36.
Patty v. Williams, 71 M. 837, 15 So. 43.
Fraudulent conveyance. Attacking creditors. Priority of lien. "Filing" of bill, immediately carried away.
Meridian Nat. Bank v. Hoyt &c. Co., 74 M. 221, 21 So. 12.
Creditor to have lien on property from filing of bill to vacate fraudulent conveyance, except as against bona fide purchasers, &c. Not affected by Code 1892, §§ 2782-2789.
Fernwood Lumber Co. v. Meehan-Rounds Lumber Co., 85 M. 54, 37 So. 502.

Section 507.
On chancery jury trial, testimony of witnesses ore tenus in open court, admissible without prior agreement of parties.
White v. Jones, 83 M. 231, 35 So. 450.

Section 510.
Venue of chancery suits.
Baker v. Burkett, 75 M. 89, 21 So. 970.
Chancery court. Venue of suits generally.
State v. Mississippi Cotton Oil Co., 79 M. 203, 30 So. 609.

Sections 512, 513.
Affidavit and bond, conditions precedent to seizure, under chancery attachment, to await final decree, of non-resident's personalty.
Advance Lumber Co. v. Laurel Nat. Bank, 86 M. 419, 38 So. 313.

Section 516.
Final decree not reversible on account of sheriff's unordered sale of sequestrated property as liable to waste or decay.
Day v. Hartman, 74 M. 489, 21 So. 302.

Section 519.
Decree holding minor, represented by foreign guardian-father, as trustee and ordering conveyance, codefendant having appeared, not within this section.
Hebron v. Kelly, 77 M. 48, 23 So. 641, 25 So. 877.

Sections 519, 520.
Assignment. Decree on publication. Rehearing.
Fink v. Henderson, 74 M. 8, 19 So. 892.

Section 528.
Chancery. Exhibit to control over contradictory averment in bill.
House v. Gumble, 78 M. 259, 29 So. 71.
Bill in chancery. Variance between allegation and exhibit: fact will be taken on demurrer to be in conformity with exhibit.
McNeill v. Lee, 79 M. 455, 30 So. 821.
Chancery. Conflict between exhibit and allegation in bill.
McKinney v. Adams, 95 M. 832, 50 So. 474.

Section 533.
Failure to specifically deny matters of fact in chancery bill. Answer insufficient to put complainant to proof.
Hopper v. Overstreet, 79 M. 241, 30 So. 637.

Section 534.
Chancery practice. Denial of execution of instrument. Waiver of oath to answer. Written contract of corporation.
Wanita Woolen Mills v. Rollins, 75 M. 253, 22 So. 819.
Sworn answer after waiver of oath, has no greater effect than unsworn one.
Morrison v. Hardin, 81 M. 583, 33 So. 80.

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Chancery. Answer under oath. "General officer." Secretary and treasurer of beneficial association, who has custody of latter's records and vouchers.
Masonic Benefit Ass'n v. Simmons, 86 M. 470, 38 So. 791.

Section 535.
Answer as evidence. Two witnesses to overturn.
Shackelford v. Brown, 72 M. 380, 17 So. 896.
See Purvis v. Woodward, 78 M. 922, 29 So. 917.

Section 536.
Chancery defendant, answering by cross-bill against codefendant, may compel answer by attachment, take pro confesso, or amend.
Jackson v. Lemler, 83 M. 37, 35 So. 306.

Section 537.
Attachment to compel answer, by chancery defendant answering by cross-bill against codefendant.
Jackson v. Lemler, 83 M. 37, 35 So. 306.

Section 540.
Chancery court. Replication to answer unnecessary. Railroad property. Back taxes. Charter exemption. Issue.
Yazoo &c. R. Co. v. Adams, 81 M. 90, 32 So. 937.

Section 542.
Answer in chancery. Application for leave to amend, made on hearing and during argument, not seasonable.
Duggan v. Champlin, 75 M. 441, 23 So. 179.

Section 543.
Amendment by chancery defendant, answering by subsequently unanswered cross-bill, against codefendant.
Jackson v. Lemler, 83 M. 37, 35 So. 306.

Section 547.
Multifariousness, in joining several distinct and disconnected matters against same defendants, not ground for objection to bill.
Henry v. Henderson, 79 M. 452, 30 So. 754.

Section 549.
Attachment, pro confesso or amendment, by chancery defendant answering by subsequently unanswered cross-bill, against codefendant.
Jackson v. Lemler, 83 M. 37, 35 So. 306.

Chancery. Process. "Time required." Pro confesso.
Sheffield v. Friedberg, 84 M. 188, 36 So. 242.

Section 555.
On chancery jury trial, testimony of witnesses ore tenus in open court, admissible without prior agreement of parties.
White v. Jones, 83 M. 231, 35 So. 450.

Embraced Code 1892, § 736. Extension of time by chancellor in vacation for filing of stenographer's notes, &c.
Jamison v. Jamison, 92 M. 468, 46 So. 83, 945.

Section 557.
Verification of bill for injunction not required in all cases.
Purvis v. Woodward, 78 M. 922, 29 So. 917.

Mandatory injunction. Ex parte application. Hearing.
Gulf Coast Ice &c. Co. v. Bowers, 80 M. 570, 32 So. 113.

Section 572.
Injunction. Dissolution. Stay. Damages.
Fox v. Miller, 71 M. 598, 14 So. 145.
Williams v. Bank of Commerce, 71 M. 858, 16 So. 238.
Armstrong v. Fusz, 16 So. 532.

Injunction. Dissolution. Sale under trust deed. Attorney's fees.
Wynne v. Mason, 72 M. 424, 18 So. 422.

Injunction bond. Five per cent. penalty. Declaration. Negation of exception.
Barber v. Levy, 73 M. 484, 18 So. 797.

Injunction. Dissolution. Stay. Damages.
Nixon v. Seal, 78 M. 363, 29 So. 399.

Section 573.
Injunction. Dissolution. Damages.
Canadian &c. Trust Co. v. Fitzpatrick, 71 M. 347, 14 So. 270.
Fox v. Miller, 71 M. 598, 14 So. 145.

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Injunctions. Five per cent. damages: when recoverable. Pleading.
Barber v. Levy, 73 M. 484, 18 So. 797.

Section 574.

Notice unnecessary in case of directors' fraudulent mismanagement and bank's consequent insolvency.
Benjamin v. Staples, 93 M. 507, 47 So. 425.

Chancery court. Receiver. Appointment. Notice.
Pearson v. Kendrick, 74 M. 235, 21 So. 37.

Section 575.

Decree discharging receiver. Appeal therefrom.
Pearson v. Kendrick, 74 M. 235, 21 So. 37.

Section 582.

Assignee-receiver in assignment for benefit of creditors under Code 1892 c. 8. Charges, allowances, and compensation.
Perry-Mason Shoe Co. v. Sykes, 72 M. 390, 17 So. 171, 28 L. R. A. 277.

Section 589.

Premium note given insurance company, delinquent as to privilege tax, void.
Montjoy v. Delta Bank, 76 M. 402, 24 So. 870.

Sections 595, 596.

Infant party to chancery suit. Right to rehearing.
Hebron v. Kelly, 77 M. 48, 23 So. 641.

Section 630.

Special term continuable, without reference to fixed length of regular terms, until completion of business.
Dees v. State, 78 M. 250, 28 So. 849.

Section 649.

Applies to justices' courts.
Ball v. Sledge, 82 M. 749, 35 So. 447, 100 Am. St. 654.

Section 650.

Attachment. Change of venue cannot be made under this section.
Baum v. Burns, 66 M. 124, 5 So. 697.
See Wessinger v. Mauser &c. Imp. Co., 75 M. 64, 21 So. 757.

Venue of actions in personam is in county "in which the defendants, or any of them, may be found."
Campbell v. Triplett, 74 M. 365, 20 So. 844.

Venue of civil actions. Foreign surety company defendant.
American Surety Co. v. Holly Springs, 77 M. 428, 27 So. 612.

Jurisdiction of local civil action (trespass quare clausum fregit) cannot be transferred by attempted change of venue resting alone on consent of parties.
Wilkerson v. Jenkins, 77 M. 603, 27 So. 611.

Circuit court. Venue of actions generally.
State v. Mississippi Cotton Oil Co., 79 M. 203, 30 So. 609.

Sections 652–654.

Regulate venue in circuit courts as to certain corporations, &c.
State v. Mississippi Cotton Oil Co., 79 M. 203, 30 So. 609.

Section 660.

Grantee's covenant to pay rent binding between assignees of estate in fee and assignees of covenant.
Wright v. Hardy, 76 M. 524, 24 So. 697.

Suit on chose in action maintainable by assignee in written assignment.
Jenkins v. Sherman, 77 M. 884, 28 So. 726.

Section 663.

Death. Action for. Parent and child.
Meyer v. King, 72 M. 1, 16 So. 245, 35 L. R. A. 474.
White v. Louisville &c. R. Co., 72 M. 12, 16 So. 248.

Death. Action for. Limitation. Disability.
Foster v. Yazoo &c. R. R. Co., 72 M. 886, 18 So. 380.

Wrongful death. Action by next of kin.
McVey v. Illinois Cent. R. Co., 73 M. 487, 18 So. 797.

Negligence. Actions for injuries causing death. Legislative development of Lord Campbell's act. Laws 1898, p. 82, ch. 65.
Bussey v. Gulf &c. R. Co., 79 M. 597, 31 So. 212.

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Death-producing injuries. Rights of action consolidated by Laws 1898, p. 82, ch. 65.
Ballard v. Mississippi Cotton Oil Co., 81 M. 507, 34 So. 533, 95 Am. St. 476, 62 L. R. A. 407.

Modified by Laws 1898, p. 82, ch. 65. Measure of damages in action by parent for death of minor child.
Cumberland Tel. &c. Co. v. Anderson, 89 M. 732, 41 So. 263.

Amended, Laws 1898, p. 82, ch. 65. Person in whom cause of action rests must sue within one year from date of death.
Pickens v. Illinois Cent. R. Co., 92 M. 210, 45 So. 868.

Section 664.
Non-joinder of cotenant as plaintiff in action to recover statutory penalty for cutting trees. Waiver.
Darrill v. Dodds, 78 M. 912, 30 So. 4.

Section 669.
Railroad. Receivers: revival against. Waiver, by purchaser at sale, by plea to merits.
Memphis &c. R. Co. v. Glover, 78 M. 467, 29 So. 89.

Section 670.
Circuit court. Filing declaration is commencement of action, &c.
Meridian Nat. Bank v. Hoyt &c. Co., 74 M. 221, 21 So. 12, 60 Am. St. 504, 36 L. R. A. 790.

Section 671.
Vendor and purchaser. Recovery, by former, of purchase money. Form of action, immaterial.
Washington v. Soria, 73 M. 665, 19 So. 485, 55 Am. St. 555.

Abolished forms of action.
Alliance Trust Co. v. Nettleton Hardwood Co., 74 M. 584, 21 So. 396.

Sections 676, 677.
Declaration's ad damnum clause controlled by filed evidence. Judgment for debt proven, greater than sum demanded. Reversal.
Montgomery v. Hanover Nat. Bank, 79 M. 443, 30 So. 635.

Writings made part of pleadings.
Georgia Home Ins. Co. v. Holmes, 75 M. 390, 23 So. 183.

Sections 682, 683, 684.
Pleading together pleas in abatement and pleas in bar entitles opposite party to judgment, &c.
Rice v. Patterson, 92 M. 666, 46 So. 255.

Section 683.
Pleas that may be joined.
Lay v. Filmore, 75 M. 493, 23 So. 184.

Section 686.
Pleadings. Notice under general issue. Counter notice.
Yazoo &c. R. Co. v. Humphrey, 83 M. 721, 36 So. 154.

Suit by passenger against carrier for personal injuries. Free pass. Pleadings. Evidence.
Yazoo &c. R. Co. v. Grant, 86 M. 565, 38 So. 502, 109 Am. St. 723.

Section 692.
More than one replication can be filed, only when verified by oath.
Wilmot v. Yazoo &c. R. Co., 76 M. 374, 24 So. 701.

Section 703.
Replication setting up adverse possession against easement relied on as defense, not subject to demurrer.
Wilmot v. Yazoo &c. R. Co., 76 M. 374, 24 So. 701.

Section 704.
Pleading. Motion to render certain.
Jones v. Millsaps, 71 M. 10, 14 So. 440, 23 L. R. A. 155n.

Section 705.
Refusal to require bill of particulars of claimant of property seized not reversible error where it appears on whole record that plaintiff in execution was not injured thereby.
Thomas v. Shell, 76 M. 556, 24 So. 876.

Authorizes demands for bills of particulars. Does not apply to criminal cases.
Westbrooks v. State, 76 M. 710, 25 So. 491.

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Section 713.

Failure of defendant sued on open account to plead to part of items and make tender into court. Judgment for plaintiff, &c.
Memphis Mach. Works v. Aberdeen, 77 M. 420, 27 So. 608.

Section 714.

Interpleader. Suit for price of timber. Title to land.
Boyle v. Manion, 74 M. 572, 21 So. 530.

Disclaimer by defendant. Replevin. Intervention by volunteer.
Lewis v. McCracken, 89 M. 229, 42 So. 671.

Sections 714, 715.

Parties. Substitution of real party.
Kohlman v. First Nat. Bank, 71 M. 843, 15 So. 131.

Section 717.

Tenant holding over after expiration of term. Summary proceedings to remove. Defective affidavit. Amendment.
Bowles v. Dean, 84 M. 376, 36 So. 391.

Section 718.

Variance. Amendment. Practice.
Illinois Cent. R. Co. v. Price, 72 M. 862, 18 So. 415.

Section 730.

Documentary evidence: jury may take same to consultation room.
Lipscomb v. State, 75 M. 559, 23 So. 210, 230.

Section 732.

Instruction. Weight of evidence.
Louisville &c. R. Co. v. Whitehead, 71 M. 451, 15 So. 890, 42 Am. St. 472.

Judge forbidden to "charge jury as to weight of evidence." Instruction.
Cryer v. State, 71 M. 467, 14 So. 261, 42 Am. St. 473.

Instruction. Confession. Weight.
Thompson v. State, 73 M. 584, 19 So. 204.

Modification of instruction for defendant to conform to state's theory, not error.
Smith v. Smith, 75 M. 542, 23 So. 260.

Prosecution for murder. Plea of insanity. Erroneous instruction.
Maston v. State, 83 M. 647, 36 So. 70.

Instructions not marked "given" or "refused." Paper, signed by stenographer, and certificate of clerk, ineffectual as bill of exceptions.
Delta Bank v. Goff, 12 So. 699.

Section 733.

Bills of exceptions in civil cases. Function. Performance.
Alexander v. Flood, 77 M. 925, 28 So. 787.

Sections 733, 735, 736.

Bill of exceptions. Signing. Special judge.
Illinois Cent. R. Co. v. Bowles, 71 M. 994, 16 So. 235.

Section 735.

Bills of exceptions: special and general.
State v. Spengler, 74 M. 129, 20 So. 879, 21 So. 4.

Compliance with this section necessary prerequisite to review of conduct of state's attorney.
Powers v. State, 83 M. 691, 36 So. 6.

Section 736.

Embraced by Code 1892, § 555. Extension of time by chancellor in vacation for filing of stenographer's notes, &c.
Jamison v. Jamison, 92 M. 468, 46 So. 83, 945.

Section 737.

Inapplicable to appeals from boards of supervisors.
Roach v. Tallahatchie County, 78 M. 303, 29 So. 93.

Section 739.

Motion for new trial. Exception to order overruling same unnecessary.
State v. Spengler, 74 M. 129, 20 So. 879, 21 So. 4.

Section 746.

Jeofails. Verdict. Insufficient evidence. Pleading.
Holmes v. Preston, 70 M. 152, 12 So. 202.

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Jeofails: what cured by verdict. Variance.
Illinois Cent. R. Co. v. Price, 72 M. 862, 18 So. 415.

Jeofails. Insufficiently stated cause.
Yazoo &c. R. Co. v. Schraag, 84 M. 125, 36 So. 193.

Sections 751, 752.
Debt due to several jointly but not as partners, may be garnished by creditor of one of them.
Fewell v. American Surety Co., 80 M. 782, 28 So. 755.

Section 802.
Amended, Laws 1894, p. 74. Justice of peace. Convicts worked on public roads. Liability of county for fines and costs.
Murch v. Warren County, 73 M. 356, 18 So. 540.

Section 808.
Burden on railroad company to overthrow presumption.
Yazoo &c. R. Co. v. Landrum, 89 M. 399, 42 So. 675.

Section 814.
Renders Code 1892, ch. 23, inapplicable during life of existing contracts.
Ex parte Hill, 12 So. 902.

Section 824.
Coroner's inquest. Post mortem examination. Fees.
Greene v. Monroe County, 72 M. 306, 17 So. 10.

Section 828.
Construed with Code 1892, § 3079, does not require performance of official duties by deputy of living and disqualified sheriff.
Lipscomb v. State, 76 M. 223, 25 So. 158.

Section 832.
Corporation created under Code 1892, c. 25, can only exercise powers prescribed by that chapter. Gravel corporation.
Woodberry v. McClurg, 78 M. 831, 29 So. 514.

Section 843.
Enacted for benefit of corporate creditors. Unavailable to attempted escaper from liability as stockholder.
Allen v. Edwards, 95 M. 719, 47 So. 382.

Section 844.
Corporate stock. Transfer on books.
Goyer Cold Storage Co. v. Wildberger, 71 M. 438, 15 So. 235.

Corporation. Deceased subscriber. Unpaid subscription. Recovery by creditor.
Robinett v. Starling, 72 M. 652, 18 So. 421.

Unpaid subscription. Garnishment. Liability of creditor without call by directors.
Scott v. Windham, 73 M. 76, 16 So. 206.

Designed to protect creditors and fix stockholders' liability for unpaid subscriptions. Non-invokable between stock seller and buyer.
Scherck v. Montgomery, 81 M. 426, 33 So. 507.

Enacted for benefit of corporate creditors. Unavailable to attempted escaper from liability as stockholder.
Allen v. Edwards, 93 M. 719, 47 So. 382.

Section 847.
Dissolution of corporation. Assets.
Sells v. Rosedale Grocery &c. Co., 72 M. 590, 17 So. 236.

Section 849.
Foreign corporations. Jurisdiction.
Pullman Palace Car Co. v. Lawrence, 74 M. 782, 22 So. 53.

Section 850.
Enacted for benefit of corporate creditors. Unavailable to attempted escaper from liability as stockholder.
Allen v. Edwards, 93 M. 719, 47 So. 382.

Section 853.
Debts in excess of capital. Liability of director.
Sells v. Rosedale Grocery &c. Co., 72 M. 590, 17 So. 236.

Sections 854–858.
Together with Code 1892, § 4291, repealed Laws 1886, p. 93, ch. 38. Telephone company cannot exercise right of eminent domain.
Alabama &c. R. Co. v. Cumberland Tel. &c. Co., 88 M. 438, 41 So. 258.

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Section 889.

Supreme Court will not interfere with trial court's discretion as to taxation of costs.
Bernheim v. State, 28 So. 28.

Section 896.

Execution sale against foreign-county surety on appeal bond, void.
Griffin v. Hickman, 92 M. 266, 46 So. 73.

Section 902.

County treasurer. Penalty not recoverable when failure results from supervisors' request to postpone reports.
Adams v. Coker, 85 M. 222, 37 So. 744.

Section 904.

Sheriff of Bolivar county: authority to receive for taxes, unregistered county warrants, &c.
Jones v. Melchior, 71 M. 115, 13 So. 857.

Section 907.

Allowance by supervisors of compensation exceeding legal limit, no defense in action under this section.
Davis v. Adams, — M. —, 50 So. 568.

Section 912.

Special term. Time limit in call, unnecessary. Continuation until completion of business.
Dees v. State, 78 M. 250, 28 So. 849.

Section 913.

Decree, in suit pending on first regular term day, rendered on day to which court was adjourned, was rendered at adjourned term.
First Nat. Bank v. Bloch, 82 M. 197, 33 So. 849.

Section 914.

Courts. Interval between expiration of term of office of judge and appointment of successor. Discontinuance.
Palmer v. State, 73 M. 780, 20 So. 156.

Section 916.

Mandatory injunction. Ex parte application. Hearing.
Gulf Coast Ice &c. Co. v. Bowers, 80 M. 570, 32 So. 113.

Injunction. Fiat of granting judge or chancellor to "authorize the issuance of the process or writ returnable," &c.
Sheffield v. Friedberg, 84 M. 188, 36 So. 242.

Sections 920, 921.

Special judge. Signing bill of exceptions.
Illinois Cent. R. Co. v. Bowles, 71 M. 994, 16 So. 235.

Non-prohibitive of approval of stenographer's notes and signing of bill of exceptions by special judge appointed under Const. 1890, § 165.
Lopez v. Jackson, 79 M. 460, 31 So. 206.

Section 921.

Special judge, de facto officer. Failure to take constitutional oath does not invalidate acts.
Powers v. State, 83 M. 691, 36 So. 6.

Sections 921, 922.

Quo warranto cannot be heard by special judge appointed by governor.
Kelly v. State, 79 M. 168, 30 So. 49.

Section 922.

Chancery court. Receiver. Appointment in vacation. Notice.
Pearson v. Kendrick, 74 M. 235, 21 So. 37.

Section 926.

Court to order and allow for supplies on failure of supervisors so to do.
Choctaw County v. Hughes, 83 M. 195, 35 So. 424.

Only change made in Code 1880, § 2276, one of regularity and method in financial administration.
Jones v. Lee County, 12 So. 341.

Section 927.

Amended, Laws 1900, p. 136. Highly penal. Extreme case required to justify pro confesso.
Equitable Life Assur. Soc. v. Clark, 84 M. 471, 31 So. 964.

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Order for inspection of books of account non-appealable under Code 1892, § 34.
Equitable Assur. Soc. v. Clark, 28 So. 798.

Section 933.

Trial or hearing of criminal case has begun and is in progress as soon as court enters upon impaneling of jury for trial of matters of fact, &c.
Lipscomb v. State, 76 M. 223, 25 So. 158.

Section 934.

Complaint in bastardy proceeding not invalid because sworn to before justice other than one before whom suit was begun.
Johnson v. Walker, 86 M. 757, 39 So. 49, 109 Am. St. 733n, 1 L. R. A. (N. S.) 470.
See Cassedy v. Mayer, 64 M. 356, 1 So. 510.

Section 940.

Amendable judgment non-assailable for technical defects, for first time in suggestion of error.
Carrier v. Poulas, 87 M. 595, 40 So. 164.

Correction of errors in judgments. Petitions, not presenting case within this section. Parol evidence.
Harper v. Barnett, 16 So. 533.

Applies only to civil cases.
Wilson v. Hansboro, — M. —, 54 So. 845.

Section 946.

Does not apply to voluntary bonds. Unnecessary cost bond voluntary.
Nichols v. Gulf &c. R. Co., 83 M. 126, 36 So. 192.

Curative of indemnifying bond conditioned under Code 1892, § 3482, instead of as provided by Code 1892, § 1967.
Bank of Gulfport v. O'Neal, 86 M. 45, 38 So. 630.

Rents of land in controversy, accruing, pending premature appeal from interlocutory chancery decree. Surety on suspersedeas bond. Liability.
Perkins v. Watson, 92 M. 452, 46 So. 80.

Section 967.

Assault and battery with intent to kill, &c. Indictment. Deadly weapon, question of fact for jury.
State v. Sims, 80 M. 381, 31 So. 907.

Draws distinctions between assault, and assault and battery.
Montgomery v. State, 85 M. 330, 37 So. 835.

Section 968.

Prosecution under this section. Evidence. Instructions.
Tuberville v. State, 38 So. 333.

Section 969.

Aiming firearms. Homicide. Conviction. Lesser offense.
Lucas v. State, 71 M. 471, 14 So. 537.

Aiming firearms. Conviction of felony. Sentence for lesser offense.
Thomas v. State, 73 M. 46, 19 So. 195.

Constitutional. Erroneous sentence.
Washington v. State, 76 M. 270, 24 So. 309.

Prosecution for pointing gun, &c., not barred by acquittal of assault and battery with intent to kill.
Richardson v. State, 79 M. 289, 30 So. 650.

Penalizes pointing and discharge of firearms, &c. Verdict operating as conviction under first clause.
Goolsby v. State, 35 So. 212.

Section 974.

Attempt to commit forgery: conviction erroneous upon facts.
Wilson v. State, 85 M. 687, 38 So. 46.

Defendant cannot be convicted of attempt to commit felony where evidence shows its actual commission.
Davis v. State, 89 M. 21, 42 So. 542.

Section 977.

Larceny not constituent offense of crime defined. Former conviction.
Cook v. State, 77 M. 800, 27 So. 605.

Section 1004.

Seduction of female under sixteen. Complement of Code 1892, § 1298. "Previous chaste character."

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Norton v. State, 72 M. 128, 16 So. 264, 18 So. 916, 48 Am. St. 538.

Seduction. Sufficiency of indictment.
Carlisle v. State, 73 M. 387, 19 So. 207.

Seduction. Indictment need not allege that woman was unmarried.
Hoff v. State, 83 M. 488, 35 So. 950.

Unchaste female non-seducible. Possible for same man to seduce same woman once only.
Hatton v. State, 92 M. 651, 46 So. 708.

Section 1007.

Criminal trusts and combines.
American Fire Ins. Co. v. State, 75 M. 24, 22 So. 99.

Section 1022.

Malicious injury of animals. Offense.
Porter v. State, 83 M. 23, 35 So. 218.

Section 1026.

Concealed weapons. Unloaded pistol.
State v. Bollis, 73 M. 57, 19 So. 99.

Assault and battery with intent to kill, &c. Indictment. Deadly weapon, question of fact for jury.
State v. Sims, 80 M. 381, 31 So. 907.

Sections 1026, 1027.

Indictment or affidavit for carrying concealed weapon, fatally defective if it fails to charge that weapon was "unlawfully" carried.
Jordan v. State, 87 M. 170, 39 So. 895.
See Whittaker v. State, 45 So. 145.

Section 1027.

Concealed weapons. United States marshal.
State v. Williams, 72 M. 992, 18 So. 486.

Carrying concealed weapons. Bodily harm. Actual apprehension. Burden of proof. Reasonable doubt.
Strother v. State, 74 M. 447, 21 So. 147.

Section 1033.

Abusive language. Insufficient indictment. "Near the premises."
State v. Moore, 24 So. 308.

Section 1034.

Disturbance of public worship. Claimant of church property, locking door of building on congregation, not guilty of offense penalized.
Davis v. State, 16 So. 377.

Section 1058.

Evidence of different acts constituting embezzlement, admissible without election.
Starling v. State, 90 M. 255, 43 So. 952.

Section 1063.

Embezzlement. Guardian. Officer.
State v. Gillis, 75 M. 331, 24 So. 25.

Refusal of executor to pay judgment debt of estate, not within intendment.
State v. Pannell, 34 So. 388.

Section 1068.

Enticing away servants. Damages.
Armistead v. Chatters, 71 M. 509, 15 So. 39.

Enticing away laborer or renter. Double damages.
Chrestman v. Russell, 73 M. 452, 18 So. 656.

Enticing servant, employe, tenant, &c.
Hoole v. Dorrah, 75 M. 257, 22 So. 829.
Mahoney v. McNeill, 77 M. 406, 27 So. 528.

Amended, Laws 1900, p. 140, ch. 102. Requisites of affidavit.
Triplet v. State, 80 M. 379, 31 So. 743.
See Jackson v. State, 13 So. 935.

Enticing servants. "Double damages" clause repealed by Laws 1900, p. 140.
Nations v. Lovejoy, 80 M. 401, 31 So. 811.

Amended, Laws 1900, p. 140, ch. 102. Enticement of infant servant, under contract made by mother, not offense.
State v. Richardson, 86 M. 439, 38 So. 497.

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Penalizes wilful interference with, and enticement of servant, &c. Instruction. Sufficiency of evidence.
Jackson v. State, 16 So. 299.

Section 1081.
Extortion. Excessive fees.
State v. Jones, 71 M. 872, 15 So. 237.
Tax collector. Exaction of prepayment of fees.
Baker v. Cox, 79 M. 306, 30 So. 641.

Section 1088.
Does not apply in case of mere exchange.
State v. Austin, 23 So. 34.

Section 1089.
Insolvent bank. Receiving deposits.
State v. Bardwell, 72 M. 535, 18 So. 377.
Insolvent bank. Duplicity in counts of indictment of officer for receiving deposits.
State v. Walker, 88 M. 592, 41 So. 8.

Section 1106.
Instrument susceptible of forgery.
France v. State, 83 M. 281, 35 So. 313.
Confines crime of forgery to instances where persons may be affected, bound, or injured. Act not constituting offense.
Wilson v. State, 85 M. 687, 38 So. 46.

Section 1108.
Forgery. Indictment must show how pecuniary obligation was to be affected.
State v. Starling, 90 M. 252, 42 So. 203.

Sections 1120, 1121.
Judgment properly returned for defendant in action on promissory note based on account for losses in dealings in "futures."
Violett v. Mangold, 27 So. 875.

Section 1122.
Does not describe two punishments in alternative.
Fuller v. State, 83 M. 30, 35 So. 214.

Section 1124.
Keeping gaming table. Indictment.
Rawles v. State, 70 M. 739, 12 So. 584.
Amended, Laws 1896, p. 110. Indictment not charging that defendant was interested in loss or gain of table, fatally defective.
Brazele v. State, 86 M. 286, 38 So. 314.

Section 1126.
Playing poker with three, five and ten-cent stakes, gambling. Sufficiency of evidence to show defendant to have been lessee and occupant of room. Non-prejudicial instruction.
Ford v. State, 86 M. 123, 38 So. 229.
Gambling. Indictment, good on demurrer. Improper use of word "feloniously."
Brister v. State, 86 M. 461, 38 So. 678.

Section 1129.
Gaming. Allowing minor to bet.
Martin v. State, 71 M. 87, 14 So. 530.

Section 1143.
Misdemeanor specifically described probably that intended to be created by Laws 1900, p. 153, § 10.
McElmore v. State, 81 M. 422, 33 So. 225.

Section 1145.
Obstructing streets. Municipal control.
Blocker v. State, 72 M. 720, 18 So. 388.
Supervisors' record must show on face conformity with Code 1880, § 823, to render road's obstruction prosecutable under this section.
State v. Morgan, 79 M. 659, 31 So. 338.

Section 1148.
Makes punishable racing or shooting in any "street or public highway." Distinction seems to be drawn between roads designated.
Blocker v. State, 72 M. 720, 18 So. 388.

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Section 1149.

Murder. Instruction in statutory language inapplicable to facts.
Strickland v. State, 81 M. 134, 32 So. 921.
Wood v. State, 81 M. 408, 33 So. 285.

Instruction purporting to define murder which excludes "without authority of law," erroneous.
Ivy v. State, 84 M. 264, 36 So. 265.

Section 1157.

Unborn quick child. Taking of substance or use of instrument by pregnant woman. Indictment.
State v. Prude, 76 M. 543, 24 So. 871.

Section 1158.

Killing not in "cruel and unusual manner."
Klyce v. State, 78 M. 450, 28 So. 827.

Section 1159.

Ineffectual to reduce from murder to manslaughter, unnecessary killing of trespasser.
McMaster v. State, 29 So. 522.
See Brown v. State, — M. —, 54 So. 305.

Section 1173.

Deed to land is subject of larceny.
State v. Hughes, 80 M. 609, 31 So. 963.

Section 1176.

Larceny. Promissory note. Evidence as to uncollectibility by reason of refusal of insolvent makers to pay, admissible.
McDowell v. State, 74 M. 373, 20 So. 864.

Makes "bonds, bills, notes," &c., subject of larceny.
State v. Hughes, 80 M. 609, 31 So. 963.

Section 1179.

Larceny. Court records and public papers.
State v. Hughes, 80 M. 609, 31 So. 963.

Section 1184.

Indictment showing mortgage debt not due at time of alleged sale, bad on demurrer.
State v. Sullivan, 80 M. 596, 32 So. 55.

Beneficiary must consent to sale of personalty—subject to lien, not immediately discharged.
McCallum v. State, 30 So. 47.

Section 1209.

Malicious mischief. Indictment, averring that act was maliciously done, not bad for failure to allege wilful perpetration.
Funderburk v. State, 75 M. 20, 21 So. 658.

Malicious injury of animals. Offense.
Porter v. State, 83 M. 23, 35 So. 218.

Malicious mischief. Offense.
Barkley v. State, 23 So. 185.

Section 1218.

Indecent exposure. Indictment. Fatal omission. Instruction.
Stark v. State, 81 M. 397, 33 So. 175.

Section 1219.

Profanity. Indictment fatally defective unless particular public place of alleged offense be charged.
State v. Shanks, 88 M. 410, 40 So. 1005.

Section 1222.

Affidavit need not aver case in which intimidated witness was to testify.
Wilson v. State, 80 M. 388, 31 So. 787.

Amendment on appeal to circuit court, of affidavit defective in charging offense penalized.
Brown v. State, 81 M. 137, 32 So. 952.

Section 1239.

Speculating in county warrants. Supervisor.
Marks v. State, 71 M. 206, 14 So. 530.

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Section 1246.

Subornation of perjury. Indictment must show materiality of testimony corruptly sought.

State v. Booker, 84 M. 187, 36 So. 241.

Section 1252.

Selling poison to minor.

Meyer v. King, 72 M. 1, 16 So. 245, 35 L. R. A. 474.

Section 1254.

"Taken," means any method by which system is made to absorb poison, and includes every possible way poison can be administered.

State v. Stuart, 88 M. 406, 40 So. 1010.

Section 1255.

Mingling poison with food. Indictment. Malice required to be charged of intent to kill, &c.

Taylor v. State, 74 M. 544, 21 So. 129.

Corpus delicti, mingling of poison with food, drink or medicine. Cannot be proved by accused's confession alone.

Stanley v. State, 82 M. 498, 34 So. 360.

Section 1258.

Physician practising without license cannot recover for professional services.

Bohn v. Lowery, 77 M. 424, 27 So. 604.

Section 1272.

Affidavit averring that person jumped off moving train does not charge offense. Damages for false imprisonment.

Alabama &c. R. Co. v. Kuhn, 78 M. 114, 28 So. 797.

Section 1281.

Attempt to rape female under age of ten years. Indictment. Proof.

Bonner v. State, 65 M. 293, 3 So. 663.

Alfred v. State, 32 So. 54.

Section 1284.

Robbery. Indictment. Fatal defects.

Smith v. State, 82 M. 793, 35 So. 178.

Robbery. Sufficiency of indictment.

Cunningham v. State, 28 So. 750.

Section 1298.

Seduction. Indictment.

Ferguson v. State, 71 M. 805, 15 So. 66.

Seduction. Previous chastity of prosecutrix. Indictment. Demurrer. Defect cured by verdict. Allegation that defendant was unmarried, unnecessary.

Norton v. State, 72 M. 128, 16 So. 264, 18 So. 916, 48 Am. St. 538.

See Hatton v. State, 92 M. 651, 46 So. 708.

Seduction. Previous chastity of female.

Carroll v. State, 74 M. 688, 22 So. 295, 60 Am. St. 539.

Seduction. Indictment need not allege that woman was unmarried.

Hoff v. State, 83 M. 488, 35 So. 950.

Subsequent offer of marriage, unaccepted, will not defeat criminal prosecution of seducer.

Williams v. State, 92 M. 70, 45 So. 146.

Section 1301.

Has no application to action against company for damages resulting from publication of message.

Cocke v. Western Union Tel. Co., 84 M. 380, 36 So. 392.

Section 1315.

Wilful or malicious trespass. Gross negligence may amount to both malice and wilfulness within meaning. Conviction may be had for trespass which was direct consequence of violation of Code 1892, § 3902.

Porter v. State, 83 M. 23, 35 So. 218.

Wilful or malicious trespass. Offense.

Barkley v. State, 23 So. 185.

Section 1317.

Boxing pine trees. Fatally defective affidavit.

Davis v. State, 80 M. 376, 31 So. 742.

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Section 1318.

Fishing on posted lands. Prosecution. Conviction on insufficient evidence.
Valentine v. State, 35 So. 170.

Section 1320.

Misdemeanor to go, after notice not to do so, upon inclosed land in possession of another. Title not involved in prosecution.
Raiford v. State, 87 M. 359, 39 So. 897.

Section 1322.

Vagrancy. Prostitute. Sufficiency of circumstantial evidence.
Peabody v. State, 72 M. 104, 17 So. 213.

Section 1323.

Vagrancy. Appeal to circuit court.
Jones v. State, 70 M. 398, 12 So. 710.

Section 1335.

Prosecution for murder. Admissibility of evidence as to place of death.
Coleman v. State, 83 M. 290, 35 So. 937, 64 L. R. A. 807.

Section 1340.

Provides that conviction before justice, of misdemeanor shall not bar prosecution for felony in same matter. Not violative of Const. 1890, § 22.
Huffman v. State, 84 M. 479, 36 So. 395.

Conviction of assault and battery on indictment for assault and battery with intent to murder, barred by former acquittal, before justice, of assault and battery.
Rucker v. State, 24 So. 311.

Section 1341.

Seduction. Indictment. Failure to allege that false promise was made to prosecutrix, cured by verdict.
Norton v. State, 72 M. 128, 16 So. 264, 18 So. 916, 48 Am. St. 538.

Mingling poison with food with intent, &c. Indictment defective in not stating nature and cause of accusation, clearly and fully. Arrest of judgment.
Taylor v. State, 74 M. 544, 21 So. 129.

Indictment of mother for infanticide, good after verdict.
Wilkinson v. State, 77 M. 705, 27 So. 639.

Section 1342, 1343.

No presumption to bring prosecution within statute that accused was bound over within certain time. Seduction.
Hatton v. State, 92 M. 651, 46 So. 708.

Section 1346.

Indictment. Marking "Filed," dating, and signing entries, exclusive legal evidence of finding and presentation. Failure, at return term. Demurrer.
Stanford v. State, 76 M. 257, 24 So. 536.

Section 1347.

Constitutional. Defendant triable upon certified copy of lost indictment.
McGuire v. State, 76 M. 504, 25 So. 495.

Section 1354.

Indictment. Defects apparent on face. Demurrer.
Gates v. State, 71 M. 874, 16 So. 342.

Defect apparent on face of indictment. Objection by demurrer.
Norton v. State, 72 M. 128, 16 So. 264, 18 So. 916, 48 Am. St. 538.

Omission, going to very essence of offense, renders indictment for felony void and attackable at any time. "Did."
Cook v. State, 72 M. 517, 17 So. 228.
Hall v. State, 44 So. 810.

Indictment. Imperfect venue. Objection, by demurrer, before jury is impaneled.
Burnett v. State, 72 M. 994, 18 So. 432.

Defective indictment for felony. Malice. Arrest of judgment.
Taylor v. State, 74 M. 544, 21 So. 129.

Indictment of mother for infanticide, good after verdict.
Wilkinson v. State, 77 M. 705, 27 So. 639.

Duplicity can only be reached by demurrer.
Clue v. State, 78 M. 661, 29 So. 516, 84 Am. St. 643.

Section 1355.

Demurrer, proper form of objection to defect apparent on face of indictment.
Norton v. State, 72 M. 128, 16 So. 264, 18 So. 916, 48 Am. St. 538.

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Section 1356.

Indictment, not insufficient "for want of a proper or perfect venue."
Burnett v. State, 72 M. 994, 18 So. 432.

Seduction of female under age of sixteen. Indictment. Date. Immaterial error.
Carlisle v. State, 73 M. 387, 19 So. 207.

Section 1358.

Forgery. Indictment. Certainty. Description.
Roberts v. State, 72 M. 110, 16 So. 233, 55 Am. St. 488n.

Section 1359.

Conviction of aiming, discharging, and killing under Code 1892, § 969, on indictment for murder in form prescribed.
Thomas v. State, 73 M. 46, 19 So. 195.

Section 1362.

Perjury. Sufficiency of indictment.
State v. Jolly, 73 M. 42, 18 So. 541.
State v. Silverberg, 78 M. 858, 29 So. 761.

Section 1375.

Homicide in attempting, without warrant, to arrest slayer. Instruction.
Cryer v. State, 71 M. 467, 14 So. 261, 42 Am. St. 473.

Arrest by private person without warrant.
Spradley v. State, 80 M. 82, 31 So. 534.

Section 1384.

Commitment for perjury should, if possible, be in absence of jury.
Golden v. State, 75 M. 130, 21 So. 971.

Arrest of palpable perjurers.
Chase v. State, 75 M. 502, 22 So. 828.
Brandon v. State, 75 M. 904, 23 So. 517.

Section 1387.

Fleeing homicide. Arrest. Reward.
Martin v. Copiah County, 71 M. 407, 15 So. 73.
Newton County v. Doolittle, 72 M. 929, 18 So. 451.

Person who merely telegraphs sheriff of county where homicide occurred of arrest of fleeing slayer, not entitled to reward.
Gould v. Chickasaw County, 85 M. 123, 37 So. 710.

Reward for arrest of fleeing manslayer. Contemplates approval of allowance by both circuit court and board of supervisors.
Tate County v. Moore, 87 M. 245, 39 So. 781.
See Ex parte Webb, 96 M. 8, 49 So. 567.

Supreme Court without jurisdiction of appeal by county from grant of ex parte petition for allowance of reward.
Warren County v. Lanier, 87 M. 606, 40 So. 429.

Slayer, not fleeing or attempting to flee within meaning.
Monroe County v. Bell, 18 So. 121.

Section 1394.

Does not validate bail bond taken by justice of peace without authority to require same.
Smith v. State, 86 M. 315, 38 So. 319.

Sections 1394, 1395.

Indictment for offense different from that named in bail bond. Liability of sureties.
Neary v. State, 38 So. 335.

Section 1395.

Bail bond taken by justice of peace without authority to require same, void.
Smith v. State, 86 M. 315, 38 So. 319.

Section 1396.

Bail bond. Scire facias. Service. Judgment by default.
Smith v. State, 76 M. 728, 25 So. 491.

Forfeited recognizance. Surety. Judgment. Service. Scire facias.
Robertson v. State, 87 M. 285, 39 So. 478.

Section 1408.

Motion for copy of list of special venire, not made until drawing of venire is complete, may, in discretion of court, be denied.
Hannah v. State, 87 M. 375, 39 So. 855.

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Section 1411.

Change of venue. Application to be in writing and supported by affidavits of two or more credible persons.

Purvis v. State, 71 M. 706, 14 So. 268.

Murder. Application for change of venue on ground that fair and impartial trial was impossible. Evidence, sufficient to make denial, reversible error.

Tennison v. State, 79 M. 708, 31 So. 421.

Change of venue. Separate indictments against one person for two offenses.

Owens v. State, 82 M. 31, 33 So. 722.

Section 1412.

Change of venue. Transmission of transcript. Presumption.

McDonald v. State, 78 M. 369, 29 So. 171.

Section 1415.

Change of venue. Time for making application in capital case.

Purvis v. State, 71 M. 706, 14 So. 268.

Section 1417.

Changes common law by giving felony defendant right to severance on seasonable application.

Malone v. State, 77 M. 812, 26 So. 968.

Section 1423.

Jury. Challenges. Full panel.

Gibson v. State, 70 M. 554, 12 So. 582.
Funderburk v. State, 75 M. 20, 21 So. 658.

Defendant should withhold peremptory challenges until presentation of full panel. Overruling challenge for cause.

Gammons v. State, 85 M. 103, 37 So. 609.

Section 1425.

Affidavit for continuance. Criminal case.

Lee v. State, 75 M. 625, 23 So. 628.

Right of defendant to continuance for absent witness obtainable on compulsory process, though state admits testimony.

Montgomery v. State, 85 M. 330, 37 So. 835.

Right of accused to first term continuance for absent witness though state admits testimony.

Walton v. State, 87 M. 296, 39 So. 689.

Section 1426.

Indictment for crime: right to convict of attempt to commit same. Applicable to rape.

Horton v. State, 84 M. 473, 36 So. 1033.

Section 1423.

Assault and battery. Civil action. Defense. Acceptance of challenge. Subsequent fight.

Lizana v. Lang, 90 M. 469, 43 So. 477.

Assault and battery. Instruction: insulting language. Justification and excuse.

Barr v. State, 21 So. 131.

Section 1431.

Gaming. Indictment. Joinder of defendants. Evidence.

Howard v. State, 83 M. 378, 35 So. 653.

Section 1432.

Improper refusal of instruction not embodying provisions prescribed.

Howard v. State, 83 M. 378, 35 So. 653.

Section 1435.

Indictment of mother for infanticide, good after verdict.

Wilkinson v. State, 77 M. 705, 27 So. 639.

Indictment. Clerical mistake as to name of defendant. Amendment without consent of grand jury.

Orr v. State, 81 M. 130, 32 So. 998.

Section 1438.

Liquors, sale of. Name of buyer. Amendment.

Hudson v. State, 73 M. 784, 19 So. 965.

Amendment of affidavit, defective in charging crime, on appeal to circuit court. Verification.

Coulter v. State, 75 M. 356, 22 So. 872.

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Conviction by justice on defective affidavit. Amendment on appeal.
Triplet v. State, 80 M. 379, 31 So. 743.

Affidavit, defective in charging offense penalized by Code 1892, § 1222. Amendment on appeal to circuit court.
Brown v. State, 81 M. 137, 32 So. 952.

Section 1439.

General verdict of guilty in murder case on agreement as to guilt but not as to punishment. Instruction.
West v. State, 80 M. 710, 32 So. 298.

Alleged error in not compelling state to obtain instruction touching penalty. Record.
Evans v. State, 87 M. 459, 40 So. 8.

Section 1453.

Indictment. Extortion. Common-law form.
State v. Jones, 71 M. 872, 15 So. 237.

Section 1454.

Misdemeanor. Punishment not fixed by statute.
Meyer v. King, 72 M. 1, 16 So. 245, 35 L. R. A. 474.

Section 1463.

Statement not measuring up to provisions of this section, is nullity, unaidable by parol evidence.
Cunning v. State, 79 M. 284, 30 So. 658.

Justice of peace. Time for certification of witness's testimony. Harmless error.
Campbell v. State, 81 M. 417, 33 So. 224.

Certificate of committing magistrate, to be admissible in evidence, must contain substance of testimony of all witnesses.
Long v. State, 81 M. 448, 33 So. 224.

Authorizes justice to reduce to writing testimony of witnesses at committing trial and certify same to circuit court. Omitted from Code 1906.
Scott v. State, 92 M. 833, 46 So. 251.

Parol testimony as to defendant's statements on preliminary examination, objected to, inadmissible, there having been compliance with this section.
Bell v. State, 38 So. 795.

Sections 1466–1468.

Murderer, acquitted on ground of insanity, and certified to be still insane and dangerous, cannot escape incarceration in asylum by reason of lucid intervals.
Caffey v. State, 78 M. 645, 29 So. 396.

Section 1489.

Prevention of crime. Bond for good behavior on third conviction of violation of liquor law.
Caldwell v. State, 87 M. 420, 39 So. 896.

Section 1502.

Defines "Crime." Witness. Conviction of misdemeanor.
Lewis v. State, 85 M. 35, 37 So. 497.

Section 1508.

Emancipation of minor does not empower him to demand conveyance of land, to be made to him upon his reaching majority.
Ray v. Kelly, 82 M. 597, 35 So. 165.

Section 1513.

Deed to land is subject of larceny.
State v. Hughes, 80 M. 609, 31 So. 963.

Section 1520.

Signature. Handwriting or mark of signer.
Ferguson v. Monroe County, 71 M. 524, 14 So. 81.

"Proper handwriting of such person." Does not require signature to will to be written out: mark may still be adopted, &c.
Sheehan v. Kearney, 82 M. 688, 21 So. 41, 35 L. R. A. 102.

Section 1525.

Appeal bond. Order to file same "within sixty days," not complied with by filing on Monday succeeding Sunday, last day.
Nickles v. Kendrick, 76 M. 334, 24 So. 534.

Section 1543.

Descent and distribution. Uncles, aunts, and cousins, through aunts dying during lifetime of intestate.
Grantham v. Statham, 33 M. 176, 35 So. 423.

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Section 1545.

Descent of property as between husband and wife. "Child." To be construed with Code 1892, § 4496.

Norfleet v. Collicott, 90 M. 221, 43 So. 616.

Section 1549.

Widow takes husband's estate to exclusion of grandchild of husband by daughter, born of slave marriage.

Hope v. Hoover, 21 So. 134.

Section 1551.

Amended, Laws 1900, p. 129. Exempt property. Descent and distribution. Widow's right. Partition. Rent, &c.

Martin v. Martin, 84 M. 553, 36 So. 523.
Stevens v. Wilbourn, 88 M. 514, 41 So. 66.

Life insurance policy. Right to proceeds. Action by heirs.

Equitable Life Assur. Soc. v. Hartfield, 87 M. 548, 40 So. 21.

Section 1552.

Exempt property. Insurance. Liability for debts.

Coates v. Worthy, 72 M. 575, 17 So. 606, 18 So. 916.

Section 1553.

Confers, on widow, personal right which does not pass to her grantee.

Middleton v. Claughton, 77 M. 131, 24 So. 963.

Descent and distribution. Exempt property. Right of widow to occupy and use. Rent, &c. Partition.

Martin v. Martin, 84 M. 553, 36 So. 523.
Stevens v. Wilbourn, 88 M. 514, 41 So. 66.

Homestead. Limit of value for protection and benefit of creditors. Appreciation, subsequently to death of exemptionist. Use and occupation by widow as against other heirs.

Moody v. Moody, 86 M. 323, 38 So. 322.

Section 1562.

Divorce. Pederasty, "cruel and inhuman treatment."

Crutcher v. Crutcher, 86 M. 231, 38 So. 337.

Divorce. Personal violence not required in order to constitute "cruel and inhuman treatment." Bill.

Pierce v. Pierce, 38 So. 46.

Section 1571.

Divorce suit. Notice of agreement not prerequisite of introduction of oral testimony.

Grego v. Grego, 78 M. 443, 28 So. 817.

Section 1574.

Right to sell hoppenweis, hop tea, and white hops on payment of dealer's license under Laws 1896, p. 39, ch. 35.

Harland v. Adams, 76 M. 308, 24 So. 262.
See Armour v. Meridian, 24 So. 533.

Section 1580.

Does not require publication of names of witnesses to signatures by mark, on petition for liquor license.

Ferguson v. Brown, 75 M. 214, 21 So. 603.

Section 1581.

Dram shops. Appeal from order granting license.

Ferguson v. Brown, 75 M. 214, 21 So. 603.

Section 1582.

Suit on dram shop keeper's bond. Proof required.

State v. Spengler, 74 M. 129, 20 So. 879, 21 So. 4.

Supervisors cannot release county's half-interest in judgment on dram shop keeper's bond.

Adams v. Cox, 80 M. 561, 32 So. 117.

Action on liquor dealer's bond for illegal sales at places other than those covered by license, unmaintainable.

Adams v. Miller, 81 M. 613, 33 So. 489.

Section 1590.

Liquors. Sale of. Penalties. Action by revenue agent. Const. 1890, § 14.

McBride v. State, 70 M. 716, 12 So. 699.
State v. Fragiacomo, 70 M. 799, 14 So. 21.

Liquors. Unlawful sale of. Attachment. Revenue agent.

Adams v. Johnson, 72 M. 896, 17 So. 682.
Adams v. Evans, 19 So. 834.

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Unlawful sale of liquors. Attachment. Prior assessment. "Due process." Penalty. Place of business. Proof.
Clark v. Adams, 80 M. 219, 31 So. 746.

"Each" refers to state, city, &c. No one plaintiff can recover more than one penalty up to time of filing suit.
Flora v. American Express Co., 92 M. 66, 45 So. 149.

Section 1592.

Liquors, sale of. Tincture of ginger.
Bertrand v. State, 73 M. 51, 18 So. 545.

Sale of liquors. Home-made wine.
Reyfelt v. State, 73 M. 415, 18 So. 925.

Conviction of violation of Laws 1892, p. 35. Punishment.
Haynes v. State, 23 So. 182.

Section 1594.

Intoxicating liquors. Procuring for inebriate. Knowledge. Indictment. Surplusage. Actual delivery.
Jenkins v. State, 82 M. 500, 34 So. 217.

Section 1604.

Makes it misdemeanor to act as agent for either seller or buyer in effecting unlawful sale of intoxicants in prohibition territory. Constitutionality. Violation.
Hart v. State, 87 M. 171, 39 So. 523, 112 Am. St. 437.

Indictment. Averment that defendant acted as agent in effecting sale, sufficient allegation that sale was consummated.
State v. Caldwell, 17 So. 372.

Demurrable indictment. Inferential or argumentative allegation as to sale.
State v. Stacks, 26 So. 962.

Section 1610.

Local option. Sale of liquors.
Bew v. State, 71 M. 1, 13 So. 868.
Ferguson v. Monroe County, 71 M. 524, 14 So. 81.
Madison County v. Powell, 75 M. 762, 23 So. 425.

Sections 1610–1616.

Local option election. Ballots.
Lehman v. Porter, 73 M. 216, 18 So. 920.

Section 1621.

Local option election. Judicial notice.
Conrad v. State, 70 M. 733, 12 So. 851.
Puckett v. State, 71 M. 192, 14 So. 452.
State v. Bertrand, 72 M. 516, 17 So. 235.

Section 1652.

Ejectment. Bill of particulars failing to deduce title from government down. Extrinsic facts. Peremptory instruction.
Goforth v. Stingily, 79 M. 398, 30 So. 690.

Ejectment. Failure of defendant to comply with demand for bill of particulars. Evidence.
Early v. Long, 89 M. 285, 42 So. 348.

Section 1653.

Ejectment. Right to introduce maps and testimony of surveyors, unaffected.
Lenoir v. People's Bank, 87 M. 559, 40 So. 5.

Section 1673.

Ejectment. Mesne profits and improvements.
Gillum v. Case, 71 M. 848, 16 So. 236.

Sections 1679–1681, 1686, 1690, 1692, 1694.

Special court of eminent domain cannot determine question of right of railroad company to condemn land. Code 1906, ch. 43.
Vinegar Bend Lumber Co. v. Oak Grove &c. R. Co., 89 M. 84, 43 So. 292.
Vinegar Bend Lumber Co. v. Oak Grove &c. R. Co., 89 M. 117, 43 So. 299.

Section 1680.

Justice, presiding over special court of eminent domain, acts ministerially, and may be controlled by mandamus.
Sullivan v. Yazoo &c. R. Co., 85 M. 649, 38 So. 33.

Special court has exclusive jurisdiction of eminent domain proceedings.
Mobile &c. Co. v. Hoye, 87 M. 571, 40 So. 5.

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Section 1690.

Justice's instruction in condemnation proceedings.
King v. Vicksburg R. &c. Co., 88 M. 456, 42 So. 204, 117 Am. St. 749, 6 L. R. A. (N. S.) 1036.

Section 1737.

Absence for seven years. Presumption of death.
Manley v. Pattison, 73 M. 417, 19 So. 236, 55 Am. St. 543.

Section 1738.

In suit by creditor of deceased to foreclose mortgage, persons whose heirship is denied are competent to prove relationship.
Covington v. Frank, 77 M. 606, 27 So. 1000.

Section 1739.

Husband and wife. Witnesses for each other.
Saffold v. Horne, 72 M. 470, 18 So. 433.

Section 1740.

Claim against estate of deceased. Evidence.
Townsend v. Kennard, 1 Miss. Dec. 222.
Covington v. Frank, 28 So. 20.
Jones v. Jones, 37 So. 449.
Moore v. Crump, 84 M. 612.
Watson v. Duncan, 84 M. 763.
Liverman v. Lee, 86 M. 370.
Stanton v. Helm, 87 M. 287, 39 So. 457.

Witness against estate. Competency.
Neblett v. Neblett, 70 M. 572, 12 So. 598.
Ragsdale v. Meridian Land &c. Co., 71 M. 284, 14 So. 193.
Jones v. Bank of Carrollton, 71 M. 1023, 16 So. 344.
Wetherbee v. Roots, 72 M. 355, 19 So. 902.
Saffold v. Horne, 72 M. 470, 18 So. 433.

Deed. Death of grantor. Delivery proved by grantee.
Horne v. Nugent, 74 M. 102, 20 So. 159.

In suit by creditor of deceased to foreclose mortgage, persons whose heirship is denied are competent to prove relationship.
Covington v. Frank, 77 M. 606, 27 So. 1000.

Death of one deposing party. Suppression of deposition of living party.
Drewry v. Hopper, 77 M. 744, 27 So. 597.

Distributee-administrator competent to establish claim of intestate against estate of another deceased.
Cock v. Abernathy, 77 M. 872, 28 So. 18.

Widow is competent witness as against legatee of deceased husband to establish equitable assignment of life insurance policy by testator to infant son.
Cockrell v. Cockrell, 83 M. 385, 36 So. 390.

Testimony of heirs of husband against estate of wife. Question of inheritance.
Steen v. Kirkpatrick, 84 M. 63, 36 So. 140.

Section 1741.

Imperative in forbidding any and all comment, friendly or otherwise, on failure of accused to testify.
Yarbrough v. State, 70 M. 593, 12 So. 551.

Failure of accused to testify. Comment.
Reddick v. State, 72 M. 1008, 16 So. 490.
Sanders v. State, 73 M. 444, 18 So. 541.

Effect of defendant's voluntary offer of himself as witness.
Steele v. State, 76 M. 387, 24 So. 910.

Admission of evidence that defendant failed to testify on preliminary examination, error.
Bunckley v. State, 77 M. 540, 27 So. 638.

Remarks constituting comments on defendant's failure to testify.
Hoff v. State, 83 M. 488, 35 So. 950.
Smith v. State, 87 M. 627, 40 So. 229.
Prince v. State, 93 M. 263, 46 So. 537.

Section 1746.

Witness. Impeachment. Conviction of crime.
Jackson v. State, 75 M. 145, 21 So. 707.
Lewis v. State, 85 M. 35, 37 So. 497.

Denial of conviction by witness, prerequisite to testimony as to same by others.
Cook v. State, 85 M. 738, 38 So. 110.

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Question to codefendant as to his having ever before been charged with criminal offense, fatal error.
Starling v. State, 89 M. 328, 42 So. 798.

Section 1747.
Deposition. Physician. "Other cause."
American Express Co. v. Bradford, 82 M. 130, 33 So. 843.

Section 1750.
Depositions of resident witnesses. Ten days' notice to opposite party.
Gordon v. Warfield, 74 M. 553, 21 So. 151.

Section 1751.
Interrogatories to non-residents to be filed and copy served on opponent, &c., ten days before issuance of commission.
Gordon v. Warfield, 74 M. 553, 21 So. 151.

Section 1752.
Deposition. Notice.
Gordon v. Warfield, 74 M. 553, 21 So. 151.

Section 1756.
Deposition. Attendance of witness. Non-resident.
Fidelity &c. Co. v. Johnson, 72 M. 333, 17 So. 2, 30 L. R. A. 206n.

Section 1761.
Testimony of non-resident party taken by opponent. Deposition. Obtainer's failure to use.
Standard Life &c. Ins. Co. v. Tinney, 73 M. 726, 19 So. 662.

Evidence. Interrogatories to adverse party. Constitutionality. Action at law. "Party to the suit." Non-resident corporation.
Illinois Cent. R. Co. v. Sanford, 75 M. 862, 23 So. 355, 942.

Section 1764.
Oral testimony in chancery court. Notice.
Cox v. Kyle, 75 M. 667, 23 So. 518.
Winner v. Brandon, 82 M. 767, 35 So. 192.
Johnson v. Hall, 87 M. 667, 40 So. 1.

Divorce suit. Notice of agreement not prerequisite of introduction of oral testimony.
Grego v. Grego, 78 M. 443, 28 So. 817.

Clauses beginning "In all proceedings," and "but this shall not change," to be construed together. Foreclosure of vendor's lien.
Dickerson v. Askew, 82 M. 436, 34 So. 157.

Agreement, written, signed and filed nunc pro tunc after final decree based on oral testimony, fully operative and effective to sustain same.
White v. Jones, 83 M. 231, 35 So. 450.

Sections 1782–1784.
Certified copies of patents from state land commissioner and United States land office, primary evidence and admissible as original patents.
Boddie v. Pardee, 74 M. 13, 20 So. 1.

Section 1791.
Book of entries, of supervisors' clerk, of duplicates of receipts given by county convict contractor to sheriff, is competent evidence, &c.
State v. Oliver, 78 M. 5, 27 So. 988.

Section 1792.
Amended, Laws 1896, p. 108. Suit upon justice's judgment. Loss of record. Evidence.
Wise v. Thread, 84 M. 200, 36 So. 244.

Sections 1793–1797.
Suit on bond of village marshal. Evidence.
Carlisle v. Silver Creek, 85 M. 380, 37 So. 1015.

Section 1797.
Chancery practice. Denial of execution of instrument. Waiver of oath to answer. Written contract of corporation.
Wanita Woolen Mills v. Rollins, 75 M. 253, 22 So. 819.

Recovery by holder of note when indorsement to him is not denied under oath.
Kendrick v. Kyle, 78 M. 278, 28 So. 951.

Proof of representative character of plaintiff, unnecessary, unless same be denied under oath. Trustee in bankruptcy.
Thompson v. First Nat. Bank, 85 M. 261, 37 So. 645.

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Answer in chancery. Written instrument. Verified denial of execution by complainant. Issue.
Brown v. British &c. Mortg. Co., 86 M. 388, 38 So. 312.

Chancery. Written instrument. Verified answer denying execution. Waiver. Suit by "administrator." Plea of payment to another as administrator.
Masonic Benefit Assn. v. Simmons, 86 M. 470, 38 So. 791.

Execution of deed. Proof. Waiver of verified answer.
Elmslie v. Thurman, 87 M. 537, 40 So. 67.

Section 1801.

Does not apply to action on bond to secure performance of contract for supplies.
American Surety Co. v. United States, 76 M. 289, 24 So. 388.

Suit on open account. Document not constituting counter-affidavit. Evidence.
Bonner v. White, 78 M. 653, 29 So. 402.

Open account. Judgment on affidavit, &c. Suit on bond.
American Surety Co. v. United States, 76 M. 289.
Adams v. Fidelity Mut. Life Ins. Co., 94 M. 443, 49 So. 119.

Section 1806.

Tax deed, prima facie evidence of validity of sale. Testimony of collector.
Mixon v. Clevenger, 74 M. 67, 20 So. 148.

Tax collector's deed, &c., prima facie evidence. Has no application to sixteenth section school lands.
Leflore County v. Bush, 76 M. 551, 25 So. 351.

Tax sale. Collector's deed. Evidence to overthrow facts, prima facie established.
Herndon v. Mayfield, 79 M. 533, 31 So. 103.
See Crawford v. McLaurin, 83 M. 265, 35 So. 209, 949.

Confirmation of tax title. Bill and exhibit: sufficient statement of cause of action.
Smith v. Denny, 90 M. 434, 43 So. 479.

Tax collector's deed made exhibit to bill. Exclusion from evidence as fatal error.
Wallace v. Lyle, 37 So. 460.

Section 1808.

Railroads. Injury by running train. Negligence.
Illinois Cent. R. v. Turner, 71 M. 402, 14 So. 450.

Railroads. Injury by running cars. Presumption of negligence.
Hamlin v. Yazoo &c. R. Co., 72 M. 39, 16 So. 877.

Railroad. Live stock on or near track. Negligence.
Roberds v. Mobile &c. R. Co., 74 M. 334, 21 So. 10.
Lowe v. Alabama &c. R. Co., 81 M. 9, 32 So. 907.
Young v. Illinois Cent. R. Co., 88 M. 446.
Mobile &c. R. Co. v. Kea, 96 M. 195.

Presumption cannot be invoked where all circumstances connected with infliction of injuries are proved.
Nichols v. Gulf &c. R. Co., 83 M. 126, 36 So. 192.

Transcript of Code 1880, § 1059. Inapplicable in suit against carrier by passenger for personal injuries received.
Yazoo &c. R. Co. v. Humphrey, 83 M. 721, 36 So. 154.
See Mobile &c. R. Co. v. Hicks, 91 M. 273, 46 So. 360.

Railroad train. Injury to person on track. Presumption of negligence.
Korter v. Gulf &c. R. Co., 87 M. 482, 40 So. 258.
See Alabama &c. R. Co. v. Hunnicutt, — M. —, 53 So. 617.

Presumption does not apply to injuries resulting from operation of railroad gate at street crossing.
McKenna v. Alabama &c. R. Co., 87 M. 652, 40 So. 426.

Railroad train. Killing cattle on track. Prima facie evidence of negligence. Instruction.
Southern R. Co. v. Murray, 91 M. 546, 44 So. 785.

Section 1810.

Evidence. Written instruments. Code provisions applicable in equity.
Wanita Woolen Mills v. Rollins, 75 M. 253, 22 So. 819.

Answer in chancery. Written instrument. Verified denial of execution by complainant. Issue.
Brown v. British &c. Mortg. Co., 86 M. 388, 38 So. 312.

Section 1822.

Will. Probate without notice. Contest. "Person interested."
Biles v. Dean, 14 So. 536.

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Section 1828.
Will, of resident, disposing of real and personal estate located here. Probate on secondary evidence.
Pratt v. Hargreaves, 77 M. 892, 28 So. 722, 78 Am. St. 551.

Section 1838.
Directions of will to be followed, &c. Payment of debts.
Gordon v. McDougall, 84 M. 715, 37 So. 298, 5 L. R. A. (N. S.) 355n.

Section 1854.
Administrator's bond. Suit thereon. Distribution.
Jones v. Patty, 73 M. 179, 18 So. 794.

Section 1859.
Sheriff ex officio administrator.
Cox v. Martin, 75 M. 229, 21 So. 611, 65 Am. St. 604, 36 L. R. A. 800.

Section 1877.
Will. Consent decree. Res adjudicata. Widow's allowance.
Blackburn v. Senatobia Educational Assn., 74 M. 852, 21 So. 798.

Section 1881.
Liability of surety on guardian's bond is "debt."
Savings &c. Assn. v. Tartt, 81 M. 276, 32 So. 115.

Sections 1831, 1882.
Administration. Assets. Rents. Crops.
Gordon v. James, 86 M. 719, 39 So. 18, 1 L. R. A. (N. S.) 461n.

Section 1882.
Administrator empowered to complete crops.
Cox v. Martin, 75 M. 229, 21 So. 611.

"Proceeds of growing crop" as "assets" in hands of deceased's personal representative. Producing land, exempt.
Dickey v. Wilkins, 17 So. 374.

Section 1883.
Refers to leases of farm from "year to year," not to crop growing at time of deceased's death.
Dickey v. Wilkins, 17 So. 374.

Section 1892.
Administration. Assets. Rents. Crops.
Gordon v. James, 86 M. 719, 39 So. 18, 1 L. R. A. (N. S.) 461n.

Section 1895.
Proper registration of claim after probate and allowance, condition precedent to petition.
Cheairs v. Cheairs, 81 M. 662, 33 So. 414.

Section 1897.
Authorizes correction in description of land sold by administrator. Non-effective to justify inclusion of realty "thought" to be embraced by property sold.
Pearson v. Caldwell, 93 M. 637, 47 So. 436.

Section 1900.
Intestacy. Debts. Exhaustion of personal estate prerequisite to sale of lands, except, &c.
Gordon v. James, 86 M. 719, 39 So. 18, 1 L. R. A. (N. S.) 461.

Section 1905.
Authorization, by will, of administration by executor without bond does not dispense with necessity of bond required.
Sharpley v. Plant, 79 M. 175, 28 So. 799, 89 Am. St. 588.

Showing necessary to render competent, parol evidence by administrator as to execution of bond.
Shannon v. Summers, 86 M. 619, 38 So. 345.

Section 1907.
Acceptance by heirs of proceeds of sale of land by administrator does not prejudice their right to bring ejectment against purchaser.
Pearson v. Caldwell, 93 M. 637, 47 So. 436.

Sections 1909–1915.
Do not require surviving partner to give bond as condition precedent to liquidation, when no administrator has been appointed and no demand for bond made.
McCaughn v. Brown, 76 M. 496, 25 So. 155.

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Section 1910.

Surviving partner undertaking management of partnership estate, must give bond in amount equal to value of same.
Gurley v. Gurley, 77 M. 413, 26 So. 962.

Fact that surviving partner is indebted to estate of deceased partner, does not preclude him from administering partnership estate.
Lance v. Calhoun, 85 M. 375, 37 So. 1014.

Section 1916.

Wrongful death. Survival of action. Administrator. Infant child of deceased. Limitation.
Foster v. Yazoo &c. R. Co., 72 M. 886, 18 So. 380.

Survival of actions. Instantaneous death. Railway employe.
McVey v. Illinois Cent. R. Co., 73 M. 487, 19 So. 209.

Survival to administrator of victim, of action for assault and battery. Exemplary damages.
Wagner v. Gibbs, 80 M. 53, 31 So. 434.

Heirs cannot sue for trespass on lands of ancestor, committed during latter's lifetime.
Conklin v. Alabama &c. R. Co., 81 M. 152, 32 So. 920.

Section 1917.

Recovery of exemplary damages by administrator of victim of assault and battery.
Wagner v. Gibbs, 80 M. 53, 31 So. 434.

Suit for trespass on lands of ancestor, committed during his lifetime, unmaintainable by heirs.
Conklin v. Alabama &c. R. Co., 81 M. 152, 32 So. 920.

Section 1922.

Does not postpone for six months petition by legatee who is to be given "comfortable support," &c., for construction of will and determination of amount to be paid.
Owens v. Waddell, 87 M. 310, 39 So. 459.

Section 1925.

Foreign guardian need not file letters here before receiving check payable to himself.
Boyle v. Griffin, 84 M. 41, 36 So. 141.

Section 1931.

Has no application to surviving partner administering partnership assets.
Lance v. Calhoun, 85 M. 375, 37 So. 1014.

Section 1932.

Non-conforming affidavit does not give jurisdiction to allow claim.
Chears v. Chears, 81 M. 662, 33 So. 414.

Sufficient statement for probate of claim against deceased for legal services.
Foster v. Schaffer, 84 M. 197, 36 So. 243.

Open account must be signed by creditor and have statutory affidavit attached.
Walker v. Nelson, 87 M. 268, 39 So. 809.

Section 1933.

Unpaid subscription to corporation. Registration of "claim" against estate of deceased subscriber.
Robinett v. Starling 72 M. 652, 18 So. 421.

Contemporaneous joinder by wife necessary to validity of trust deed on homestead owned in fee simple by husband.
Hubbard v. Sage &c. Co., 81 M. 616, 33 So. 413.

Liability of surety on guardian's bond, not probatable claim.
Savings &c. Assn. v. Tartt, 81 M. 276, 32 So. 115.

Prescribes limitation for probate of claims. Inapplicable where will of deceased creates express trust for payment of debts.
Gordon v. McDougall, 84 M. 715, 37 So. 298.

Claim for damages for assault and battery not within meaning. Refers to contractual claims only.
Feld v. Borodofski, 87 M. 727, 40 So. 816.
Borodofski v. Feld, 88 M. 31, 40 So. 816.

Suit on note, not probated within year, unmaintainable against maker's administrator.
Johnson v. Success Brick Machinery Co., 93 M. 169, 46 So. 957.

Section 1946.

Insolvent estate. Suit against administrator. Claim for labor. Exempt property.
Mitchener v. Robins, 73 M. 383, 19 So. 103.

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Section 1950.
Administrator's final account. Presumptions.
Barr v. Sullivan, 75 M. 536, 23 So. 772.

Section 1961.
Does not postpone for twelve months, petition by legatee who is to be given "comfortable support," &c., for construction of will and determination of amount to be paid.
Owens v. Waddell, 87 M. 310, 39 So. 459.

Section 1962 (subdivision 10a).
Exempt property. Wages. Garnishment.
Chapman v. Berry, 73 M. 437, 18 So. 918, 55 Am. St. 546.

Section 1963.
Exemption. Wages. Contract price not exempt.
Heard v. Crum, 73 M. 157, 18 So. 934, 55 Am. St. 520.

Section 1964.
Exemptions. Life insurance.
Jones v. Patty, 73 M. 179, 18 So. 794.

Sections 1964, 1965.
Life insurance. Non-cumulative exemptions.
Cozine v. Grimes, 76 M. 294, 24 So. 197.

Section 1964.
Life insurance policy. Ownership. Pledge.
Jackson Bank v. Williams, 77 M. 398, 26 So. 965, 78 Am. St. 530.

Section 1965.
Exemption. Proceeds of life insurance.
Coates v. Worthy, 72 M. 575, 17 So. 606, 18 So. 916.

Claim for nursing deceased during last illness, "debt," and not chargeable against proceeds of life insurance policy. Funeral expenses, otherwise.
Dobbs v. Chandler, 84 M. 372, 36 So. 388.

Life insurance policy. Right to proceeds. Action by heirs.
Equitable Life Assur. Soc. v. Hartfield, 87 M. 548, 40 So. 21.

Exemption depends on residence of insured and not upon that of his heirs and legatees.
Borodofski v. Feld, 88 M. 31, 40 So. 816.

Section 1966.
Levy of execution. Exempt property. Failure to make selection consequent upon absence of demand, &c. Waiver of exemption.
Bank of Gulfport v. O'Neal, 86 M. 45, 38 So. 630.

Section 1967.
Exempt property. Execution. Bond of indemnity, erroneously conditioned.
Bank of Gulfport v. O'Neal, 86 M. 45, 38 So. 630.

Section 1968.
Exempt property. Execution. Suit on indemnifying bond.
Bank of Gulfport v. O'Neal, 86 M. 45, 38 So. 630.

Section 1969.
Execution. Exempt property. Liability of unindemnified officer. Bond erroneously conditioned.
Bank of Gulfport v. O'Neal, 86 M. 45, 38 So. 630.

Section 1970.
Homestead exemption. Head of family.
Powers v. Sample, 72 M. 187, 16 So. 293.

Widow's claim to homestead defeated by foreign citizenship of deceased husband.
Vignaud v. Dean, 77 M. 860, 27 So. 881.

Section 1971.
Assignment. Exempt property. Money retained by debtor.
Mahorner v. Forcheimer, 73 M. 302, 18 So. 570.

Homestead. Claim of right by widow defeated by foreign citizenship of deceased husband.
Vignaud v. Dean, 77 M. 860, 27 So. 881.

Execution. Exempt personalty. Selection: when unnecessary.
Bank of Gulfport v. O'Neal, 86 M. 45, 38 So. 630.

Exemptionist may select according to his taste and judgment.
Tishomingo Sav. Institution v. Young, 87 M. 473, 40 So. 9, 112 Am. St. 454.

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Section 1972.

Homestead. Selection. Widow without right.
Wiseman v. Parker, 73 M. 378, 19 So. 102.

Homestead declaration. Prospective. Non-applicable in case of debts contracted before code became operative.
Hinds v. Morgan, 75 M. 509, 23 So. 35.

Landowner's right to determine homestead. Realty not included: sale or incumbrance. Record declaration.
Nixon v. Hewes, 80 M. 88, 31 So. 899.

Section 1973.

Homestead. Selection and declaration.
Chapman v. White Sewing Mach. Co., 77 M. 890, 28 So. 749, 78 M. 438, 28 So. 735.

Right of landowner to determine homestead. Realty unincluded: sale or incumbrance. Record declaration.
Nixon v. Hewes, 80 M. 88, 31 So. 899.

Section 1975.

Improper homestead declaration. Procedure.
Nixon v. Hewes, 80 M. 88, 31 So. 899.

Sections 1975, 1976.

Homestead. Not confined to any particular section.
Wiseman v. Parker, 73 M. 378, 19 So. 102.

Section 1976.

Homestead. Improper declaration. Procedure.
Nixon v. Hewes, 80 M. 88, 31 So. 899.

Section 1980.

Debt for labor. Exempt property. Insolvent estate.
Mitchener v. Robins, 73 M. 383, 19 So. 103.

Section 1981.

Homestead. Abandonment. Intent.
Moore v. Bradford, 70 M. 70, 11 So. 630.

Homestead. Removal, not "temporary, by reason of some casualty or necessity."
Salter v. Embrey, 18 So. 373.

Section 1982.

Invalid, good-faith homestead conveyance treated by vendor as binding, does not render property liable for owner's debts.
Zukoski v. McIntyre, 93 M. 806, 47 So. 435.

Section 1983.

Homestead. Wife driven from home. Conveyance by husband.
Scott v. Scott, 73 M. 575, 19 So. 589.

Homestead. Conveyance. Joinder by wife.
Duggan v. Champlin, 75 M. 441, 23 So. 179.
Nixon v. Hewes, 80 M. 88, 31 So. 899.

Deed to right of way over homestead occupied by husband-owner and wife, void without joinder by latter.
Gulf &c. R. Co. v. Singleterry, 78 M. 772, 29 So. 754.

Homestead. Conveyance. Joinder by wife.
Johnson v. Hunt, 79 M. 639, 31 So. 205.
Moseley v. Larson, 86 M. 288, 38 So. 234.
Yazoo Lumber Co. v. Clark, 95 M. 244, 48 So. 516.

Husband's void homestead deed, good against third parties as color of title to sustain claim by adverse possession.
Avera v. Williams, 81 M. 714, 33 So. 501.

Homestead. Temporary removal. Abandonment. Deed. Non-joinder of wife.
Collins v. Bounds, 82 M. 447, 34 So. 355.

Conveyance of homestead. Joinder of wife.
Bolen v. Lilly, 85 M. 344, 37 So. 811, 107 Am. St. 291.

Section 1985.

"Living with his wife." Intent of exemptionist in absenting himself.
Walton v. Walton, 76 M. 662, 25 So. 166, 71 Am. St. 540.

Section 1986.

Widow's claim to homestead defeated by foreign citizenship of deceased husband.
Vignaud v. Dean, 77 M. 860, 27 So. 881.

Exemption depends on residence of insured and not upon that of his heirs and legatees.
Borodofski v. Feld, 88 M. 31, 40 So. 816.

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Sections 1987-2026.
Witness fees. Commitment. Per diem.
Marshall County v. Tidmore, 74 M. 317, 21 So. 51.

Section 1991w.
Boards of supervisors. Record of deeds. Abstract books. Fees of chancery clerks. Const. 1890, § 90, par. o.
Yazoo &c. R. Co. v. Edwards, 78 M. 950, 29 So. 770.

Sections 1995, 1996.
Supervisors subject to mandamus to provide for payment of allowance to circuit clerk.
Chatters v. Coahoma County, 73 M. 351, 19 So. 107.

Section 2004.
Fees to be paid sheriffs in advance.
Baker v. Cox, 79 M. 306, 30 So. 641.

Section 2016.
County treasurers entitled to commissions on school funds.
Adams v. Watts, 76 M. 667, 26 So. 364.

Two county treasurers in one year does not authorize allowance larger than that fixed for one.
Davis v. Adams, 96 M. 177, 50 So. 568.

Section 2021.
Commissions of collector. Delinquent taxes.
Anderson v. Hawks, 70 M. 639, 12 So. 697.
Miller v. Delta &c. Land Co., 74 M. 110, 20 So. 875.

Section 2027a.
County having two judicial districts. Allowances to clerk.
Chatters v. Coahoma County, 73 M. 351, 19 So. 107.

Sections 2055-2062.
Stock law district. Fences. Taxes.
Browning v. Mathews, 73 M. 343, 18 So. 658.

Sections 2055-2059.
Provides for establishment of stock law districts. Does not violate Const. 1890, § 33.
Ormond v. White, 85 M. 276, 37 So. 834.

Section 2056.
Amended, Laws 1894, p. 48, ch. 58, and Laws 1897, p. 21, ch. 17. Irregular stock law district, without natural boundaries, laid out so as to exclude persons unfavorable to adoption of law, unauthorized.
Gore v. Doolittle, 77 M. 620, 27 So. 997.
Garner v. Webster County, 79 M. 565, 31 So. 210.
See Shaw v. Wofford, 82 M. 143, 34 So. 329.

Amended, Laws 1900, p. 164, ch. 124. Stock law. Petition or two-thirds vote must precede declaration of operative effect, &c.
Stockton v. Caldwell, 86 M. 477, 38 So. 369.

Section 2057.
Does not apply to cows, mules and horses.
Whitfield v. Tatum, 83 M. 153, 35 So. 447.

Sections 2061, 2062.
Counties. Dividing fences. Stock law.
Leflore County v. State, 70 M. 769, 12 So. 904.
Montgomery County v. State, 71 M. 153, 15 So. 28.

Section 2108.
Applies to demurrage for delay in unloading cars.
New Orleans &c. R. Co. v. George, 82 M. 710, 35 So. 193.

Section 2114.
Money lost on wager recoverable by loser. Judgment for winner subject to collateral attack.
Campbell v. New Orleans Nat. Bank, 74 M. 526, 21 So. 400, 23 So. 25.
See Minkus v. Armstrong, 90 M. 751, 44 So. 32.

Section 2116.
Without application to contracts invalid under Code 1892, § 2117.
Isaacs v. Silverberg &c. Co., 87 M. 185, 39 So. 420.
See Minkus v. Armstrong, 90 M. 751, 44 So. 32.

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Section 2117.

Judgment properly returned for defendant in action on promissory note based on account for losses in dealings in "futures."
Violett v. Mangold, 27 So. 875.

Contracts invalid under this section, not embraced by Code 1892, § 2116.
Isaacs v. Silverberg &c. Co., 87 M. 185, 39 So. 420.

Sections 2126, 2127.

Not invalid as giving judicial board legislative authority.
Ex parte Fritz, 86 M. 210, 38 So. 722, 109 Am. St. 700.

Section 2128.

Constitutionality. Misdemeanant under this section, triable before any justice having local jurisdiction.
Ex parte Fritz, 86 M. 210, 38 So. 722, 109 Am. St. 700.

Section 2131.

Garnishment in attachment. Issuance.
J. M. Kelly Banking Co. v. Robinson-Norton Co., 71 M. 141, 13 So. 932.

Section 2134.

Requires writ of garnishment to be served as summons. Judgment by default.
Alexander v. Lloyd, 70 M. 662, 14 So. 22.

Service of writ of garnishment. Judgment at return term. "Unless the court be satisfied that the garnishee can be personally served at once," &c., refers to scire facias.
Alexander v. Equitable Fire Ins. Co., 12 So. 706.

Section 2139.

Garnished debtor fails to observe provisions, at his own peril.
Laurel v. Turner, 80 M. 530, 31 So. 965.

Section 2143.

Suggestion by garnishee that third person claims funds in his hands prerequisite to such person's becoming party.
People's Bank v. Smith, 75 M. 753, 23 So. 428, 65 Am. St. 618.

Debt owned by several jointly but not as partners may be garnished by creditor of one of owners.
Fewell v. American Surety Co., 80 M. 782, 28 So. 755.

Section 2144.

Justice of peace. Attachment. Garnishment. Claim by third person not "in writing under oath." Appeal.
First Nat. Bank v. Fain Grocery Co., 87 M. 503, 40 So. 6.

Section 2145.

Garnishment. Traverse of answer: when to be filed.
Consumers' Ice Co. v. Cook Well Co., 71 M. 886, 16 So. 259.

Section 2147.

Attachment defendant not entitled to change of venue because garnishee whose answer is uncontroverted lives without county.
McCloud v. McCullers, 84 M. 20, 36 So. 65.

Section 2156.

Governor cannot institute suit for and in name of state.
Henry v. State, 87 M. 1, 39 So. 856.
Henry v. State, 88 M. 843, 39 So. 856.

Section 2162.

Habeas corpus. Traverse of return. Properly certified copy of affidavit or indictment.
Ex parte Devine, 74 M. 715, 22 So. 3.

Requisition. Habeas corpus. Pendency of appeal. Bail.
Ex parte Wall, 84 M. 783, 38 So. 628.

Section 2167.

Governor of this state may sue in foreign jurisdictions.
Henry v. State, 87 M. 1, 39 So. 856.
Henry v. State, 88 M. 843, 39 So. 856.

Section 2189.

Chancery clerks. Guardians ex officio. Commissions.
Harkleroad v. Maxwell, 77 M. 117, 25 So. 873.
Maxwell v. Harkleroad, 77 M. 456, 27 So. 990.

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Section 2205.

Wards owning jointly. Process. Void sale.
Theobald v. Deslonde, 93 M. 208, 46 So. 712.

Section 2223.

Limitations do not run against action on bond of guardian, for failure to deliver property, until final account and discharge.
Dunn v. Clingham, 93 M. 310, 47 So. 503.

Section 2227.

By necessary implication authorizes court to investigate by habeas corpus, propriety of delivering up alleged fugitives.
Ex parte Devine, 74 M. 715, 22 So. 3.

Habeas corpus. Bail. Pendency of appeal. Murder. Extradition.
Ex parte Wall, 84 M. 783, 38 So. 628.

Section 2237.

Habeas corpus. When and where returnable. Sickness.
Patterson v. State, 71 M. 675, 15 So. 794.

Section 2275.

County health officer. Compensation. Salary. Assumpsit on quantum meruit, unmaintainable.
Yandell v. Madison County, 81 M. 288, 32 So. 918.

Section 2289.

Wife's contract, on sufficient consideration, relinquishing all claim to husband's estate, enforceable.
Wyatt v. Wyatt, 81 M. 219, 32 So. 317.

Renders inoperative Code 1871, § 2323, providing that wife shall not be disseized by husband's conveyance of her land.
Southworth v. Brownlow, 84 M. 405, 36 So. 522.

Section 2292.

Bill to recover proceeds of wife's property, deposited by deceased husband in his own name. Demurrer.
Hendricks v. Peavy, 78 M. 316, 28 So. 944.

Section 2293.

Supplies for wife's farm. Note of husband.
McCormick v. Altneave, 73 M. 86, 19 So. 198.
Gross v. Pigg, 73 M. 286, 19 So. 235.

Scope of husband's limited agency may be extended by conduct of wife.
Johnson v. Jones, 82 M. 483, 34 So. 83.

Furnishing husband supplies for wife's plantation. Subjecting cotton. Waiver of right.
Dean v. Boyd, 86 M. 204, 38 So. 297.

Sections 2293, 2294.

Husband and wife. Leases and transfers between.
Lea v. Clarksdale Bank &c. Co., 72 M. 317, 16 So. 431.
Underwood v. Ainsworth, 72 M. 328, 18 So. 379.

Section 2294.

Declares invalid all unrecorded transfers between husband and wife.
Walker v. Marseilles, 70 M. 283, 12 So. 211.

Preference in assignment by husband in favor of wife. "In perfect good faith."
Perry-Mason Shoe Co. v. Sykes, 72 M. 390, 17 So. 171.

Husband and wife. Transfer between. Validity.
Davis v. Williams, 73 M. 708, 19 So. 352.

Husband and wife. Conveyances between. Acknowledgment. Notice.
Snider v. Udell Woodenware Co.., 74 M. 353, 20 So. 836.

Husband and wife. Transfer of cotton. Third person. Evidence insufficient to show title in husband.
Williams v. Yazoo &c. R. Co., 82 M. 659, 35 So. 169.

Transfer by husband to wife, otherwise valid, not rendered void by reason of suits threatened or pending against grantor.
Donoghue v. Shull, 85 M. 404, 37 So. 817.

Transfer to wife by non-resident husband of property located in this state, not within this section. Subsequent removal here.
Willis v. Memphis Grocery Co., 19 So. 101.

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Section 2318.

Summer contract of physician-superintendent to render medical services, actionable.
Fairley v. Western Union Tel. Co., 73 M. 6, 18 So. 796.

Sections 2323, 2327.

Foreign insurance company validly served by service on soliciting agent.
Pervangher v. Union Casualty &c. Co., 81 M. 32, 32 So. 909.

Section 2348.

Interest. Building and loan associations.
Goodman v. Durant B. & L. Ass'n, 71 M. 310, 14 So. 146.
National Mut. B. & L. Ass'n v. Pinkston, 79 M. 468, 30 So. 692, 31 So. 834.

Interest on promise to make loan.
Hiller v. Ellis, 72 M. 701, 18 So. 95.

Usury. Conflict of laws. Penalty.
Commercial Bank v. Auze, 74 M. 609, 21 So. 754.

Complainant seeking to enjoin sale under deed of trust given to secure usurious debt need only tender principal.
Purvis v. Woodward, 78 M. 922, 29 So. 917.
See Purvis v. Woodward, 78 M. 916, 29 So. 825.

Usury. Suit to recover. Statute of limitations.
Buntyn v. National Mut. B. & L. Ass'n, 86 M. 454, 38 So. 345.

Amended by Code 1906, § 2678. Usury. Former right. "Received."
Mississippi Bldg. &c. Ass'n v. McElveen, — M. —, 56 So. 187.

Sections 2348, 2350.

Delinquent taxes. Interest.
Illinois Cent. R. Co. v. Adams, 78 M. 895, 29 So. 996.

Section 2351.

Partial payments. Deed. Undue influence. Improper charges, &c.
Leach v. Hirshman, 90 M. 723, 44 So. 33.

Section 2353.

Joint and several debtors. Action against partner.
Cohen v. Gamble, 71 M. 478, 15 So. 236.

Section 2354.

Jurors. Competency.
Mabry v. State, 71 M. 716, 14 So. 267.

Section 2355.

Opinion of juror. Qualification.
Green v. State, 72 M. 522, 17 So. 381, 41 L. R. A. 569n.

Juror. Examination. Competency.
Jeffries v. State, 74 M. 675, 21 So. 526.

Prosecution for murder. Incompetent venireman. Fixed opinion, &c.
Shepprie v. State, 79 M. 740, 31 So. 416.

Juror in criminal case. Oath not conclusive as to impartiality.
Fugate v. State, 82 M. 189, 33 So. 942.

Excusing challenged venireman against whom criminal prosecution is pending, not error.
Lewis v. State, 85 M. 35, 37 So. 497.

Prospective juror. Competency. Opinion, absence of bias, &c.
Gammons v. State, 85 M. 103, 37 So. 609.

Prospective criminal juror. Opinion, as not disqualifying fact.
Evans v. State, 87 M. 459, 40 So. 8.
Cook v. State, 90 M. 137, 43 So. 618.

Section 2357.

Prosecution for murder. Right of court to excuse veniremen.
Brown v. State, 38 So. 316.

Section 2358.

List. Jury box. Venire in capital cases.
Purvis v. State, 71 M. 706, 14 So. 268.

Jury laws. Race discrimination, &c.
Dixon v. State, 74 M. 271, 20 So. 839.

Manner of procuring list of jurors. Substantial compliance
Cook v. State, 90 M. 137, 43 So. 618.

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Section 2359.
Jury list. Number of names.
Cook v. State, 90 M. 137, 43 So. 618.

Section 2360.
Certification of jury lists to circuit court. Filing. Alteration.
Cook v. State, 90 M. 137, 43 So. 618.

Section 2361.
Names of persons on jury list. Jury box.
Cook v. State, 90 M. 137, 43 So. 618.

Section 2363.
Amended, Laws 1904, p. 208, ch. 151. Juries. Special venire. Local law. Perry county.
Burt v. State, 86 M. 280, 38 So. 233.

Section 2367.
Regular jury. Drawing. Illegality. Officers.
Cook v. State, 90 M. 137, 43 So. 618.

Section 2373.
Quashal for judge's direct or indirect designation of indicted person as one making sales.
Fuller v. State, 85 M. 199, 37 So. 749.

Section 2375.
Grand jury. Objection to members.
Dixon v. State, 74 M. 271, 20 So. 839.

Objection to grand jury after oath. Impaneling conclusive evidence of competency and qualification.
Posey v. State, 86 M. 141, 38 So. 324.

Cuts off all objections by every person unless preferred before swearing and impanelling or unless to array for fraud.
Cain v. State, 86 M. 505, 38 So. 227.

Drawing grand jury. Error uncured. Dismissal of indictment.
Shepherd v. State, 89 M. 147, 42 So. 544.

Section 2376.
Excusing members of grand jury. Swearing substitutes.
Posey v. State, 86 M. 141, 38 So. 324.

Section 2386.
Absent veniremen. Compulsory process.
Hale v. State, 72 M. 140, 16 So. 387.

Section 2387.
Failure to draw jury from legal box prepared by board of supervisors, not ground for quashal of venire.
Campbell v. State, 17 So. 441.

Section 2389.
Questionable acts preceding service of special venire not ground for reversal.
Lipscomb v. State, 76 M. 223, 25 So. 158.

Jury laws directory. Jury listed, &c., to be deemed legal after impaneling.
Posey v. State, 86 M. 141, 38 So. 324.

Preparation of jury list more than fifteen days before commencement of term, not ground for quashing panel.
Cook v. State, 90 M. 137, 43 So. 618.

Section 2391.
Jury. Visiting scene. Absence from court.
Foster v. State, 70 M. 755, 12 So. 822.

Section 2394.
Justice of the peace. Jurisdiction. Amount in controversy.
Western Union Tel. Co. v. Sullivan, 70 M. 447, 12 So. 460.
Waters v. Mobile &c. R. Co., 74 M. 534, 21 So. 240.

Section 2395.
Motion to dismiss, defendant being resident householder of foreign county, renewed and admitted in circuit court on appeal, must be sustained.
Boyd v. Quinn, 22 So. 802.

Justice's judgment actionable in district of defendant's residence. Error to sue in foreign district where judgment was rendered.
Wise v. Thread, 84 M. 200, 36 So. 244.

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Section 2399.

Court of justice of peace is court of record.
Vicksburg Grocery Co. v. Brennan, 20 So. 845.

Justice of peace. Illegal adjournment. Default judgment.
Alabama &c. R. Co. v. Dalton, 86 M. 299, 38 So. 285.

Section 2401.

Affidavit averring merely that defendant is justly indebted to plaintiff in specified sum, insufficient.
Greenburg v. Massey, 90 M. 121, 43 So. 1.

Review in supreme court of cause originating in magistrate's court. Sufficiency of record.
Parrott v. Poppenheimer, 16 So. 911.

Section 2403.

Justice of peace cannot, even in emergency, deputize specially private person to execute attachment in foreign county.
Miller v. Edwards, 75 M. 739, 23 So. 426.

Justice of peace. Appointment of special constable to execute and return summons. Ejectment against purchaser at execution sale. Presumption.
Alfred v. Batson, 91 M. 749, 45 So. 465.

Sections 2412, 2413.

Judgment. Enrollment. Execution.
Smith v. Mixon, 73 M. 581, 19 So. 295.

Section 2420.

Criminal jurisdiction of mayor.
Burnett v. State, 72 M. 994, 18 So. 432.

Justice cannot bind over alleged misdemeanant to await action of grand jury. Void bail bond.
Smith v. State, 86 M. 315, 38 So. 319.

Section 2421.

Criminal prosecution before justice of peace. Affidavit.
Coulter v. State, 75 M. 356, 22 So. 872.

Justice of peace without jurisdiction to bind over alleged misdemeanant to await action of grand jury. Void bail bond.
Smith v. State, 86 M. 315, 38 So. 319.

Section 2423.

Bond for appearance before justice of peace.
Smith v. State, 86 M. 315, 38 So. 319.

Section 2432.

Death of justice. Delay. Dismissal of appeal.
Brennan v. Straas, 85 M. 341, 37 So. 956.

Section 2433.

Grantee's covenant to pay rent binding between assignees of estate in fee and assignees of covenant.
Wright v. Hardy, 76 M. 524, 24 So. 697.

Quit-claim deed to mortgaged property not mere assignment of right to sue for mortgagee's fraud. Same passes redemption equity.
Houston v. National Mut. Bldg. &c. Ass'n, 80 M. 31, 31 So. 540.

Section 2434.

Statute of frauds. Parol sale of standing timber.
Walton v. Lowrey, 74 M. 485, 21 So. 243.

Party walls. Statute of frauds.
Weems v. Mayfield, 75 M. 286, 22 So. 892.

Section 2436.

Devise of land. Succession of living donees. Heirs of remainderman's body. Default thereof. Right heirs of donor.
Brinson v. Sandifer, 90 M. 41, 42 So. 89.

Section 2438.

Quit-claim deed to mortgaged property not mere assignment of right to sue for mortgagee's fraud. Same passes redemption equity.
Houston v. National Mut. Bldg. &c. Ass'n, 80 M. 31, 31 So. 540.

Section 2440.

Warranty. "Grant, bargain and sell."
Cunningham v. Dillard, 71 M. 61, 13 So. 882.

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Section 2441.

Estates in common. Limitation. Survivorship.
Hawkins v. Hawkins, 72 M. 749, 18 So. 479.

Tenants in common. Conveyance of land.
Brabham v. Day, 75 M. 923, 23 So. 578.

Section 2443.

Sale of land in bulk, in pursuance of provision of deed of trust, valid.
Brown v. British American Mortg. Co., 86 M. 388, 38 So. 312.

Deed of trust. Four-hundred-acre tract. Lump sale, void.
McClusky v. Trussel, 90 M. 544, 44 So. 69.

Sale under mortgage or deed of trust. "Single tract."
Provine v. Thornton, 92 M. 395, 46 So. 950.

Section 2444.

"Right and estate in such lands" does not embrace right of vendor to subject land sold to payment of purchase money.
Howell v. Hill, 94 M. 566, 48 So. 177.

Section 2449.

Grantor in deed of trust is owner against world, and against beneficiary and trustee before condition broken.
Smith v. Forbes, 89 M. 141, 42 So. 382.

Section 2451.

Penalizes failure to make on record of mortgage, &c., requested entry of satisfaction. To be strictly construed.
British &c. Mortg. Co. v. Burke, 80 M. 643, 32 So. 51.

Deed of trust. Noncompliance with requests for entry of satisfaction. Omission in description of property.
Peirce v. Kingston Lumber Co., 90 M. 216, 43 So. 81.

Sections 2457, 2458, 2460.

Deed. Registration. Notice.
Woods v. Garnett, 72 M. 78, 16 So. 390.

Section 2457.

Conveyances, mortgages, &c. "Lodging" for record.
Brannon v. Pringle, 46 So. 161.

Section 2458.

Tax deed, unrecorded for two years, inadmissible to prove title against innocent purchaser.
Sintes v. Barber, 78 M. 585, 29 So. 403.

Conveyances, covenants, &c. "Delivery" for record.
Brannon v. Pringle, 46 So. 161.

Section 2459.

Assignment of title bond need not be recorded.
Macrae v. Goodbar, 80 M. 315, 31 So. 812.

Section 2461.

Transfer of debt. Notation on record.
Bramlett v. Wetlin, 71 M. 902, 15 So. 934.
See Drane v. Newsom, 73 M. 422, 19 So. 200.

Section 2462.

Record liens. Renewal. Limitations.
Drane v. Newsom, 73 M. 422, 19 So. 200.

Amended, Laws 1896, p. 106. Lien appearing on record's face to be barred by limitation to cease as to subsequent creditors, &c. Extension under Code 1892, § 2753.
Klaus v. Moore, 77 M. 701, 27 So. 612.

Judgment. Lien. Apparent bar. Renewal and extension.
Street v. Smith, 85 M. 359, 37 So. 837.

Section 2479.

Deed. Life estate. "Convey and warrant."
Hart v. Gardiner, 74 M. 153, 20 So. 877.

Sections 2479, 2480.

"Warrant," constitutes warranty of possession as well as of title.
Allen v. Caffee, 85 M. 766, 38 So. 186.

Section 2484.

Mortgage. Sale. Terms not specified.
Goodman v. Durant B. & L. Ass'n, 71 M. 310, 14 So. 146.

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Deed of trust. Place of sale.
Williams v. Dreyfus, 79 M. 245, 30 So. 633.

Deed of trust. Notice and manner of sale.
Melsheimer v. McKnight, 92 M. 386, 46 So. 827.
See Davis v. O'Connell, 92 M. 348, 47 So. 672.

Governs place of sale under deed of trust designating, contrary to Laws 1896, p. 16 ch. 103, place outside county as one where sale is to be made.
Polk v. Dale, 93 M. 664, 47 So. 386.

Section 2495.

Lien of landlord. Subtenant. Marshaling.
Applewhite v. Nelms, 71 M. 482, 14 So. 443.

Landlord's lien. Coextensive with those of employer and employee under § 2682.
Powell v. Smith, 74 M. 142, 20 So. 872.

Landlord and tenant. Lien on agricultural products. Rent of dwelling house on farm.
Scroggins v. Foster, 76 M. 318, 24 So. 194.

Section 2498.

Destruction of building. Abatement of rent.
Taylor v. Hart, 73 M. 22, 18 So. 546, 30 L. R. A. 716.

Section 2501.

Assignee of rent note may distrain for amount thereof.
Coker v. Britt, 78 M. 583, 29 So. 833.

Section 2517.

Action by tenant for statutory damages when no rent is due, separate and distinct from replevin suit, damages in which are provided by Code 1892, § 2522.
Biddle v. Paine, 74 M. 494, 21 So. 250.

Section 2518.

Provides alternative test of jurisdiction: value of property or amount distrained for.
Biddle v. Paine, 74 M. 494, 21 So. 250.

Section 2521.

Replevin by tenant. Verdict. Sufficiency.
Gilleylen v. Stewart, 72 M. 262, 16 So. 495.

Section 2522.

Replevin suit in which damages are provided by this section, separate and distinct from action by tenant for statutory damages when no rent is due.
Biddle v. Paine, 74 M. 494, 21 So. 250.

Section 2531.

Claimant's issue. Burden of proof.
Spears v. Robinson, 71 M. 774, 15 So. 111.

Section 2533.

Claimant of goods seized under attachment for rent to be treated as plaintiff in replevin.
Pierce v. Watkins, 74 M. 394, 21 So. 148.

Section 2539.

Provisions, giving same right of entry for non-payment of rent, to assignee of lessor as to latter himself, apply only to estates for life or years, &c.
Wright v. Hardy, 76 M. 524, 24 So. 697.

Section 2544.

Lease of land by month, to continue for indefinite period, terminable only at end of monthly period, by giving one week's notice.
Wilson v. Wood, 84 M. 728, 36 So. 609.

Section 2547.

Tenant holding over after expiration of term. Summary proceedings to remove. Affidavit.
Bowles v. Dean, 84 M. 376, 36 So. 391.

Summary proceedings to remove tenant for nonpayment of rent. Affidavit and proof.
Wilson v. Wood, 84 M. 728, 36 So. 609.

Sections 2547–2557.

Municipality. Possession of room in courthouse. Tenant at will. Proceedings to remove.
Bay St. Louis v. Hancock County, 80 M. 364, 32 So. 54.

Dispossession of tenant. Summary proceeding. Denial by affidavit, in circuit court.
Harvey v. Clark, 81 M. 166, 32 So. 906.

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Section 2548.

Landlord and tenant. Summary proceedings by former to remove latter for non-payment of rent. Affidavit.

Bowles v. Dean, 84 M. 376, 36 So. 391.

Section 2552.

Dispossession of tenant, holding over. Summary proceeding. Denial by affidavit, in circuit court.

Harvey v. Clark, 81 M. 166, 32 So. 906.
Bowles v. Dean, 84 M. 376, 36 So. 391.

Summary proceedings to remove tenant for non-payment of rent. Denial by defendant.

Wilson v. Wood, 84 M. 728, 36 So. 609.

Section 2558.

Land-office created.

Holder v. Wineman, 76 M. 824, 25 So. 481.

Sections 2564, 2565.

State lands. Public policy. "Enter." "Purchase." "Escheat." Laws 1877, p. 34, § 3, considered, &c.

Wisconsin Lumber Co. v. State, — M. —, 54 So. 247.

Sections 2565, 2566.

Replevin by land commissioner of timber cut from land forfeited to state for non-payment of taxes.

State v. Fitzgerald, 76 M. 502, 24 So. 872.

Section 2566.

Provides for land commissioner, &c.

Holder v. Wineman, 76 M. 824, 25 So. 481.

Section 2588.

Amended, Laws 1896, p. 60. Provision for refund by state of purchase price of land on failure of title thereto, applies only to sales by land commissioner.

Holder v. Wineman, 76 M. 824, 25 So. 481.

Public lands. Failure of title. Venue. Repealed, Laws 1900, p. 73, ch. 65.

State v. Mississippi Cotton Oil Co., 79 M. 203, 30 So. 609.

Sections 2589, 2590.

Timber cut from land forfeited to state for nonpayment of taxes. Replevin by land commissioner.

State v. Fitzgerald, 76 M. 502, 24 So. 872.

Section 2682.

Lien on crop. Ginning of cotton.

Irwin v. Miller, 72 M. 174, 16 So. 678.

Employer's lien. Agricultural products. Purchaser. Notice.

Powell v. Smith, 74 M. 142, 20 So. 872.

Manager of plantation. Waiver of lien on cotton produced. Suit for conversion against factor.

McCormick v. Blum, 75 M. 81, 21 So. 707.

Warehouseman cannot assert lien on cotton received and stored for purpose of sale and shipment.

Shingleur-Johnson Co. v. Canton Cotton Warehouse Co., 78 M. 875, 29 So. 770, 84 Am. St. 655.

Section 2684.

Laborer's lien. Affidavit. Itemized account.

Baldwin v. Morgan, 73 M. 276, 18 So. 919.

Section 2689.

Mechanic's lien. Verified written statement of defense. Evidence. Peremptory instruction for plaintiff, error.

Easterling v. Shaefer, 38 So. 230.

Section 2698.

Mechanic's lien. Security. Waiver.

Smith &c. Co. v. Butts, 72 M. 269, 16 So. 242.

Mechanic's lien. Purchaser pendente lite. Appeal. Notice.

Smith &c. Co. v. Burns, 72 M. 966, 18 So. 483, 33 L. R. A. 85n.

Sections 2698–2714.

Materialman's lien. Petition. Judgment. Injunction. Owner of building.

Smith v. Frank Gardner Hardware Co., 83 M. 654, 36 So. 9.

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Section 2700.

Contract with husband, on his credit, entered into without written consent of wife, for plumbing work on latter's homestead, non-enforceable against her separate estate.
Fairbanks Co. v. Briley, 25 So. 354.

Section 2714.

Materialman's lien cannot be defeated by agreement between owner and contractor, &c.
Rosenbaum v. Carlisle, 78 M. 882, 29 So. 517.

Materialman's lien. Indebtedness of owner to contractor. Notice.
Chamberlain-Hunt Academy v. Port Gibson Brick &c. Co., 80 M. 517, 32 So. 116, 484.

Sections 2719, 2720.

Writ of seizure. Voluntary surrender of property by defendant to third person without prior right, does not defeat lien, &c.
Fidelity &c. Co. v. B. F. Sturtevant Co., 86 M. 509, 38 So. 703, 109 Am. St. 716.

Section 2720.

Election of remedies. Judgment. Lien for purchase money.
Clark &c. Co. v. Erwin, 72 M. 926, 18 So. 419.

Sections 2725, 2726.

Liens on water craft. Debts of independent contractor.
Valverde v. Spottswood, 77 M. 912, 28 So. 720.

Section 2730.

Mere scrambling possession insufficient to confer title.
Mitchell v. Bond, 84 M. 72, 36 So. 148.

Limitation of actions. Bill to remove clouds.
Kennedy v. Sanders, 90 M. 524, 43 So. 913.

Section 2731.

Limitations. Statutory bar.
Hill v. Nash, 73 M. 849, 19 So. 707.

Title not obtained by mere scrambling possession.
Mitchell v. Bond, 84 M. 72, 36 So. 148.

Exception. Concealed fraud. Allegations and proof necessary.
Jones v. Rogers, 85 M. 802, 38 So. 742.

Limitations. Bill to avoid foreclosure sale.
Alabama &c. R. Co. v. Thomas, 86 M. 27, 38 So. 770.

Sections 2731-2762.

Limitations. Cause of action concealed. Filing of bill. Notice. Fraud.
North American Trust Co. v. Lanier, 78 M. 418, 28 So. 804, 84 Am. St. 635.

Section 2732.

Mortgages. Equity of redemption. Limitation.
Tuteur v. Brown, 74 M. 774, 21 So. 748.

Limitation of actions. Bill to redeem land illegally purchased by mortgagee at his own sale.
Houston v. National Mut. B. & L. Assn, 80 M. 31, 31 So. 540.
Cox v. American Freehold &c. Co., 88 M. 88, 40 So. 739.

Non-applicable to homestead trust deed void by reason of wife's failure to join in execution.
Woods v. Campbell, 87 M. 782, 40 So. 874.

Section 2733.

Limitations. Loss of lien given by law upon attachment of bar to debt.
Madison County v. Powell, 71 M. 618, 15 So. 109.

Section 2734.

Mere scrambling possession insufficient to confer title.
Mitchell v. Bond, 84 M. 72, 36 So. 148.

Section 2735.

Tax title. Suit to recover land. Limitations.
Butts v. Ricks, 82 M. 533, 34 So. 354.

Statute of limitations. Does not apply to tax sale void because assessment was made under unconstitutional act.
Eastland v. Yazoo Delta Lumber Co., 90 M. 330, 43 So. 956.

Limitation without application when chancery clerk was "purchaser" at tax sale.
Barker v. Jackson, 90 M. 621, 44 So. 34.

Sections 2737, 2739.

Limitations. Vendor and purchaser. Right of action in former, resting on contract, provable by writing.

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Washington v. Soria, 73 M. 665, 19 So. 485, 55 Am. St. 555.

Limitations. Claim of supervisor for compensation under Laws 1890, p. 384, ch. 250, barred after six years.

Madison County v. Collier, 87 M. 204, 30 So. 610, substituted for Madison County v. Collier, 79 M. 220, 30 So. 610, withdrawn by court.

Section 2737.

Limitation of action. Promissory note. Lex fori.

Wright v. Mordaunt, 77 M. 537, 27 So. 640, 78 Am. St. 536.

Statute of limitations. Promise in writing. Recital of consideration in deed.

Fowlkes v. Lea, 84 M. 509, 36 So. 1036, 68 L. R. A. 925n.

Damage caused by construction of switch track in front of property not actionable after six years.

Romano v. Yazoo &c. R. Co., 87 M. 721, 40 So. 150.

Causes of action of wife against husband not excepted from operation.

Wyatt v. Wyatt, 81 M. 219, 32 So. 317.

Section 2738.

Limitations do not run against action on bond of guardian for failure to deliver property, until final account and discharge.

Dunn v. Clingham, 93 M. 310, 47 So. 503.

Section 2739.

Cause of action evidenced by writing acknowledging debt, not barred by three years' statute.

Cock v. Abernathy, 77 M. 872, 28 So. 18.

Statute of limitations. Usury. Suit to recover.

Buntyn v. National Mut. B. & L. Ass'n, 86 M. 454, 38 So. 345.

Section 2741.

Usury. Penalty. Statute of limitations.

Commercial Bank v. Auze, 74 M. 609, 21 So. 754.

Section 2742.

Libel. Letter. Publication. Statute of limitations. Concealment of cause of action.

McCarlie v. Atkinson, 77 M. 594, 27 So. 641.

Section 2743.

Judgments. Execution within seven years.

Berkson v. Cox, 73 M. 339, 18 So. 934, 55 Am. St. 539.

Suit in name of assignee within seven years, renews and extends lien of judgment.

Street v. Smith, 85 M. 359, 37 So. 837.

Section 2744.

Action on foreign judgment. Limitation.

Marx v. Logue, 71 M. 905, 15 So. 890.

Section 2746.

Action for death. Limitations. No saving for disability.

Foster v. Yazoo &c. R. Co., 72 M. 886, 18 So. 380.

Section 2748.

Limitations. Absence from state.

Weille v. Levy, 74 M. 34, 20 So. 3, 60 Am. St. 500.

Applies to cause of action accrued in this state. Deprives absentee of right to time expired during his absence.

Wright v. Mordaunt, 77 M. 537, 27 So. 640, 78 Am. St. 536.

Limitation of actions. Absence from state. Suit to foreclose mortgage.

Hunt v. Belknap, 78 M. 76, 28 So. 751.

Section 2749.

Statute of limitations. Attorney and client. Trust. Concealed fraud.

Hudson v. Kimbrough, 74 M. 341, 20 So. 885.

Libel. Letter. Publication. Statute of limitations. Concealment of cause of action.

McCarlie v. Atkinson, 77 M. 594, 27 So. 641, 78 Am. St. 540.

Section 2753.

Limitation of actions. Promissory note. Death of maker.

Klaus v. Moore, 77 M. 701, 27 So. 612.

Section 2754.

Action barred in another state barred here.

Louisville &c. R. Co. v. Pool, 72 M. 487, 16 So. 753.

Does not apply if defendant has never resided in this state.

Robinson v. Moore, 76 M. 89, 23 So. 631.

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Sole purpose and effect, to give party sued in this state benefit of bar completed elsewhere.
Wright v. Mordaunt, 77 M. 537, 27 So. 640, 78 Am. St. 536.

Statutes of limitation. Action barred in another state barred here.
Hunt v. Belknap, 78 M. 76, 28 So. 751.

Section 2755.

Limitations. Right extinguished.
Proctor v. Hart, 72 M. 288, 16 So. 595.

Section 2757.

Judgment, not contract. New promise. Limitation.
Berkson v. Cox, 73 M. 339, 18 So. 934, 55 Am. St. 539.

Limitations. New promise of firm debtor to managing partner.
Yarbrough v. Gilland, 77 M. 139, 24 So. 170.

Limitation of actions. "Such acknowledgment or promise." Recitals in deed. Distinct identification of debt.
Stewart v. Forman, 90 M. 85, 43 So. 67.

Section 2758a.

Does not aid plaintiff who brings suit on insurance policy after time designated therein.
Ward v. Pennsylvania Fire Ins. Co., 82 M. 124, 33 So. 841.

Section 2759.

Limitations. Rights reserved.
Wilkerson v. Hudson, 71 M. 130, 13 So. 866.

Section 2760.

Purchaser of land sold under decree of chancery court cannot defend upon two years' statute, unless he has made actual payment of purchase money.
Gibson v. Currier, 83 M. 234, 35 So. 315, 102 Am. St. 442.

Applicability of limitation.
Shannon v. Summers, 86 M. 619, 38 So. 345.

Limitation. Action to recover land sold under chancery decree, &c. Does not apply where court was without jurisdiction to make order of sale.
Moores v. Flurry, 87 M. 707, 40 So. 226.

Limitation of actions. Property sold by order of chancery court, &c. Prospective in operation.
Jordan v. Bobbitt, 91 M. 1, 45 So. 311.

Section 2762.

Limitations. Loss of lien given by law, upon attachment of bar to debt.
Madison County v. Powell, 71 M. 618, 15 So. 109.

Sections 2762, 2763.

Remedies of vendor. Jurisdiction of law and equity. Limitations.
Washington v. Soria, 73 M. 665, 19 So. 485, 55 Am. St. 555.

Section 2763.

Limitations. Bill to avoid foreclosure sale.
Alabama &c. R. Co. v. Thomas, 86 M. 27, 38 So. 770.

Limitation of actions. Constructive trust.
Patton v. Pinkston, 86 M. 651, 38 So. 500.

Limitation of actions. Trusts. Repudiation.
Stanton v. Helm, 87 M. 287, 39 So. 457.

Sections 2782–2789.

Do not affect right of creditor filing bill to vacate fraudulent conveyance, to lien, &c., as provided by Code 1892, § 503.
Fernwood Lumber Co. v. Meehan-Rounds Lumber Co., 85 M. 54, 37 So. 502.

Sections 2783, 2786.

Suit affecting real estate. Lis pendens. Constructive notice prior to present statute.
Alliance Trust Co. v. Nettleton Hardwood Co., 74 M. 584, 21 So. 396, 60 Am. St. 531, 36 L. R. A. 155.

Section 2835.

Lunacy inquest. Jury. Not violative of Const. U. S. fourteenth amendment, § 1, nor Const. 1890, art. 1, § 14.
Fant v. Buchanan, 17 So. 371.

Sections 2835, 2836, 2840, 2842.

Semble, that verdict finding defendant, accused of murder, not guilty on ground of

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insanity, and certifying him to be still insane and dangerous, is not reviewable on appeal.
Caffey v. State, 78 M. 645, 29 So. 396.

Section 2846.
Mandamus. Public school teacher's right under license.
Brown v. Owen, 75 M. 319, 23 So. 35.

Section 2847.
Mandamus. Venue. Several defendants in different counties.
State v. Mississippi Cotton Oil Co., 79 M. 203, 30 So. 609.

Sections 2848, 2849.
Mandamus against supervisors to compel allowance of account. Award as to particular items.
Chatters v. Coahoma County, 73 M. 351, 19 So. 107.

Section 2912a.
Bill of exceptions on appeal to circuit court from judgment of municipal authorities extending corporate limits. Trial de novo.
Yerger v. Greenwood, 77 M. 378, 27 So. 620.

Sections 2912a, 2913.
Amended, Laws 1902, p. 154. Municipality. Change of boundaries. Appeal. Issue in circuit court. Determination. Separate incorporation of adjacent territory, &c.
Jackson v. Whiting, 84 M. 163, 36 So. 611.

Section 2913.
Appeal to circuit court from judgment of municipal authorities extending corporate limits. Bill of exceptions. Trial de novo.
Yerger v. Greenwood, 77 M. 378, 27 So. 620.

Section 2921.
Amended, Laws 1898, p. 90. Authorizes governor to pass upon and approve applications for incorporation of unincorporated cities, &c. Not violative of Const. 1890, § 88.
Jackson v. Whiting, 84 M. 163, 36 So. 611.

Section 2923.
Each incorporated town to be governed by provisions of Code 1892, ch. 93.
Blocker v. State, 72 M. 720, 18 So. 388.
Claim against municipality. Suit by creditor. Res adjudicata.
Pyland v. Purvis, 87 M. 433, 40 So. 7.

Section 2925.
Ordinances. "Mayor and board of aldermen." Right of mayor to vote, &c.
Bousquet v. State, 78 M. 478, 29 So. 399.

Sections 2925–2957.
Contain specific enumeration of powers conferred on each municipality governed by provisions of Code 1892, ch. 93. Local improvements.
Nugent v. Jackson, 72 M. 1040, 18 So. 493.

Section 2928.
Ordinance prohibiting generally keeping of hogs in city without regard to their being nuisance, invalid.
Comfort v. Kosciusko, 88 M. 611, 41 So. 268.
See Crittenden v. Booneville, 92 M. 277, 45 So. 723.

Sections 2929, 2931, 2933, 2936.
Municipalities: power over streets.
Blocker v. State, 72 M. 720, 18 So. 388.

Sections 2931–2933.
Municipality. Contract to construct street railway, &c. Proceeds of forfeiture. Donation in aid of corporation.
Adams v. Jackson Electric &c. Co., 78 M. 887, 30 So. 58.

Section 2935.
Municipality cannot impose on meat markets, privilege tax in amount exceeding fifty per cent. of state license tax.
Biloxi v. Borries, 78 M. 657, 29 So. 466.
See Harris v. Water Valley, 78 M. 659, 29 So. 401.

Sections 2939, 2945.
Working streets. Municipality.
Blocker v. State, 72 M. 720, 18 So. 388.

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Section 2939.

Brookhaven. Division of county road tax on municipal property.
Lincoln County v. Brookhaven, 90 M. 5, 41 So. 449.

Section 2943.

Alderman to preside in absence of mayor. Right of latter to vote, &c.
Bousquet v. State, 78 M. 478, 29 So. 399.

Section 2945.

Municipality. Vacation of street. Compensation. "Abutting landowner."
Poythress v. Mobile &c. R. Co., 92 M. 638, 46 So. 139.

Section 2946.

Municipalities to exercise right of eminent domain in laying out of streets, &c.
Blocker v. State, 72 M. 720, 18 So. 388.

Section 2947.

Vests municipalities with full jurisdiction in matter of streets, &c. Complement of Code 1892, § 289.
Blocker v. State, 72 M. 720, 18 So. 388.

Municipalities. Full jurisdiction over streets. Trimming shade trees. Abutting owner. Compensation.
Hazlehurst v. Mayes, 84 M. 7, 36 So. 33, 64 L. R. A. 805.

Section 2964.

Empowers towns "to provide for lighting of streets, parks," &c. Necessary trimming of shade trees. Abutting owner. Compensation.
Hazlehurst v. Mayes, 84 M. 7, 36 So. 33, 64 L. R. A. 805.

Section 2970.

Draws distinction between roads within and without corporate limits.
Blocker v. State, 72 M. 720, 18 So. 388.

Section 2972.

Municipalities. License taxes.
Greenwood v. Delta Bank, 75 M. 162, 21 So. 747.

Amended, Laws 1898, p. 20, § 55. Municipality cannot impose on meat markets, privilege tax in amount exceeding fifty per cent. of state license tax.
Biloxi v. Borries, 78 M. 657, 29 So. 466.
Harris v. Water Valley, 78 M. 659, 29 So. 401.

Privilege tax. Municipality. Commercial agencies. Repeal of Code 1892, § 3336.
Bradstreet Co. v. Jackson, 81 M. 233, 32 So. 999.

Section 2978.

Police justice. Election. Mayor may vote only when there is tie between aldermen.
Bousquet v. State, 78 M. 478, 29 So. 399.

Section 2979.

Mayor. Duties, &c. Right to vote on occasion of election of police justice.
Bousquet v. State, 78 M. 478, 29 So. 399.

Mayor cannot veto election of police justice.
Rich v. McLaurin, 83 M. 95, 35 So. 337.

Section 2986.

Mayor. Power to remit fines, &c. Right to vote, &c.
Bousquet v. State, 78 M. 478, 29 So. 399.

Mayor can remit only such forfeitures as accrue in criminal proceedings.
Jackson Electric &c. Co. v. Adams, 79 M. 408, 30 So. 694.

Section 2989.

Municipality. Election of inferior officers. Outgoing and incoming boards. Regular meetings.
Ott v. State, 78 M. 487, 29 So. 520.

Section 2991.

Municipality. Majority of aldermen elected, to constitute quorum to transact business. Right of mayor to vote, &c.
Bousquet v. State, 78 M. 478, 29 So. 399.

Section 2992.

Tax collector. "Mayor and board of aldermen." Right of mayor to vote, &c.
Bousquet v. State, 78 M. 478, 29 So. 399.

Municipality. Election of inferior officers. Outgoing and incoming boards. Regular meetings.
Ott v. State, 78 M. 487, 29 So. 520.

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Section 3000.

Street commissioner to have general control of streets, &c.
Blocker v. State, 72 M. 720, 18 So. 388.

Section 3001.

Mayor of incorporated town without elected police justice, ex officio justice of peace within corporate limits.
Burnett v. State, 72 M. 994, 18 So. 432.

Mayor. Jurisdiction as justice. Unlawful detainer.
Nickles v. Kendricks, 73 M. 711, 19 So. 582.

Police justice. "Mayor and board of aldermen." Right of mayor to vote, &c.
Bousquet v. State, 78 M. 478, 29 So. 399.

Authority of city police justice unaffected by election of justices of peace for city district.
Hughes v. State, 79 M. 77, 29 So. 786.

Title of police justice to office unaffected by assignment to him of certain same duties as justice of peace.
Rich v. McLaurin, 83 M. 95, 35 So. 337.

Section 3003.

Municipality. Resolution directing donation of proceeds of forfeiture to corporation, void.
Adams v. Jackson Electric &c. Co., 78 M. 887, 30 So. 58.

Renders oral agreement of mayor and aldermen to return money forfeited to city by nonperformance of contract, ultra vires and void.
Jackson Electric Ry. & Power Co. v. Adams, 79 M. 408, 30 So. 694.

Section 3005.

Municipal building. "Mayor and board of aldermen." Right of mayor to vote, &c.
Bousquet v. State, 78 M. 478, 29 So. 399.

Sections 3006, 3011-3013.

Municipality. Local improvements.
Nugent v. Jackson, 72 M. 1040, 18 So. 493.

Section 3008.

Municipality. Ordinance. Title.
Ocean Springs v. Green, 77 M. 472, 27 So. 743.

Ordinance providing that all offenses made misdemeanors under state laws shall be violations of municipal laws, contains only one subject.
Winfield v. Jackson, 89 M. 272, 42 So. 183.
See Smothers v. Jackson, 92 M. 327, 45 So. 982.

Section 3010.

Municipality. Proof of codification of ordinances is evidence that particular one of same is duly in force.
Chrisman v. Jackson, 84 M. 787, 37 So. 1015.

Sections 3011, 3012.

Municipality. Special improvement and assessment. Expense. Abutting owner.
Greenville v. Harvie, 79 M. 754, 31 So. 425.

Unrepugnant to Const. 1890, §§ 17, 112. Initiatory resolution. Double taxation. Special assesments. Bonds. Construction of, and objection to improvement.
Edwards House Co. v. Jackson, 91 M. 429, 45 So. 14.

Municipality. Special assessment. Sidewalks. Description of improvements. Notice.
Jackson v. Williams, 92 M. 301. 46 So. 551.

Section 3014.

Municipal taxation. School purposes.
Boguechitto v. Lewis, 75 M. 741, 23 So. 549.

Bonds. "Mayor and board of aldermen." Right of mayor to vote, &c.
Bousquet v. State, 78 M. 478, 29 So. 399.

Municipalities. Public works. Bonds. Special assessments under Code 1892, §§ 3011, 3012.
Edwards House Co. v. Jackson, 91 M. 429, 45 So. 14.

Sections 3014, 3016.

Municipality. Bonds. Notice. Election. Injunction.
Clarksdale v. Broaddus, 77 M. 667, 28 So. 954.

Section 3014.

Does not limit bond issue of municipality operating under special charter.
Love v. Yazoo City, 91 M. 535, 44 So. 835.

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Sections 3014–3017.

Vicksburg. Charter, as amended November 4, 1902. Limit on bond issue.
Smith v. Vicksburg, 86 M. 577, 38 So. 301.

Section 3015.

Bonds for municipal public works. Special assessments under Code 1892, §§ 3011, 3012.
Edwards House Co. v. Jackson, 91 M. 429, 45 So. 14.

Section 3016.

"Electors" means those who would be entitled to vote at any election held in pursuance of constitution and laws of state.
Greene v. Rienzi, 87 M. 463, 40 So. 17.

Municipal public works. Bonds. Special assessments under Code 1892, §§ 3011, 3012.
Edwards House Co. v. Jackson, 91 M. 429, 45 So. 14.

Section 3018.

Does not give town power to independently assess railroad property which is part of road.
New Albany v. Kansas City &c. R. Co., 76 M. 111, 23 So. 546.

Assessment for back taxes. Failure to give notice to property owner. Quashal.
Clarksdale v. Yazoo &c. R. Co., 29 So. 93.

Section 3020.

Does not confer power upon mayor and board of aldermen to levy taxes for past fiscal year.
Adams v. Greenville, 77 M. 881, 27 So. 990.

Section 3022.

Municipal tax sale is invalid when authorities have failed to designate place for making same.
Nixon v. Biloxi, 76 M. 810, 25 So. 664.

Tax deed, unrecorded for two years, inadmissible to prove title against innocent purchaser.
Sintes v. Barber, 78 M. 585, 29 So. 403.

Municipality. Amendment of charter. Day for tax sale.
O'Flinn v. McInnis, 80 M. 125, 31 So. 584.
See Brown v. Sharp, 31 So. 712.

Section 3026.

Municipality. Mayor. Aldermen. Eligibility. Strict construction.
State v. Cavett, 78 M. 851, 29 So. 853.

Section 3028.

Prescribes one year's residence in municipality as additional qualification to right to vote in municipal election. Authorized by Const. 1890, § 245. Repugnant to Const. 1890, §§ 241, 242.
State v. Kelly, 81 M. 1, 32 So. 909.

Sections 3028, 3029.

Prescribes conditions precedent to lawful exercise of right of suffrage by electors of municipality.
Greene v. Rienzi, 87 M. 463, 40 So. 17.

Section 3030.

Officer holding over. Successor qualified.
Roane v. Mathews, 75 M. 94, 21 So. 665.

Municipality. Election of inferior officers. Outgoing and incoming boards. Regular meetings.
Ott v. State, 78 M. 487, 29 So. 520.

Section 3034.

Municipal elections to be governed by law on subject of state and county elections.
Shines v. Hamilton, 87 M. 384, 39 So. 1008.

Section 3035.

Municipalities. Acceptance of code chapter.
Jackson v. Schlomberg, 70 M. 47, 11 So. 721.
State v. Govan, 70 M. 535, 12 So. 959.

Municipalities. Coming under general law. Constitutionality.
Lum v. Vicksburg, 72 M. 950, 18 So. 476.

Sections 3037, 3038.

Municipality. Rejection of Code 1892, ch. 93. Time for certification of resolution.
State v. Govan, 70 M. 535, 12 So. 959.

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Section 3039.

Municipality. Amendment of charter. Day for tax sale.
O'Flinn v. McInnis, 80 M. 125, 31 So. 584.
See Brown v. Sharp, 31 So. 712.

Amended, Laws 1900, p. 79, ch. 69. Right of municipality to amend special charter. Constitutional law.
Yazoo City v. Lightcap, 82 M. 148, 33 So. 949.

Vicksburg charter. Amendment of February 17, 1904, Laws 1904, p. 168, c. 116, constitutional.
Ex parte Dickson, 89 M. 778, 42 So. 233.

Amended, Laws 1900, p. 79, ch. 69. Yazoo City. Amendment of special charter. Municipal ownership and operation of electric street railway. Issuance of bonds.
Love v. Yazoo City, 91 M. 535, 44 So. 835.

Section 3055.

Municipal treasurer. Valid bond.
Gloster v. Harrell, 77 M. 793, 23 So. 520, 941.

Validates supervisor's bond with penalty, erroneous through mistake.
State v. Smith, 87 M. 551, 40 So. 22.

Section 3056.

Official bonds. How payable. Parties.
Patty v. Williams, 71 M. 837, 15 So. 43.

Section 3077.

Tax collector's deposits, trust fund. Legal estate in depositor. Beneficial estate in state, county, and levee board.
Fogg v. Bank of Friar's Point, 80 M. 750, 32 So. 285.

Includes sheriff's official deposits.
Metcalfe v. Merchants' & Planters' Bank, 89 M. 649, 41 So. 377.

Section 3079.

Construing with Code 1892, § 828, latter does not require performance by deputy, of official duties of living and disqualified sheriff.
Lipscomb v. State, 76 M. 223, 25 So. 158.

Section 3097.

Heir may sue for partition though estate is in course of administration and debts are not all paid.
Garrett v. Colvin, 77 M. 408, 26 So. 963.

Regulates venue in partition proceedings.
State v. Mississippi Cotton Oil Co., 79 M. 203, 30 So. 609.

Improper to partition rights in reversion or remainder, and to make reversioners or remaindermen parties to partition proceeding.
Lawson v. Bonner, 88 M. 235, 40 So. 488.

Section 3100.

Sale of lands for partition of proceeds.
Cox v. Kyle, 75 M. 667, 23 So. 518.

Section 3101.

Chancery. Partition suit. Claims. Payment of liens. Taxes, use and occupation.
Walker v. Williams, 84 M. 392, 36 So. 450.

Chancery. Partition. Co-tenants. Parties.
Thames v. Mangum, 87 M. 575, 40 So. 327.

Partition proceedings. Disputed titles. Parties. Conclusiveness of decree.
Foster v. Jones, 17 So. 893.

Section 3112.

Partition. Interlocutory decree.
Gilleylen v. Martin, 73 M. 695, 19 So. 482.

Decree ordering partition and that confirming report of commissioners, made evidence of title.
Foster v. Jones, 17 So. 893.

Partition: parties concluded.
Shuler v. Murphy, 9 M. 518, 44 So. 810.

Section 3119.

Partition. Allowance of attorney's fees.
Neblett v. Neblett, 70 M. 572, 12 So. 598.

Section 3145.

Board of supervisors. Liability on claim for burial of pauper.
Marshall County v. Rivers, 88 M. 45, 40 So. 1007.

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Section 3158.

Claims against county. Medical services.
Tallahatchie County v. Harrison, 75 M. 744, 23 So. 291.

Board of supervisors. Liability on claim for burial of pauper.
Marshall County v. Rivers, 88 M. 45, 40 So. 1007.

Section 3159.

Supervisors. Apprenticing poor orphan.
Moore v. Allen, 72 M. 273, 16 So. 600.

Section 3201.

Provides for working convicts on farm leased for that purpose. Constitutionality. Repeal.
State v. Henry, 87 M. 125, 40 So. 152.

Section 3251.

Physician practising without license can not recover for professional services.
Bohn v. Lowery, 77 M. 424, 27 So. 604.

Section 3276.

Surety. Judgment of discharge. Proceeding by co-surety for contribution. Res adjudicata.
Ruff v. Montgomery, 83 M. 185, 36 So. 67.

Section 3280.

Payment of judgment by surety. Indorsement on record by plaintiff. Bona fide purchaser from principal debtor.
Taylor v. Alliance Trust Co., 71 M. 694, 15 So. 121.

Section 3336.

Privilege tax. Commercial agencies. Repealed Laws 1896, p. 54, § 13. Saving clause.
Bradstreet Co. v. Jackson, 81 M. 233, 32 So. 999.

Section 3342.

Privilege tax. "Cotton seed buyer."
Johnson v. Jennings, 72 M. 349, 16 So. 791.
See Gloster Oil Works v. Buckeye Cotton Oil Co., 87 M. 618, 40 So. 225.

Section 3370.

Municipality cannot impose on meat markets, privilege tax in amount exceeding fifty per cent. of state license tax.
Biloxi v. Borries, 78 M. 657, 29 So. 466.
See Harris v. Water Valley, 78 M. 659, 29 So. 401.

Section 3379.

Together with Code 1892, § 3875, repeals all railroad exemptions contained in statutes not irrepealable.
Adams v. Yazoo &c. R. Co., 77 M. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33n.

Imposes privilege tax, not on iron rails, but on railroads. Classification of latter. Number of tracks immaterial.
Adams v. Illinois Cent. R. Co., 92 M. 566, 46 So. 50.

Section 3387.

Imposes privilege tax on sleeping-car companies doing intrastate business. Not violative of Const. U. S., art. 1, § 8.
Pullman Palace Car Co. v. Adams, 78 M. 814, 30 So. 757, 84 Am. St. 647.

Section 3390.

Privilege tax. Plantation store.
Alcorn v. State, 71 M. 464, 15 So. 37.

Failure to pay privilege tax. Insurance.
Sneed v. British-American Assurance Co., 72 M. 51, 17 So. 281.

Privilege tax. Junk shop as "store."
Pitts v. Vicksburg, 72 M. 181, 16 So. 418.

Privilege tax. Failure to pay. Insurance.
American Fire Ins. Co. v. First Nat. Bank, 73 M. 469, 18 So. 931.
Sun Mut. Ins. Co. v. Searles, 73 M. 62, 18 So. 544.

Privilege tax. Goods in dwelling and smoke house.
Craig v. Pattison, 74 M. 881, 21 So. 756.

Section 3401.

Privilege tax. Failure to pay. Insurance.
Sneed v. British-American Assurance Co., 72 M. 51, 17 So. 281.
Crum v. Carrington Shoe Co., 72 M. 458, 16 So. 674.

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Privilege tax. Contract with delinquent: validity as to stranger.
Cunningham Bros. Woolen Co. v. Atlanta Nat. B. & L. Assn., 73 M. 516, 19 So. 234.

Privilege tax. Failure to pay. Contracts void.
American Fire Ins. Co. v. First Nat. Bank, 73 M. 469, 18 So. 931.

Note and renewals given for debt contracted in course of business of merchant, delinquent as to privilege tax, void.
Puckett v. Fore, 77 M. 391, 27 So. 381.

Privilege taxes. Delinquency. Disability to sue. Amnesty act, Laws 1904, p. 57, ch. 75.
North British &c. Ins. Co. v. Edwards, 85 M. 322, 37 So. 748.

Section 3408.

Privilege tax. Suit therefor. Retailing liquors.
State v. Fragiacomo, 70 M. 799, 14 So. 21.

Privilege tax. Antedated license.
American Fire Ins. Co. v. First Nat. Bank, 73 M. 469, 18 So. 931.

Section 3410.

Privilege tax. Merchant. Affidavit of applicant for license.
American Fire Ins. Co. v. First Nat. Bank, 73 M. 469, 18 So. 931.

Privilege tax. Insufficient payment.
Pearson v. Kendrick, 75 M. 416, 23 So. 290.

Section 3412.

Privilege tax. Restrictions on municipalities. Repeal.
Vicksburg v. Sun Mut. Ins. Co., 72 M. 67, 16 So. 257.

Privilege tax. Municipality.
Pitts v. Vicksburg, 72 M. 181, 16 So. 418.

Amended, Laws 1898, p. 20, § 55. Municipality can not impose on meat markets, privilege tax in amount exceeding fifty per cent. of state license tax.
Biloxi v. Borries, 78 M. 657, 29 So. 466.
See Harris v. Water Valley, 78 M. 659, 29 So. 401.

Section 3414–3418.

Chancery. Injunction. Process. Pro confesso.
Sheffield v. Friedberg, 84 M. 188, 36 So. 242.

Section 3416.

Inapplicable to cases appealed from justice of peace.
Rowe v. Cannon, 84 M. 101, 36 So. 146.

Section 3417.

Service of writ of garnishment. Judgment at return term. "Unless the court be satisfied that the garnishee can be personally served at once," &c., refers to scire facias.
Alexander v. Equitable Fire Ins. Co., 12 So. 706.

Forfeited recognizance. Surety. Judgment. Service. Scire facias.
Robertson v. State, 87 M. 285, 39 So. 478.

Service being within five days before return day, garnishee is not required to answer until next term. Default judgment.
Alexander v. Lloyd, 70 M. 662, 14 So. 22.

Section 3421.

Service of process by publication, insufficient to support decree unless precedent proceedings are in strict conformity.
Moore v. Somerville, 80 M. 323, 31 So. 793.

No personal judgment for alimony against non-resident husband served by publication.
Larson v. Larson, 82 M. 116, 33 So. 717.

Chancery practice. Non-resident defendant. Process: when service is complete.
Fernwood Lumber Co. v. Meehan-Rounds Lumber Co., 85 M. 54, 37 So. 502.

Section 3430.

Process. Service on minor.
Moore v. Allen, 72 M. 273, 16 So. 600.

Process. Service. Infants. Void decree.
Gibson v. Currier, 83 M. 234, 35 So. 315, 102 Am. St. 442.

Section 3433.

Process. Insurance company.
Georgia Home Ins. Co. v. Holmes, 75 M. 390, 23 So. 183, 65 Am. St. 611.

Section 3439.

Process. Defects. Validity. Special venire.
Hale v. State, 72 M. 140, 16 So. 387.

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Attachment. Issuance by deputy. Amendment.
Wimberly v. Boland, 72 M. 241, 16 So. 905.

Void execution not amendable.
Smith v. Mixon, 73 M. 581, 19 So. 295.

Sections 3459, 3460.
Enrolled judgment. Execution to another county.
Smith v. Mixon, 73 M. 581, 19 So. 295.

Section 3470.
Attachment. Removal from state. Money.
Philadelphia Investment Co. v. Bowling, 72 M. 565, 17 So. 231.

Section 3481.
Enrolled judgment. Execution to another county.
Smith v. Mixon, 73 M. 581, 19 So. 295.

Section 3482.
Indemnifying bond. Attachment. Wilful wrong.
Moore v. Lowrey, 74 M. 413, 21 So. 237.

Execution. Exempt property. Indemnifying bond conditioned under this section, cured by Code 1892, § 946.
Bank of Gulfport v. O'Neal, 86 M. 45, 38 So. 630.

Section 3486.
Deed of trust. Advertisement of sale.
Melsheimer v. McKnight, 92 M. 386, 46 So. 827.
See Davis v. O'Connell, 92 M. 348, 47 So. 672.

Section 3489.
Deed of trust. Manner of sale.
Melsheimer v. McKnight, 92 M. 386, 46 So. 827.

Section 3499.
Judgment of justice of the peace. Sale thereunder. Filing transcript.
Dunlap v. Fant, 74 M. 197, 20 So. 874.

Section 3501.
Process. Regulations. Service on minor.
Moore v. Allen, 72 M. 273, 16 So. 600.

Section 3503.
Note. Assignment. Defense.
Millsaps v. Merchants' &c. Bank, 69 M. 918, 13 So. 837.
Millsaps v. Merchants' &c. Bank, 71 M. 361, 13 So. 903.

Promissory notes. Anti-commercial statute.
Bank of Winona v. Wofford, 71 M. 711, 14 So. 462.

Promissory note. Pleading.
Robertshaw v. Britton, 74 M. 873, 21 So. 523.

Anti-commercial statute. Promissory note. Negotiability.
Clifton v. Bank of Aberdeen, 75 M. 929, 23 So. 394.

Draft attached to bill of lading. Breach of warranty. Right of purchaser-consignee against paper's assignee for purchase money.
Miller v. American Nat. Bank, 76 M. 84, 23 So. 439.

Note, payable from maker's share of profits which may accrue from partnership, negotiable.
Heckler v. Frankenbush, 76 M. 780, 25 So. 670.

Section 3520.
Quo warranto. School trusteeship, "office" within meaning.
Ellis v. Greaves, 82 M. 36, 34 So. 81.

Section 3521.
Quo warranto. Trusts and combines. Venue.
State v. Mississippi Cotton Oil Co., 79 M. 203, 30 So. 609.

Quo warranto. Municipality. Relator. Policeman. Information.
Beverly v. Hattiesburg, 83 M. 621, 36 So. 74.

Section 3540.
Quo warranto. Municipal office is "public office."
Kelly v. State, 79 M. 168, 30 So. 49.

Section 3546.
Unlawful speed of trains. Flying switches. Boy killed.
Howell v. Illinois Cent. R. Co., 75 M. 242, 21 So. 746, 36 L. R. A. 545.
Pulliam v. Illinois Cent. R. Co., 75 M. 627, 23 So. 359.

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Unlawful speed of railroad train. Dog killed.
Jones v. Illinois Cent. R., 75 M. 970, 23 So. 358.

Liability of railroad company to trespasser on track within municipality when unlawful speed is proximate cause of injuries received.
Alabama &c. R. Co. v. Carter, 77 M. 511, 27 So. 993.

Amendatory act, Laws 1896, p. 76, ch. 63, does not deprive railroad companies of defense of contributory negligence, &c.
Farquhar v. Alabama &c. R. Co., 78 M. 193, 28 So. 850.

Railroad trains. Excessive speed in municipality. Contributory negligence. Knowledge of habitual violations of law.
Hasie v. Alabama &c. R. Co., 78 M. 413, 28 So. 941, 84 Am. St. 632.

Amended, Laws 1896, p. 76, ch. 63. Recovery can not be had, for injury from fire caused by train which exceeded speed limit, unless excess of speed was proximate cause.
Clisby v. Mobile &c. R. Co., 78 M. 937, 29 So. 913.

Section 3547.

Railroad locomotive. Bell or whistle. Street or highway crossing. For protection of animals as well as persons.
Young v. Illinois Cent. R. Co., 88 M. 446, 40 So. 870.

Action against railroad company for killing stock at highway crossing. Proof. Instruction.
Southern R. Co. v. Murray, 91 M. 546, 44 So. 785.

Section 3548.

Prohibits flying, running, &c., switches within municipalities. Constitutionality.
Jones v. Alabama &c. R. Co., 72 M. 22, 16 So. 379.
Natchez &c. R. Co. v. Crawford, — M. —, 55 So. 596.

Railroads. Kicking switches. Contributory negligence.
Alabama &c. R. Co. v. Jones, 73 M. 110, 19 So. 105, 55 Am. St. 488n.
Pulliam v. Illinois Cent. R. Co., 75 M. 627, 23 So. 359.

Carrier liable for injuries inflicted, within city, on cattle in car by making "flying," "running" or "kicking" switch.
Illinois Cent. R. Co. v. Kerl, 77 M. 736, 27 So. 993.

Contributory negligence, defense to action for injuries, caused by kicking switch made outside municipality.
Yazoo &c. R. Co. v. Humphrey, 83 M. 721, 36 So. 154.

Section 3549.

May be invoked by person who, while driving team along street, crossing railroad track, is injured by backing train within prescribed limits of passenger depot.
Illinois Cent. R. Co. v. McCalip, 76 M. 360, 25 So. 166.

Railroads. Backing train. Passenger depot. Walking between tracks. Licensee. Gross negligence.
Yazoo &c. R. Co. v. Metcalf, 84 M. 242, 36 So. 259.

Passenger depot. Backing train. Contributory negligence. Deliberation, recklessness, &c.
Sledge v. Yazoo &c. R. Co., 87 M. 566, 40 So. 13.

Section 3551.

Railroads. Obstructing "highways" and streets.
Illinois Cent. R. Co. v. State, 71 M. 253, 14 So. 459.
See Hamline v. Southern R. Co., 76 M. 410, 25 So. 295.

Railroad. Obstructing highway. Proof necessary. Damages to health.
Anderson v. Alabama &c. R. Co., 81 M. 587, 33 So. 840.

Section 3552.

Railroad crossings. Signboards. "Highways." Penalties.
Mobile &c. R. Co. v. State, 51 M. 137.
State Board of Education v. Mobile &c. R. Co., 71 M. 500, 14 So. 445.
See Hamline v. Southern R. Co., 76 M. 410, 25 So. 295.

Section 3555.

Railroads. Grades, &c., at "highway" crossings. City street.
Hamline v. Southern R. Co., 76 M. 410, 25 So. 295.

Crossings and bridges. Applies to highways laid out after construction of railroad. Constitutionality.
Illinois Cent. R. Co. v. Copiah County, 81 M. 685, 33 So. 502.

Railroads. Highway crossing. Grade.
Gulf &c. R. Co. v. Sneed, 84 M. 252, 36 So. 261.

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Section 6557.

Liability of railroad company. Gross negligence. Proximate cause. Contributory negligence.

Illinois Cent. R. Co. v. Trail, 25 So. 863.

Section 3559.

Amended, Laws 1896, p. 97. Railroads. Engineer. Incompetent fireman and defective appliances. Constitution 1890, § 193.

Illinois Cent. R. Co. v. Guess, 74 M. 170, 21 So. 50.

Fellow-servants. Negligence. Defective appliances. Corporations. Laws 1896, p. 97, ch. 87, amended by Laws 1898, p. 84, ch. 66.

Brooks v. Mississippi Cotton Oil Co., 76 M. 874, 25 So. 479.

Amended, Laws 1898, p. 84. Engineer of switch engine, not superior agent or officer, as regards yardmaster employed by same railroad company.

Farquhar v. Alabama &c. R. Co., 78 M. 193, 28 So. 850.

Fellow-servant rule. Rescript of Const. 1890, § 193. Amended Laws 1896, p. 97.

Ballard v. Mississippi Cotton Oil Co., 81 M. 507, 34 So. 533, 95 Am. St. 476, 62 L. R. A. 407.

Declaration by fireman alleging injuries by negligence of engineer, who was his superior with right to control his service, good on demurrer.

Cheaves v. Southern R. Co., 82 M. 48, 34 So. 385.

Causes of action predicated of negligence of master and that of fellow-servants should not be joined in same count.

Illinois Cent. R. Co. v. Abrams, 84 M. 456, 36 So. 542.

Suit by widow and children bars action by widow as administratrix under Code 1906, § 721.

Mobile &c. R. Co. v. Hicks, 91 M. 273, 46 So. 360, 124 Am. St. 679.

Section 3560.

Competing railroads not to consolidate. Amended, Laws 1898, p. 95.

Yazoo &c. R. Co. v. Southern R. Co., 83 M. 746, 35 So. 74.

Section 3561.

Railroads. Cattle-guards and crossings. Penalty.

Kansas City &c. R. Co. v. Spencer, 72 M. 491, 17 So. 168.

Necessary plantation road. Crossing. Penalty.

Alabama &c. R. Co. v. Odeneal, 73 M. 34, 19 So. 202.
Seelbinder v. Illinois Cent. R. Co., 73 M. 84, 19 So. 300.
Kansas City &c. R. Co. v. Jones, 73 M. 397, 18 So. 684.
Hardy v. Alabama &c. R. Co., 73 M. 719, 19 So. 661.

Railroads. Farm crossing. Necessary plantation road.

Alabama &c. R. Co. v. Ligon, 74 M. 176, 20 So. 988.
Alabama &c. R. Co. v. Odeneal, 74 M. 827, 21 So. 52.

Suit for penalty for failure to construct and maintain stock gaps, &c. Reception of evidence.

French v. Canton &c. R. Co., 74 M. 542, 21 So. 299.

Railroads. Stock-gaps and cattle-guards. Action for penalty by owner of land in stock law district, unmaintainable.

Canton &c. R. Co. v. French, 75 M. 939, 23 So. 357.

Requires railroads to make and maintain convenient and suitable crossings, for plantation roads. Sufficient compliance.

Yazoo &c. R. Co. v. Anderson, 76 M. 582, 25 So. 295.

Defective stock-gaps. Action by tenant.

Southern R. Co. v. Murrell, 78 M. 446, 28 So. 824.
Yazoo &c. R. Co. v. Young, 28 So. 826.

Leaving train standing for six consecutive days over plantation road, is violation.

Illinois Cent. R. Co. v. Denham, 82 M. 77, 33 So. 839.

Railroads. Cattle-guards. Judicial declaration as to compliance. As not violative of Const. U. S., fourteenth amendment, § 1.

Yazoo &c. R. Co. v. Harrington, 85 M. 366, 37 So. 1016.

Stock-gaps and cattle-guards. Does not apply unless land is substantially enclosed.

Yazoo &c. R. Co. v. Sallis, 89 M. 636, 42 So. 202.

Railroads. "Crossing." Use by licensee. "Necessary plantation roads."

Illinois Cent. R. Co. v. McGowan, 92 M. 603, 46 So. 55.

Failure of railroad to maintain stock gap and cattle-guard. Appeal by defendant. Time from which undated compromise agreement speaks. Second suit for penalty.

Yazoo &c. R. Co. v. Neal, 93 M. 680, 47 So. 673.

Railroad. Failure to construct and maintain necessary cattle-guards, &c. Evidence. Instruction.

Bass v. Maxwell, 25 So. 873.

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Suit to recover penalty. Opinion evidence as to proper construction of cattle-guards erected, inadmissible.
Grace v. Gulf &c. R. Co., 25 So. 875.

Railroads. Cattle-guards. Tenants relying upon common circumference fence.
Gibbons v. Yazoo &c. R. Co., 33 So. 5.

Section 3563.
Conductor required to protect passengers from assault, insult, &c. Conservator of peace.
Gallegly v. Kansas City &c. R. Co., 83 M. 171, 35 So. 420.

Section 3568.
Duty and liability absolute until destination is reached and passenger has reasonable time and opportunity to obtain baggage.
Zeigler v. Mobile &c. R. Co., 87 M. 367, 39 So. 811.

Section 3569.
Highly penal. Lost sample case checked by station agent, with knowledge, as baggage. Actual value, extent of railroad's liability.
New Orleans &c. R. Co. v. Shackleford, 87 M. 610, 40 So. 427, 112 Am. St. 461.

Section 3572.
Southern R. Co. in Mississippi. Charter.
Yazoo &c. R. Co. v. Southern R. Co., 83 M. 746, 36 So. 74.

Section 3587.
Southern R. Co. in Mississippi, cannot consolidate with "parallel or competing road."
Yazoo &c. R. Co. v. Southern R. Co., 83 M. 746, 36 So. 74.

Forbids parallel or competing railroads to consolidate. Special law.
State v. Mobile &c. R. Co., 86 M. 172, 38 So. 732.

Section 3588.
Southern R. Co. in Mississippi, cannot lease "parallel or competing lines."
Yazoo &c. R. Co. v. Southern R. Co., 83 M. 746, 36 So. 74.

Section 3612.
So much, as forbids registration of person who has not paid all taxes, &c., violative of Const. 1890, § 242.
Bew v. State, 71 M. 1, 13 So. 868.

Section 3643.
Validity of election unaffected by irregular appointment of election commissioners and invalidity of ballots.
Shines v. Hamilton, 87 M. 384, 39 So. 1008.

Section 3655.
Election. Official ballot. Name of candidate. Nomination. Ticket commissioner.
Shines v. Hamilton, 87 M. 384, 39 So. 1008.

Section 3679.
Contest for office of mayor of corporation operating under code chapter on municipalities, properly brought under.
Shines v. Hamilton, 87 M. 384, 39 So. 1008.

Sections 3683, 3686.
County district office. Vacancy.
State v. Lovell, 70 M. 309, 12 So. 341.

Section 3707.
Replevin. Jurisdictional function of affidavit.
Ball v. Sledge, 82 M. 749, 35 So. 447, 100 Am. St. 654.

Section 3709.
Regulates venue in replevin.
State v. Mississippi Cotton Oil Co., 79 M. 203, 30 So. 609.

Section 3715.
Replevin. Bond of defendant to be conditioned that property "shall be forthcoming to satisfy the judgment of the court."
Sparks v. Hopsen, 83 M. 124, 35 So. 446.

Section 3716.
Replevin. Surety on defendant's bond, conditioned under this section. Costs.
Sparks v. Hopsen, 83 M. 124, 35 So. 446.

Section 3726.
Replevin. Recovery of plaintiff limited to "interest" in property.
McKean v. J. Matthews Apparatus Co., 74 M. 119, 20 So. 869.

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Replevin. Judgment in alternative.
Bond v. Griffin, 74 M. 599, 22 So. 187.

Section 3727.
Replevin. Judgment for defendant.
Biddle v. Paine, 74 M. 494, 21 So. 250.

Section 3729.
Replevin. Surety on defendant's bond conditioned in form prescribed by Code 1892, § 3716. Costs.
Sparks v. Hopsen, 83 M. 124, 35 So. 446.

Section 3730.
Replevin. Claim of property by third person. Inapplicable to instant case.
Lewis v. McCracken, 89 M. 229, 42 So. 671.

Section 3744.
Exemptions from taxation. Railroads.
Adams v. Yazoo &c. R. Co., 77 M. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33n.

Property of secret society rented for profit, not exempt from taxation.
Ridgely Lodge, No. 23, I. O. O. F. v. Redus, 78 M. 352, 29 So. 163.

Section 3744, par. c.
Lands of one county, located in another, are exempt from taxation.
Warren County v. Nall, 78 M. 726, 29 So. 755.

Section 3744, par. e.
Exemption. Property of religious society. Acquisition after accrual of taxes.
McHenry Baptist Church v. McNeal, 86 M. 22, 38 So. 195.

Section 3746.
Proceeding to foreclose lien for taxes. Railroad holding majority of stock and bonds, &c., necessary party.
Yazoo &c. R. Co. v. Adams, 77 M. 764, 25 So. 355.

Delinquent taxes. Interest.
Illinois Cent. R. Co. v. Adams, 78 M. 895, 29 So. 996.

Taxes, operating as lien from first of February. Sale of property free from liability.
Vicksburg Water Works Co. v. Vicksburg Water Supply Co., 80 M. 68, 31 So. 535.

Assessment of personal property to "unknown owner," valid.
Powell v. McKee, 81 M. 229, 32 So. 919.

Section 3747.
Taxes, due and unpaid. Exemption. "Debt."
Yazoo &c. R. Co. v. West, 78 M. 789, 29 So. 475.

Interest, not recoverable on delinquent taxes. "Debt."
Illinois Cent. R. Co. v. Adams, 78 M. 895, 29 So. 996.
See Delta &c. Land Co. v. Adams, 93 M. 340, 48 So. 190.

Personal property. Assessment to "unknown owner," valid.
Powell v. McKee, 81 M. 229, 32 So. 919.

Section 3748.
Taxable property held before first day of February to be assessed and taxes thereon paid for current year.
Gerard v. Duncan, 84 M. 731, 36 So. 1034, 66 L. R. A. 461.

Section 3749.
Assessment to be made in municipality of actual residence.
Millsaps v. Jackson, 88 M. 504, 42 So. 234.

Section 3755.
Taxation. Insolvent bank. Assignment. Duty of assignee.
Gerard v. Duncan, 84 M. 731, 36 So. 1034.

Section 3757.
Taxation. Loans by non-resident. Business situs. Mortgages on lands in this state.
Adams v. Colonial &c. Mortgage Co., 82 M. 263, 34 So. 482, 100 Am. St. 633, 17 L. R. A. (N. S.) 138.

Section 3761.
Tax assessment lists. Solvent credits. "Property not otherwise enumerated." Presumption.
Adams v. Clarke, 80 M. 134, 31 So. 216.

Section 3764.
Banks: how taxed. Shares of capital stock. Market value. Deduction. Report.
Bank of Oxford v. Oxford, 70 M. 504, 12 So. 203.

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Sections 3768, 3769.

Taxation. Bank. Surplus. Undervaluation. Assessment for previous years.
Bank of Oxford v. Lafayette County, 79 M. 152, 29 So. 825.

Section 3775.

Parol evidence to identify defectively described land, sold for taxes. Clew must be found in assessment roll.
McQueen v. Bush, 76 M. 283, 24 So. 196.

Sections 3775, 3776.

Sale for taxes. Assessment roll. Description of land. Saving clauses non-effective. Parol evidence.
Crawford v. McLaurin, 83 M. 265, 35 So. 209, 949.

Do not authorize parol testimony to supply tax deed with description.
Hughes v. Thomas, 29 So. 74.

Section 3776.

Ambiguous description in tax deed and decree of confirmation. Evidence.
Illinois Cent. R. Co. v. LeBlanc, 74 M. 650, 21 So. 760.

Sale for taxes of defectively described land. Parol evidence to identify. Clew must be found in assessment roll.
McQueen v. Bush, 76 M. 283, 24 So. 196.

Assessment roll. Description of land. Parol evidence.
Smith v. Hickman, 24 So. 973.
Crawford v. McLaurin, 83 M. 265.

Section 3787.

Taxation. Deliberate undervaluation. Property not listed. Approval of assessment. Res adjudicata. Back taxes.
Adams v. Clarke, 80 M. 134, 31 So. 216.

Section 3793.

Assessment roll. Objections. Changes.
Yazoo Delta Investment Co. v. Suddoth, 70 M. 416, 12 So. 246.

Section 3794.

Board of supervisors. Assessment, not approved by operation of law, by reason of adjournment pending consideration of rolls.
Madison County v. Frazier, 78 M. 880, 29 So. 765.

Delinquent taxes. Interest.
Illinois Cent. R. Co. v. Adams, 78 M. 895, 29 So. 996.

Lands bought from state after any February 1, are not subject to taxation for year of purchase.
Wildberger v. Shaw, 84 M. 442, 36 So. 539.

Section 3797.

Board of supervisors. Assessment. Appeal. Supersedeas.
Tunica County v. Tate, 78 M. 294, 29 So. 74.

Section 3799.

Board of supervisors. Change of assessment. Constitutionality.
Tunica County v. Tate, 78 M. 294, 29 So. 74.

Taxation. Assessment. Relief. Personal property.
Jennings v. Coahoma County, 79 M. 523, 31 So. 107.
Kuhn v. Warren County, — M. —, 54 So. 442.

Reduction of assessment. Petition.
Forsdick v. Quitman County, 25 So. 294.

Sections 3801, 3802.

Taxes. Payment. Collection by distress and sale of personalty. Ten per cent. compensation to collector.
Miller v. Delta &c. Land Co., 74 M. 110, 20 So. 875.

Section 3801.

Interest, not recoverable on delinquent taxes.
Illinois Cent. R. Co. v. Adams, 78 M. 895, 29 So. 996.

Taxes for year of purchase unassessable against lands bought from state after any February 1.
Wildberger v. Shaw, 84 M. 442, 36 So. 539.

Section 3803.

Warrants in payment of county taxes.
Jones v. Melchior, 71 M. 115, 13 So. 857.

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Section 3804.

Tax collector. Additional assessments. Constitutionality.
Tunica County v. Tate, 78 M. 294, 29 So. 74.

Authorizes tax collector to assess such persons and personal property as he may find unassessed by assessor. Constitutionality.
Powell v. McKee, 81 M. 229, 32 So. 919.

Section 3807.

Tax receipt. Parol evidence. Not designed to take property of taxpayer for failure of officer to give statutory receipt.
Perret v. Borries, 78 M. 934, 30 So. 59.

Section 3811.

Tax collector: limited discretion as to when advertisement of delinquent lands is to be made.
Miller v. Delta &c. Land Co., 74 M. 110, 20 So. 875.

Sections 3811, 3813.

Destruction of court-house. Tax sale made as per order at building designated by board of supervisors as court-house, valid.
Thayer v. Hartman, 78 M. 590, 29 So. 396.

Section 3813.

Tax titles. Sale in subdivisions.
Nelson v. Abernathy, 74 M. 164, 21 So. 150.

Tax sale in solido of land, assessed in part to named owner and in part to unknown owner, void.
Higdon v. Salter, 76 M. 766, 25 So. 864.

Tax sale of undivided half interest in eighty-acre tract, does not pass title. Evidence.
Stevenson v. Reed, 90 M. 341, 43 So. 433.

Tax sale in solid block of seventy-two acres, void.
Herron v. Jennings, 31 So. 965.

Section 3814.

Tax title. Town lots. Joint assessment. Separate sale.
House v. Gumble, 78 M. 259, 29 So. 71.

Section 3817.

Tax titles. Curative statute. Ineffectual as to void sales.
Nelson v. Abernathy, 74 M. 164, 21 So. 150.
Seals v. Perkins, 96 M. 704, 51 So. 806, 52 So. 584.

Tax deed can not be invalidated except by proof that land was not liable to sale, &c.
Crawford v. McLaurin, 83 M. 265, 35 So. 209, 949.

Tax collector's deed made exhibit to bill. Exclusion from evidence as fatal error.
Wallace v. Lyle, 37 So. 460.

Section 3819.

Tax sale. Overbid. Redemption. Interest. Liability of tax collector.
Bank of Indianola v. Dodds, 90 M. 767, 44 So. 767.

Section 3820.

Sale of land for amount in excess of taxes and costs. Redemption. Interest. Liability of tax collector.
Bank of Indianola v. Dodds, 90 M. 767, 44 So. 767.

Section 3823.

Tax deed, unrecorded for two years, inadmissible to prove title against innocent purchaser.
Sintes v. Barber, 78 M. 585, 29 So. 403.

Interest, not recoverable on delinquent taxes.
Illinois Cent. R. Co. v. Adams, 78 M. 895, 29 So. 996.

Two years allowed for redemption from tax sale do not constitute statute of limitations within Const. 1890, § 104.
Tallahatchie County v. Little, 93 M. 88, 46 So. 257.

Void tax sale of parcels of land separately assessed to single owner. Redemption.
Hewes v. Seal, 80 M. 437, 32 So. 55.

Allows two years for redemption of land from tax sale. Not statute of limitations within Const. 1890, § 104.
Tallahatchie County v. Little, 93 M. 88, 46 So. 257.

Tax conveyance. "Filing."
Brannon v. Pringle, 46 So. 161.

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Section 3824.

Tax sale. Overbid. Redemption. Interest. Liability of tax collector.
Bank of Indianola v. Dodds, 90 M. 767, 44 So. 767.

Tax sale. Two tracts of land belonging to different owners, assessed together. Redemption.
Moores v. Thomas, 95 M. 644, 48 So. 1025.

Section 3826.

Sale of debts for delinquent taxes. Wages.
White v. Martin, 75 M. 646, 23 So. 289, 65 Am. St. 616.

Delinquent taxes. Collection by sale of debts. Interest.
Illinois Cent. R. Co. v. Adams, 78 M. 895, 29 So. 996.

Section 3830.

Interest, not recoverable on delinquent taxes.
Illinois Cent. R. Co. v. Adams, 78 M. 895, 29 So. 996.

Section 3832.

Supervisors' minutes allowing insolvencies unimpeachable, in action by state revenue agent against tax collector, by evidence aliunde.
Adams v. Carter, 25 So. 669.

Section 3840.

Tax collector not precluded by settlement under this section, from establishing trust in funds in insolvent depository.
Fogg v. Bank of Friar's Point, 80 M. 750, 32 So. 285.

Imposes penalty of thirty per cent. per annum damages for failure of tax collector to report and pay over taxes collected, &c. Repealed, notwithstanding Code 1906, § 4357, by Laws 1904, p. 216, ch. 161.
Adams v. Saunders, 93 M. 520, 46 So. 960.

Section 3850.

Delinquent taxes. Sale of land not sold at regular time. Suit by sheriff unmaintainable.
Yazoo &c. R. Co. v. West, 78 M. 789, 29 So. 475.

Section 3853.

Tax sale. Two tracts of land belonging to different owners, assessed together. Redemption.
Moores v. Thomas, 95 M. 644, 48 So. 1025.

Section 3875.

Railroad commission. Property escaping taxation. Assessment.
Yazoo &c. R. Co. v. Adams, 73 M. 648, 19 So. 91.

Together with Code 1892, § 3379, repeals all railroad exemptions contained in statutes not irrepealable. "Non-taxable."
Adams v. Yazoo &c. R. Co., 77 M. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33n.

Sections 3875–3886.

Not violative of Const. U. S., fourteenth amendment, § 1, nor Const. 1890, § 112. Collateral attack on decision of railroad commissioners.
Yazoo &c. R. Co. v. Adams, 77 M. 764, 25 So. 355.
See Yazoo &c. R. Co. v. Adams, 81 M. 90, 32 So. 937.

Section 3877.

Supreme Court will take judicial notice that railroad companies were assessed and have paid ad valorem taxes.
Gulf &c. Co. v. Adams, 85 M. 772, 38 So. 348.

Section 3892.

Suit for damages against county directly, maintainable by owner of land taken, without notice, for road purposes.
Copiah County v. Lusk, 77 M. 136, 24 So. 972.

Proceedings of supervisors in laying out and opening public roads, invalid unless jurisdictional facts appear of record.
Craft v. DeSoto County, 79 M. 618, 31 So. 204.

Amended, Laws 1896, p. 152. Validity of judgment ordering laying out of public road.
Illinois Cent. R. Co. v. Swalm, 83 M. 631, 36 So. 147.

Section 3894.

Damage to abutting property by construction of causeway along highway. Liability of county.
Rainey v. Hinds County, 78 M. 308, 28 So. 875.

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Section 3896.
Appeal in proceedings for assessment of damages for land taken for highway purposes. Bill of exceptions. Void bond.
Evans v. Sharkey County, 89 M. 302, 42 So. 173.

Section 3901.
Person having right to demand passage through land of another, can only procure it by proceeding to have private way established.
Wills v. Reed, 86 M. 446, 38 So. 793.

Section 3902.
Trespass which was direct consequence of violation, punishable under Code 1892, § 1315.
Porter v. State, 83 M. 23, 35 So. 218.

Section 3922.
Instant complaint on road supervisor's bond for damages caused by defective bridge does not state cause of action.
State v. Vaughn, 77 M. 681, 27 So. 999.

Section 3929.
Roads. Working by contract. "Division."
State v. Vice, 71 M. 912, 15 So. 129.
Does not repeal Laws 1884, p. 318, authorizing working of public roads in Madison county under contract.
Madison County v. Stewart, 74 M. 160, 20 So. 857.
Madison County v. Collier, 79 M. 220, 30 So. 610.

Section 3931.
Brookhaven. Division of county road tax on municipal property.
Lincoln County v. Brookhaven, 90 M. 5, 41 So. 449.

Section 3937.
Instant complaint on road supervisor's bond for damages caused by defective bridge, does not state cause of action.
State v. Vaughn, 77 M. 681, 27 So. 999.

Section 3947.
Free public ferry. Liability of keeper for negligence.
Sparkman v. Graham, 79 M. 376, 30 So. 713.

Section 3986.
County superintendent of education. Removal of teachers.
Brown v. Owen, 75 M. 319, 23 So. 35.

Section 4008.
School trustees. Did not supersede Laws 1888, p. 173, ch. 148.
Ellis v. Greaves, 82 M. 36, 34 So. 81.

Section 4011.
Creation of separate school district in municipality, &c. Neither showing as to ability to maintain seven months' terms, nor petition necessary.
Mebane v. Hickory Flat, — M. —, 55 So. 359.

Section 4014.
Municipal taxes. School purposes.
Boguechitto v. Lewis, 75 M. 741, 23 So. 549.

Section 4026.
Teacher's license: length of life.
Doss v. Wiley, 72 M. 179, 16 So. 902.

Section 4139.
Medical aid to prisoner. Liability of county.
Gray v. Coahoma County, 72 M. 303, 16 So. 903.

Sections 4144–4147.
School lands. Confirming title. Abstracts, &c.
Osborn v. Hinds County, 71 M. 19, 14 So. 457.
Wright v. Lauderdale County, 71 M. 800, 15 So. 116.
Bolivar County v. Coleman, 71 M. 832, 15 So. 107.
Carroll County v. Jones, 71 M. 947, 15 So. 106.

Section 4148.
School lands. Adverse possession. Presumption.
Carroll County v. Estes, 72 M. 17, 16 So. 908.

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Amite County v. Steen, 72 M. 567, 17 So. 930.
Leflore County v. Bush, 76 M. 551, 25 So. 351.

School land. Lease. Adverse possession. Prima facie evidence.
Forsdick v. Tallahatchie County, 76 M. 622, 24 So. 962.

Sections 4187–4193.
State revenue agent. Assessment by. Constitutionality.
State v. Tonella, 70 M. 701, 14 So. 17, 22 L. R. A. 346.
See Yazoo &c. R. Co. v. West, 78 M. 789, 29 So. 475.

Sections 4192, 4193.
Revenue agent. Assessment of property untaxed since 1886, &c. Constitutionality. Repealed by Laws 1894, p. 29.
State v. Kuhn, 72 M. 276, 16 So. 598.
See State v. Rigby, 16 So. 599.

Section 4194.
Revenue agent. Appeal without bond.
State v. Kuhn, 72 M. 276, 16 So. 598.
See State v. Rigby, 16 So. 599.

Sections 4194, 4199.
State revenue agent. Costs.
Adams v. Evans, 74 M. 886, 21 So. 921.

Section 4199.
State revenue agent. Compensation. Suit not begun.
Adams v. Bolivar County, 75 M. 154, 21 So. 608.

Section 4200.
Suits against delinquent taxpayers. Parties. Prospective in operation.
Adams v. Stonewall Mfg. Co., 80 M. 94, 31 So. 544.

Suits against delinquent taxpayers. Parties. Judgment. Inapplicable, under facts, in instant case.
Delta &c. Co. v. Adams, 93 M. 340, 48 So. 190.

Section 4225.
Statute of frauds. Lease. Agency.
Lobdell v. Mason, 71 M. 937, 15 So. 44.

Prenuptial parol agreement by parties to marriage contract as to rights of each in realty of other, unenforceable.
Steen v. Kirkpatrick, 84 M. 63, 36 So. 140.

Verbal promise to pay for goods conditioned upon promisee's furnishing third parties with same, collateral.
Wray v. Cox, 86 M. 638, 38 So. 344.

Unnecessary to validity of executory contract for sale of land that signing agent have written authority.
Hopper v. McAllum, 87 M. 441, 40 So. 2.

Section 4225d.
Statute of frauds. Performance of contract within one year.
Smith v. Jones, 75 M. 325, 22 So. 802.

Sections 4226–4228.
Statute of frauds. Sale of personalty. Title reserved.
Jennings v. Wilson, 71 M. 42, 14 So. 259.

Section 4228.
Fraudulent conveyance from husband to wife. Subsequent creditors.
Donoghue v. Shull, 85 M. 404, 37 So. 817.

Section 4229.
Statute of frauds. Contract for sale of sheep: delivery of three pet lambs, not of flock, insufficient to validate.
Ladnier v. Ladnier, 90 M. 475, 43 So. 946.

Section 4230.
Verbal spendthrift trust within statute of frauds.
Horne v. Higgins, 76 M. 813, 25 So. 489.

Statute of frauds. Trusts. Parol evidence to prove absolute deed, mortgage.
Fultz v. Peterson, 78 M. 128, 28 So. 829.

Section 4231.
Statute of frauds. Trusts. Assignment of promissory note, secured by recorded lien,

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transferred as incident of debt.
Klaus v. Moore, 77 M. 701, 27 So. 612.
Statute of frauds. Creation of trusts. Inapplicable in instant case.
Brewer v. Gates, 31 So. 205.

Section 4233.
Statute of frauds. Trusts. Parol evidence to prove absolute deed, mortgage.
Fultz v. Peterson, 78 M. 128, 28 So. 829.
Culp v. Wooten, 79 M. 503, 31 So. 1.
Bill to have deed, absolute on face, decreed a mortgage. Demurrer.
Schwartz v. Lieber, 79 M. 257, 30 So. 649.
Refers to visible, tangible property. Transfer of life policy during life of assured not embraced.
Armstrong v. Owens, 83 M. 10, 35 So. 320.

Section 4234.
Sign. Does not apply to person conducting milling and ginning business.
Yale v. Taylor Mfg. Co., 63 M. 598.
See Willis v. Memphis Grocery Co., 19 So. 101.
Business sign. Property acquired in trade.
Citizens' Bank v. Studebaker, 71 M. 544, 14 So. 733.
Fraudulent conveyance. Business sign. Sale to pay debt.
Columbus Buggy Co. v. Turley, 73 M. 529, 19 So. 232, 55 Am. St. 550, 32 L. R. A. 260.
Trial of right of property. Business sign.
Albin v. Howard, 74 M. 370, 20 So. 844.
Business sign. Undisclosed principal. Insurance policy. Garnishment.
Meridian Land &c. Co. v. Ormond, 82 M. 758, 35 So. 179.
Has no reference to person transacting business solely as insurance agent.
Lyons v. Steele, 86 M. 261, 38 So. 371.
Property merely stored by owner with judgment debtor non-seizable under execution against latter.
Burwell v. Herron, 16 So. 356.
Trader. Business sign, &c. Constitutionality.
Brister v. Joseph Bowling Co., 29 So. 830.

Section 4242.
Pretermission of term does not affect right of traveling official stenographer to week's salary.
Wood v. Chickasaw County, 85 M. 120, 37 So. 642.

Section 4248.
Does not embrace claims which auditor of public accounts is not empowered to audit and allow.
Hall v. State, 79 M. 38, 29 So. 994.
Regulates venue in suits against state.
State v. Mississippi Cotton Oil Co., 79 M. 203, 30 So. 609.

Section 4284.
Railroad commission. Findings not conclusive.
Western Union Tel. Co. v. Mississippi Railroad Commission, 74 M. 80, 21 So. 15.

Section 4287.
Highly penal. Carrier not liable for charge collected as agent of connecting carrier.
Gilliland v. Illinois Cent. R. Co., 81 M. 41, 32 So. 916.
Common carrier. Discrimination in rates. Contract, not void on face. Milling-in-transit agreement.
Laurel Cotton Mills v. Gulf &c. R. Co., 84 M. 339, 37 So. 134.
Express company, discriminating purposely, liable for double damages.
American Express Co. v. Crawley, 88 M. 525, 41 So. 261.

Sections 4287–4293.
Telephone company. Discrimination in rates. Remedy.
Cumberland Tel. &c. Co. v. State, 54 So. 446.

Section 4288.
Highly penal. Carrier not liable for charge collected as agent of connecting carrier.
Gilliland v. Illinois Cent. R. Co., 81 M. 41, 32 So. 916.
Double damages recoverable from express company, discriminating purposely.
American Express Co. v. Crawley, 88 M. 525, 41 So. 261.

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Section 4290.

Discrimination in rates by common carrier. Contract, not void on face. Milling-in-transit agreement.

Laurel Cotton Mills v. Gulf &c. R. Co., 84 M. 339, 37 So. 134.

Section 4291.

Together with Code 1892, §§ 854-858, repealed, Laws 1886, p. 93, ch. 38. Telephone company can not exercise right of eminent domain.

Alabama &c. R. Co. v. Cumberland Tel. &c. Co., 88 M. 438, 41 So. 258.

Actual damages only, recoverable from express company, guilty of unintentional discrimination.

American Exp. Co. v. Crawley, 88 M. 525, 41 So. 261.

State railroad commission may make rules as to reciprocal demurrage.

Yazoo &c. R. Co. v. Keystone Lumber Co., 90 M. 391, 43 So. 605.

Section 4292.

Common carrier. Discrimination. Contract, not void on face. Milling-in-transit agreement. Approval of rates. Burden of proof.

Laurel Cotton Mills v. Gulf &c. R. Co., 84 M. 339, 37 So. 134.

Section 4293.

Penalty for discrimination by common carrier. Contract. Milling-in-transit agreement. Rates. Burden of proof.

Laurel Cotton Mills v. Gulf &c. R. Co., 84 M. 339, 37 So. 134.

Section 4297.

State railroad commission may pass order converting "rebilling rate" into open or flat rate.

Alabama &c. R. Co. v. Railroad Commission, 86 M. 667, 38 So. 356, aff'd, 203 U. S. 496, 27 S. Ct. 163, 51 L. ed. 289.

Section 4299.

Insurance on billed cotton, destroyed and paid for, recoverable by carrier notwithstanding lack of actual receipt by it of property.

Illinois Cent. R. Co. v. Lancashire Ins. Co., 79 M. 114, 30 So. 43.

Bill of lading containing misdescription as to number of pounds in shipment, binding on carrier.

Loyd v. Kansas City &c. R. Co., 88 M. 422, 40 So. 1005.

Section 4301.

Presumption, conclusive save in two cases, excepted. Instruction.

Russell v. Mobile &c. R. Co., 87 M. 806, 40 So. 1015.

Request to "kindly trace shortage," contained in letter, declaring same, from consignee to last connecting carrier, insufficient "demand."

Threefoot & Co. v. New Orleans &c. R. Co., 89 M. 192, 43 So. 303.

Section 4302.

Does not empower railroad commission to require railroad company to maintain detached freight and passenger depots in same municipality.

State v. Yazoo &c. R. Co., 87 M. 679, 40 So. 263.

Section 4309.

Common carriers. Depots. Designation of location by railroad commission.

State v. Mobile &c. R. Co., 86 M. 172, 38 So. 732, 122 Am. St. 277.

Sections 4309, 4311.

Railroad commission cannot require railroad company to maintain detached freight and passenger depots in same municipality.

State v. Yazoo &c. R. Co., 87 M. 679, 40 So. 263.

Section 4313.

Carrier. Intending passenger. Assault and battery. Station agent.

Andrews v. Yazoo &c. R. Co., 86 M. 129, 38 So. 773.

Section 4326.

Telegram. Failure to deliver. Penalty.

Western Union Tel. Co. v. Clarke, 71 M. 157, 14 So. 452.

To be strictly construed. Does not apply to case of delay in transmitting telegram.

Marshall v. Western Union Tel. Co., 79 M. 154, 27 So. 614, 89 Am. St. 585.
Western Union Tel. Co. v. Hall, 79 M. 623, 31 So. 202.

Penalty, not recoverable for failure to transmit telegram.

Hilley v. Western Union Tel. Co., 85 M. 67, 37 So. 556.
See Western Union Tel. Co. v. Pallotta, 81 M. 216, 32 So. 310.

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Highly penal. Imperfectly framed as regards telephone companies. Refers, as framed, to written or printed messages or matter only.
Cumberland Tel. &c. Co. v. Sanders, 83 M. 357, 35 So. 653.

Repealed by § 13 of act adopting Code 1906 (Code 1906, p. 138).
Postal Telegraph Co. v. Shannon, 91 M. 476, 44 So. 809.

Sections 4328, 4329.
Telegraph companies. Discontinuance of office.
Western Union Tel. Co. v. Mississippi Railroad Commission, 74 M. 80, 21 So. 15.

Section 4329.
Telephone company. Discrimination in rates. Remedy.
Cumberland Tel. &c. Co. v. State, 54 So. 446.

Section 4344.
Appeal under Code 1892, § 34, denied by chancellor, grantable by any Supreme Court judge.
State v. Woodruff, 83 M. 107, 35 So. 422.

Section 4350.
Supreme Court. Issues of fact.
Yazoo &c. R. Co. v. Adams, 81 M. 90, 32 So. 937.

Section 4353.
Supreme Court. Hearing and determination. Entering proper judgment, sentence, or decree.
Yazoo &c. R. Co. v. Adams, 81 M. 90, 32 So. 937.

Section 4355.
Appeal. Filing transcript. Dismissal.
Snodgrass v. Nolan, 71 M. 857, 15 So. 801.

Section 4360.
Taxation. Assessment. Judgment on appeal. Damages.
Vicksburg Bank v. Adams, 74 M. 179, 21 So. 401.

Affirmance conditioned on remittitur gives appellee no right to damages.
Howie Bros. v. Bonds, 87 M. 698, 40 So. 227.

Section 4370.
Exceptions in trial court necessary prerequisite to review.
Hardeman v. State, 16 So. 876.

Criminal procedure. Judgment not reversed for certain errors.
Burnett v. State, 72 M. 994, 18 So. 432.

Burglary. Necessity of special exception in trial court to absence of proof of corporate existence of victim. Reversal.
James v. State, 77 M. 370, 26 So. 929, 78 Am. St. 527.

Supreme Court forbidden, in criminal cases, though capital, to consider errors or omissions unassigned below. Instructions in civil case.
Alexander v. Flood, 77 M. 925, 28 So. 787.

Distinguished from Code 1871, § 2884, (Code 1857, § 7, art. 3, p. 573). Unconstitutional in application to jurisdictional matters.
Arbuckle v. State, 80 M. 15, 31 So. 437.

Failure to challenge for cause, jurors known to be disqualified. Reversal.
West v. State, 80 M. 710, 32 So. 298.

Objection to lack of formal arraignment presented by motion in arrest, not seasonable.
Short v. State, 82 M. 473, 34 So. 353.

Error in swearing jury, unobjected to in lower court, unavailable on appeal.
Alexander v. State, 22 So. 871.

Special exceptions to organization of court or grand jury, or to place of holding court necessary.
Coleman v. State, 40 So. 230.

Section 4378.
Inapplicable where judgment is void as to all parties.
Weis v. Aaron, 75 M. 138, 21 So. 763.
See Davis v. State, 75 M. 637, 23 So. 770, 941.

Section 4403.
Penalizes sale of lots prior to recording of plat. To be strictly construed. Prospective in operation.
Wellborn v. Muller, 84 M. 726, 36 So. 544.

Sections 4411, 4412.
Trespass. Cutting trees. Statutory penalty. Necessary proof.

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Therrell v. Ellis, 83 M. 494, 35 So. 826.
See Smith v. Saucier, 40 So. 328.

Section 4412.
Cutting trees. Penalty. De facto court.
Lusby v. Kansas City &c. R. Co., 73 M. 360, 19 So. 239.
Vendee may recover penalties from vendor who after sale but before surrender of possession, cut trees from land sold.
Smith v. Forbes, 89 M. 141, 42 So. 382.

Section 4425.
Claim of property levied on: who may make.
Trice v. Walker, 71 M. 968, 15 So. 787.
See Thomas v. Shell, 76 M. 556, 24 So. 876.

Section 4428.
Issue must be made up at execution's return term. Party delaying issue will be cast.
Bedford &c. Co. v. Adams Mach. Co., 93 M. 537, 47 So. 429.

Section 4429.
Burden of proof on trial of claimant's issue, on attachment plaintiff.
Bernheim v. Dibrell, 11 So. 795.

Section 4437.
Trusts and combines. Not repealed by Laws 1896, p. 68.
American Fire Ins. Co. v. State, 75 M. 24, 22 So. 99.
Prohibits agreements to limit, &c., price of commodity. Oysters, sold as merchandise, as "commodity." "Inimical to the public welfare."
Barataria Canning Co. v. Joulian, 80 M. 555, 31 So. 961.
Trusts and combines. Car service association.
Yazoo &c. R. Co. v. Searles, 85 M. 520, 37 So. 939, 68 L. R. A. 715.
See Cumberland Telephone &c. Co. v. State, — M. —, 54 So. 670.

Sections 4437–4442.
Trusts and combines. Manufacturer may confine sales of products in given territory to single dealer.
Houck v. Wright, 77 M. 476, 27 So. 616.
Telephone company. Discrimination in rates. Remedy.
Cumberland Tel. &c. Co. v. State, 54 So. 446.

Section 4461.
Time for bringing unlawful detainer for land purchased at tax sale in March, 1892, governed by Code 1880, § 538.
Wilkerson v. Hudson, 71 M. 130, 13 So. 866.
Unlawful detainer. Equitable title. Defense.
Lobdell v. Mason, 71 M. 937, 15 So. 44.
Purchaser at execution sale, assign of execution defendant within meaning.
Glenn v. Caldwell, 74 M. 49, 20 So. 152.
Unlawful entry and detainer. Landlord and tenant. Stranger entering during term.
Hammel v. Atkinson, 82 M. 465, 34 So. 225.
Unlawful detainer. Scope of action. Title. Equities.
Clark v. Bourgeois, 86 M. 1, 38 So. 187.

Section 4475.
Unlawful entry and detainer. Effect of judgment.
Richardson v. Callihan, 73 M. 4, 19 So. 95.

Sections 4489, 4490.
Wills. Applies to acts of direct and express revocation, only.
Hoy v. Hoy, 93 M. 732, 48 So. 903, 136 Am. St. 548, 25 L. R. A. (N. S.) 182n.

Section 4492.
Nuncupative will. Last sickness.
Donald v. Unger, 75 M. 294, 22 So. 803.

Section 4496.
Wife has only child's right in husband's property. Voluntary conveyance to prevent wife's inheriting, not voidable.
Jones v. Somerville, 78 M. 269, 28 So. 940, 84 Am. St. 628.
Will of wife. Renouncing husband incompetent to assail antenuptial contract as forgery.
Watson v. Duncan, 84 M. 763, 37 So. 125.

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Operation and effect of renunciation of will by widow. Debts of estate.
Gordon v. James, 86 M. 719, 39 So. 18, 1 L. R. A. (N. S.) 461.

Will. Widow. Renunciation. To be construed with Code 1892, § 1545. "Child."
Norfleet v. Callicott, 90 M. 221, 43 So. 616.

Section 4497.

Will of wife. Provision for husband. Not for creditors of latter to make renunciation.
Carter v. Harvey, 77 M. 1, 25 So. 862.

Section 4499.

Widow. "Separate property at the time of the death of her husband." Proceeds of life insurance in benevolent society, &c.
O'Reily v. Laughlin, 92 M.1, 45 So. 19.
See Laughlin v. O'Reiley, 92 M. 121, 45 So. 193.

CODE 1906.

Page 135, Sections 1, 2, 4 (Act of Adoption).

Statement of commissioners (note to Code 1906, § 4897) that Code 1906, § 4879a does not appear in enrolled bill of code, sufficient to render such section unenforceable.
Postal Telegraph Co. v. Shannon, 91 M. 476, 44 So. 809.

Page 138, Section 11 (Act of Adoption).

Contract, made after April 21, 1906, in business on which privilege tax is unpaid, actionable.
Young v. State Life Ins. Co., 91 M. 710, 45 So. 706.

Page 138, Section 13 (Act of Adoption).

Repealed Code 1892, § 4326, latter not appearing in "enrolled draft deposited in the office of the secretary of state."
Postal Telegraph Co. v. Shannon, 91 M. 476, 44 So. 809.

Chapter 8.

Assignment for benefit of creditors. Cross-petition. Complaint. Election.
Metcalfe v. Merchants' &c. Bank, 89 M. 649, 41 So. 377.

Chapter 9.

Attachment against debtors. Operation and effect of provisions: proceedings to subject personalty to purchase-money lien.
Quillin v. Paine, 94 M. 696, 47 So. 898.

Chapter 15.

Bastardy proceedings unmaintainable by deserted wife who married after she became pregnant.
Welch v. Cliburne, 94 M. 443, 49 So. 184.

Chapter 24.

Mutual fire insurance company incorporated under this chapter to insure members' property only, not within Code 1906, § 2564.
Farmers' Mut. Fire Ins. Co. v. Cole, 90 M. 508, 43 So. 949.

Chapter 39.

Drainage district. Part of Code 1906. Constitutionality.
Haley v. Drainage Commissioners, — M. —, 55 So. 353.

Chapter 43.

Special court cannot adjudicate issue as to right of railroad company to exercise power of eminent domain.
Vinegar Bend Lumber Co. v. Oak Grove &c. R. Co., 89 M. 84, 43 So. 292; 89 M. 117, 43 So. 299.

Expressly limited in application, by Code 1906, §§ 1854, 1856, to persons, either natural or artificial, having right to condemn. Application for organization of special court.
Cumberland Tel. &c. Co. v. Morgan, 92 M. 478, 45 So. 429.

Municipality, undertaking to lay out new street requiring taking or damaging of property must proceed under this chapter.
Illinois Cent. R. Co. v. State, 94 M. 759, 48 So. 561.

Chapter 57.

Supervisors cannot prohobit non-resident club members shooting game in open season on property leased by club.
State v. Buckingham, 93 M. 846, 47 So. 501.

Chapter 58.

Garnishment. Evidence: failure to object in trial court. Set-off. Verdict proper on facts.
Melton Hardware Co. v. Heidelberg, 91 M. 598, 44 So. 857.

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Chapter 69.
Does not govern incorporation of mutual fire insurance companies, organized for purpose of insuring property of members only.
Farmers' Mut. Fire Ins. Co. v. Cole, 90 M. 508, 43 So. 949.

Chapter 76.
Attachment for rent. Effect of failure to give notice. Replication by replevying claimant.
Wright v. Craig, 92 M. 218, 45 So. 835.

Chapter 85.
Does not abrogate common-law right to possessory lien for work done and materials furnished in repairing boat, &c.
Kornosky v. Hoyle, 97 M. 562, 52 So. 481.

Chapter 89.
Wife may protect and enforce right to alimony, under Code 1906, § 1673, through medium of lis pendens.
W. H. Gallaspy Sons' Co. v. Massey, — M. —, 54 So. 805.

Chapter 99.
Municipality. Special charter. Amendment. Limit on bond issue.
Love v. Yazoo City, 91 M. 535, 44 So. 835.
Does not provide means whereby one municipality may absorb another.
Gandsi v. Seminary, 95 M. 315, 48 So. 908.

Chapter 114.
Amendatory act, Laws 1908, p. 59, ch. 73, unconstitutional as regards Code 1906, § 3832.
Board of Levee Com'rs of Yazoo-Mississippi Delta v. Royal Ins. Co., 96 M. 832, 51 So. 2.

Chapter 129.
Sixteenth sections. Waste. Boards of supervisors. Delegation of power. "County."
Jefferson Davis County v. Simrall Lumber Co., 94 M. 530, 49 So. 611.

Chapter 131.
Governs proceedings by revenue agent to back-assess city property. Notice, required by Code 1906, § 4740, should be given to municipal assessor and collector.
Adams v. Clarksdale, 95 M. 88, 48 So. 242.

Chapter 135.
Object and purpose to regulate stenographer himself, &c.
Chenault v. Adams, 52 So. 189.

Chapter 139.
Telephone company: discrimination in rates. Remedy.
Cumberland Tel. &c. Co. v. State, — M. —, 54 So. 446.

Chapter 144.
Trial of right of property.
White v. Roach, — M. —, 53 So. 622.
See Mahaffey Co. v. Russell, — M. —, 54 So. 807.

Chapter 145.
Trusts and combines. Violation.
Retail-Lumber Dealers' Assn. v. State, 95 M. 337, 48 So. 1021.
Grenada Lumber Co. v. State, — M. —, 54 So. 8.
Cumberland Tel. &c. Co. v. State, — M. —, 54 So. 670.

Section 1.
Chapter 39, "Drainage District," part of Code 1906.
Haley v. Drainage Commissioners, — M. —, 55 So. 353.

Section 4.
Repeal by code of statutory provisions. Former rights. Usury.
Mississippi Bldg. &c. Assn. v. McElveen, — M. —, 56 So. 187.

Section 8.
Building and loan association charter obtained under general law, not local or private law.
Mississippi Bldg. &c. Assn. v. McElveen, — M. —, 56 So. 187.

Section 10.
Actionable words: demurrable declaration.
Dedeaux v. King, 92 M. 38, 45 So. 466.
Actionable words. Declaration good on demurrer. Questions for jury.
Davis v. Woods, 95 M. 226, 48 So. 961.

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Section 25.

Notice unnecessary in case of directors' fraudulent mismanagement and bank's consequent insolvency.

Benjamin v. Staples, 93 M. 507, 47 So. 425.

Section 33.

Appeal, by defendant for whom peremptory instruction has been given, from order granting new trial, is not from final judgment and will be dismissed.

Yazoo &c. R. Co. v. Reid, 90 M. 616, 43 So. 952.

Section 34.

Refusal to grant appeal from decree overruling demurrer to bill is proper, where there are no principles to be settled and appeal would only result in vexatious delay and expense.

Delta &c. Land Co. v. Adams, 93 M. 340, 48 So. 190.

Appeal discretionary, not matter of right.

State Fire Ins. Co. v. Morrison, 95 M. 639, 48 So. 178.

Granting appeal to overruled chancery demurrant, discretionary.

Harvey v. Lumber Mineral Co., 96 M. 627, 51 So. 209.

Failure of overruled demurrant to give bond within ten days deprives Supreme Court of jurisdiction of appeal.

Turner v. Simmons, — M. —, 54 So. 658.

Section 35.

Appeal will not lie from denial of petition of stranger to become party to equity suit.

Bush v. Quick, 90 M. 32, 43 So. 70.

Decree reforming articles of copartnership, dissolving latter, appointing master, &c., is interlocutory. Appeal.

Greve v. Magee, 92 M. 190, 45 So. 706.

Interlocutory decree. Appeal: "to settle the principles of the cause."

Bierce v. Grant, 91 M. 791, 45 So. 876.

Decree perpetuating injunction and appointing master to ascertain damages is interlocutory.

Smith v. Holifield, — M. —, 54 So. 84.

Section 40.

Gives municipality same right of appeal as state.

Gulfport v. Stratakos, 90 M. 489, 43 So. 812.

Order granting bail in murder case on continuance after indictment not appealable.

State v. Key, 93 M. 115, 46 So. 75.

Appeal by state from judgment of acquittal: overruling demurrer to indictment moot question and non-reviewable.

State v. Wall, — M. —, 54 So. 5.

Section 40, Subdivision 2.

On appeal by municipality, opinion will be announced but case will neither be reversed nor affirmed.

Greenwood v. Jones, 91 M. 728, 46 So. 161.

Section 47.

Execution of appeal bond operates as appeal.

Grand Court v. Downs, — M. —, 53 So. 417.

Section 67.

Condition of family of convicted felon, and deprivation of patients of his services as physician, no grounds for bail.

Winegarden v. State, 87 M. 264, 39 So. 1013.

Section 72.

Rules for orderly and systematic hearing, and designation of date after return day for call of criminal docket, proper.

Bennett v. State, — M. —, 55 So. 482.

Section 80.

Judgments, of boards of supervisors, in general. Appeals.

Jennings v. Coahoma County, 79 M. 523, 31 So. 107.

See Kuhn v. Warren County, — M. —, 54 So. 442.

Section 81.

Applies specifically to appeals from judgments of boards of supervisors relating to taxes.

Jennings v. Coahoma County, 79 M. 523, 31 So. 107.

See Kuhn v. Warren County, — M. —, 54 So. 442.

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Section 83.
Actual trial justice must approve appeal bond.
McPhail v. Blaun, 95 M. 53, 48 So. 725.

Sections 84, 85.
Compliance as to certification of proceedings necessary, in order for circuit court to acquire jurisdiction.
McPhail v. Blaun, 47 So. 666.

Section 85.
Certification of record by another than justice of peace, mayor, or police justice, renders dismissal of appeal in circuit court, proper.
Greenwood v. Weaver, 96 M. 604, 50 So. 981.

Certification must be by police justice.
Allen v. State, — M. —, 53 So. 498.
Rodgers v. Hattiesburg, — M. —, 55 So. 481.

Section 90.
Certiorari from justice's court. Practice in circuit court.
Arky v. Cameron, 92 M. 632, 46 So. 54.

Circuit court on certiorari should reverse judgment against, and discharge garnishee who has filed, before justice, uncontested answer denying liability.
Hattiesburg Trust &c. Co. v. Hood, 97 M. 340, 52 So. 790.

Section 131.
Contemplates that where one or more of partners reside in this state, attachment cannot be sustained on ground of non-residence.
Barney v. Moore-Haggerty Lumber Co., 95 M. 118, 48 So. 232.

Section 133.
Ground of attachment containing disjunctive, averrable in statutory terms.
Helton v. McLeod, 93 M. 516, 46 So. 534.

Section 147.
Attachment against non-resident. Judgment by default. Failure to make affidavit for publication of notice.
McKinney v. Adams, 95 M. 832, 50 So. 474.

Section 163.
Operation and effect: proceedings to subject personalty to purchase money lien.
Quillin v. Paine, 94 M. 696, 47 So. 898.

"Trial" in last clause used in comprehensive sense: making up of issue, part of "trial."
White v. Roach, — M. —, 53 So. 622.

Section 171.
Damages of defendant in uncontested wrongful attachment assessable on writ of inquiry.
McLin v. Warden, 55 So. 358.

Section 307.
Erection and maintenance of courthouse and jail.
Adams v. Helms, 95 M. 211, 48 So. 290.

Section 313.
New courthouse. Cost. Means of payment. Taxation.
Wells v. McNeill, 93 M. 407, 48 So. 184.

Section 319.
Insurance money, trust fund for replacing property destroyed and not part of general fund to be used for current expenses.
Adams v. Helms, 95 M. 211, 48 So. 290.

Section 324.
Levy under this section limited by Laws 1908, p. 56, ch. 72.
Wells v. McNeill, 93 M. 407, 48 So. 184.

Sections 331, 333.
Must be followed in levying future taxes. Sum to pay for courthouse cannot be levied by installments.
Wells v. McNeill, 93 M. 407, 48 So. 184.

Section 331.
"Constructing public roads" includes maintenance and betterment of roads already existing, &c.
Weston v. Hancock County, — M. —, 54 So. 307.

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Section 333.

Publication of exact copies of signed orders sufficient.
Turner v. Leflore County, 93 M. 188, 46 So. 258.

County bonds. Publication of notice. "Next preceding." Space filler.
Weston v. Hancock County, — M. —, 54 So. 307.

Section 338.

Judgment against town. Mandamus. Warrant: priority.
Jonestown v. Ganong, — M. —, 52 So. 579, 692.

Sections 361, 362.

New notice after rejection of bids.
State v. Wall, — M. —, 54 So. 5.

Section 361.

Traveler, negligently injured, not entitled to proceed on county road contractor's bond.
Redditt v. Wall, — M. —, 55 So. 45.

Section 363.

Compensation of supervisors for general supervision of contracted highway work, contract price of which does not exceed $200.
State v. Wilson, — M. —, 51 So. 715.

Sections 506, 507.

Chancellor cannot after adjournment, vacate final decrees rendered by him in vacation.
Ex parte Stanfield, — M. —, 53 So. 538.

Section 507.

Order in vacation without notice for administrator to pay attorney for services in defending action against him, error.
Murphy v. Harris, 93 M. 286, 46 So. 232.

Section 536.

Personal decree for balance against attached non-resident company on personal service, appearance and answer.
John E. Hall Commission Co. v. Foote, 90 M. 422, 43 So. 676.

Sections 543, 544.

Father absolutely necessary party defendant to proceedings. Failure to summon and non-appearance render removal decree void.
Lake v. Perry, 95 M. 550, 49 So. 569.

Section 548.

Confirmation of tax title. Parties. Bill and exhibit: sufficient statement of cause of action.
Smith v. Denny, 90 M. 434, 43 So. 479.

Sections 549, 550.

Bill to quiet title. Refusal to allow amendment. Dismissal without prejudice.
Russell v. Denson, — M. —, 54 So. 439.

Section 550.

Right to plant and take oysters in bay in front of certain property, not "real estate."
Catchot v. Zeigler, 92 M. 191, 45 So. 707.

Sections 554, 561.

Removal of testamentary trustee: jurisdiction.
Nutt v. State, 96 M. 473, 51 So. 401.

Section 558.

Defendant in suit for accounting and to recover bankrupt's preferences received, not entitled to jury trial as of right.
First Nat. Bank v. Lincoln, 97 M. 720, 53 So. 387.

Section 579.

Chancery. Conflict between exhibit and allegation in bill.
McKinney v. Adams, 95 M. 832, 50 So. 474.

Section 587.

Cross-bill introducing no new matter material in defending original bill's case, demurrable.
District Grand Lodge I. O. O. F. v. Leonard, 92 M. 777, 46 So. 532.

Part of pleading constituting cross-bill need not be separate from part constituting answer. Repetition of averments unnecessary.
Phœnix Ins. Co. v. Smith, 95 M. 347, 48 So. 1020.

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Section 593.
Bill to quiet title under Code 1906, § 549. Refusal to allow amendment to bring suit within Code 1906, § 550. Dismissal without prejudice.
Russell v. Denson, — M. —, 54 So. 439.

Section 606.
Includes Code 1906, § 797. Chancellor may grant extension in case provided by latter.
Jamison v. Jamison, 92 M. 468, 46 So. 83, 945.

Section 609.
Dissolution consequence of failure to give bond.
Tillman v. Heard, 95 M. 238, 48 So. 963.

Section 610.
Writ issued without bond, void.
Castleman v. State, 94 M. 609, 47 So. 647.

Section 622.
Decree of dissolution of money judgment injunction has force and effect of judgment against bond's obligors.
Steadman v. Butler, 95 M. 695, 49 So. 614.

Section 625.
Immediate appointment, without notice, of receiver for bank, proper upon facts.
Benjamin v. Staples, 93 M. 507, 47 So. 425.

Section 657.
Chancellor cannot confirm in vacation, over protest of party in interest alleging gross inadequacy of price.
George v. Woods, 94 M. 268, 49 So. 147.

Section 684.
Joinder of pleas in bar and pleas in abatement entitles opposite party to judgment, &c.
Rice v. Patterson, 92 M. 666, 46 So. 255. This section should have been referred, apparently, to Code 1892.—Ed.

Section 721.
Action by widow as administratrix barred by suit by widow and children under Code 1892, Section 3559.
Mobile &c. R. Co. v. Hicks, 91 M. 273, 46 So. 360, 124 Am. St. 679.
Person in whom cause of action rests must sue within one year from date of death.
Pickens v. Illinois Cent. R. Co., 92 M. 210, 45 So. 868.
Children not to be deprived by widow, of damages recovered. Entry of judgment.
Foster v. Hicks, 93 M. 219, 46 So. 533.
Amended by Laws 1908, ch. 167. Sheriff holding proceeds of execution on judgment in favor of widow, may file interpleader to settle conflicting claims.
Kelly v. Howard, 54 So. 10.

Section 728.
Commencement of suit runs from date of issuance of summons where same is delayed at plaintiff's express order.
Stewart v. Pettit, 94 M. 769, 48 So. 5.

Section 729.
Form and name of declaration, immaterial, &c.
Coopwood v. McCandless, — M. —, 54 So. 1007.

Section 747.
Survivor must probate account distinct from mutual dealings.
Cohn v. Carter, 92 M. 627, 46 So. 60.

Section 755.
Judgment on overruling demurrer to declaration. Applies to all actions, whether on contract or sounding in tort.
Feazell v. Soltzfus, — M. —, 54 So. 444.

Section 772.
Disclaimer by defendant. Replevin. Intervention by volunteer.
Lewis v. McCracken, 89 M. 229, 42 So. 671.
Unnecessary that statement of claim of defendant by interpleader conclude with verification or to the country.
Caston v. Turner, 95 M. 303, 48 So. 721.

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Section 775.
Replevin by distributees before justice. Appeal. Amendment.
Jones v. Clemmer, — M. —, 54 So. 4.

Section 784.
Application for continuance must conform to requirements. Otherwise, denial will not be fatal.
Gibson v. Carr, 91 M. 773, 45 So. 864.

Section 793.
Takes from judge right to give any charge to jury in any state of case unless that charge is requested in writing.
Canterbury v. State, 90 M. 279, 43 So. 678.

Section 797.
Included in § 606. Chancellor may grant extension in case provided.
Jamison v. Jamison, 92 M. 468, 46 So. 83, 945.

Failure to give notice required authorizes striking stenographer's notes from record.
Hines v. Shumaker, 95 M. 477, 50 So. 564.

Satisfaction of requirement as to notice.
Scarborough v. Harrison Naval Stores Co., 95 M. 497, 51 So. 274, 52 So. 143.

Court cannot grant additional time beyond ninety-day limit for filing of stenographer's notes.
Chenault v. Adams, 52 So. 189.

Section 797d.
Added by Laws 1910, p. 94. Motion to strike out stenographer's notes.
Evans v. Ham, — M. —, 54 So. 250.

Section 801.
Circuit court required to consider written reasons for new trial only.
Richburger v. State, 90 M. 806, 44 So. 772.

Section 811.
Has application only in case where it is sought to recover money judgment.
Jonestown v. Ganong, 97 M. 67, 52 So. 579, 692.

Section 897.
Mutual fire insurance companies organized for purpose of insuring property of members only, to be incorporated under provisions of Code 1906, ch. 24.
Farmers' Mut. Fire Ins. Co. v. Cole, 90 M. 508, 43 So. 949.

Section 901.
Unsealed corporation deed unavailable in ejectment.
Littelle v. Creek Lumber Co., — M. —, 54 So. 841.

Section 909.
Judgment against corporation for infringement of patent not "debt." Stockholder not liable thereon.
Avery v. McClure, 94 M. 172, 47 So. 901, 22 L. R. A. (N. S.) 256n.

Sections 919, 920.
As amended by Laws 1908, p. 132, ch. 123, do not apply to actions accruing prior to adoption of statute.
Saxony Mills v. Wagner, 94 M. 233, 47 So. 899, 23 L. R. A. (N. S.) 834n.

Sections 925, 929.
Foreign telephone company can exercise power of eminent domain.
Cumberland Tel. &c. Co. v. Yazoo &c. R. Co., 90 M. 686, 44 So. 166.

Section 948.
Character of evidence on which to base judgment of falsity of poverty affidavit.
Feazell v. Soltzfus, — M. —, 54 So. 444.

Section 973.
Execution sale against foreign-county surety on appeal bond, void.
Griffin v. Hickman, 92 M. 266, 46 So. 73.

Section 988.
Failure of clerk to enter on minutes, order for special term, does not invalidate proceedings at such term.
Ex parte Neil, 90 M. 518, 43 So. 615.

Section 992.
Void municipal ordinance. Prosecutions for violations. Writ of prohibition.
Crittenden v. Booneville, 92 M. 277, 45 So. 723, 131 Am. St. 518.

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Section 1007.

Where neither fraud, nor mistake in judgment is charged, time of entry of same on minutes cannot be impeached by parol evidence.
Childress v. Carley, 92 M. 571, 46 So. 164.

Section 1016.

Applies only to civil cases. Inapplicable where effort is to entirely change judgment.
Wilson v. Hansboro, — M. —, 54 So. 845.

Decree rendered in vacation is final and cannot be amended and modified on motion in term on ground of mistake.
Anderson v. McInnis, — M. —, 56 So. 170.

Section 1022.

Rents of land in controversy, accruing, pending premature appeal from interlocutory chancery decree. Surety on supersedeas bond. Liability.
Perkins v. Watson, 92 M. 452, 46 So. 80.

Section 1029.

Unlawful cohabitation. Sufficiency of indictment. Admissibility of evidence. Harmless error in instruction.
Tynes v. State, 93 M. 119, 46 So. 535.

Unlawful cohabitation. Erroneous sentence on plea of guilty before justice of peace. Indictment: right to interpose former conviction as defense.
Smithey v. State, 93 M. 257, 46 So. 410.

Section 1036.

Arson. Storage room, joined to dwelling house, &c.
Spears v. State, 92 M. 613, 46 So. 166, 16 L. R. A. (N. S.) 185.

Arson. Burning of dwelling at night. Instruction.
Rist v. State, 93 M. 841, 47 So. 433.

Section 1040.

Indictment charging, in one count, crime penalized by this section and that made punishable by Code 1906, § 1042, demurrable.
State v. Freeman, 90 M. 315, 43 So. 289.

Arson. Burning of unoccupied dwelling. Sufficiency of indictment.
Banks v. State, 93 M. 700, 47 So. 437.

Section 1042.

Indictment charging, in one count, crime made punishable by this section and that penalized by Code 1906, § 1040, demurrable.
State v. Freeman, 90 M. 315, 43 So. 289.

Section 1043.

Assault with intent to kill. Instruction, erroneous on indictment and evidence.
Gentry v. State, 92 M. 141, 45 So. 721.

Indictment for offenses intimately associated in concrete: duplicity.
Jimerson v. State, 93 M. 685, 46 So. 948.

Section 1044.

Assault and battery with cowhide, whip, &c. Indictment, bad on demurrer.
State v. Spigener, 96 M. 597, 50 So. 977.

Section 1045.

Indictment: duplicity. "Point" and "aim" practically synonymous.
Coleman v. State, 94 M. 860, 48 So. 181.

Section 1049.

Acts constituting offense.
Stokes v. State, 92 M. 415, 46 So. 627, 21 L. R. A. (N. S.) 898n.

Attempt to rape. Indictment. Instruction giving jury right to fix punishment, and resultant verdict.
Frost v. State, 94 M. 104, 47 So. 898.

Section 1073.

Burglary elsewhere than in dwelling house. Demurrable indictment.
State v. Smith, 47 So. 478.

Section 1081.

Unchaste female cannot be seduced. Possible for same man to seduce same woman once only.
Hatton v. State, 92 M. 651, 46 So. 708.

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Section 1103.

Person carrying deadly weapon, only part of which is concealed, is guilty of "carrying concealed weapon."
Martin v. State, 93 M. 764, 47 So. 426.

Section 1105.

Burden of proving defenses permitted is on defendant.
Collins v. Fife, — M. —, 55 So. 484.

Section 1122.

Illegal voting. Municipal election is included in words "at any election."
Sample v. Verona, 94 M. 264, 48 So. 2.

Section 1136.

Substantive crime denounced—embezzlement. Refusal to compel election by state, harmless error.
Starling v. State, 90 M. 255, 43 So. 952.

No distinction between words "care" and "possession." Indictment.
Richburger v. State, 90 M. 806, 44 So. 772.

No single act of embezzlement prior to finding of indictment,—where procedure was under Code 1906, § 1436,—prosecutable following acquittal on same.
State v. Caston, — M. —, 50 So. 569.

Question for jury whether mere failure to turn over employer's funds is sufficient to show guilt.
Hampton v. State, — M. —, 54 So. 722.

Section 1141.

Tax collector convicted of embezzlement cannot be prosecuted for conversion.
McInnis v. State, 97 M. 280, 52 So. 634.

Section 1146.

Enticement of tenant. Civil action: condition precedent. Advances.
Wheeler v. Pannell, 96 M. 382, 51 So. 598.

Enticing servant. Criminal prosecution. Evidence insufficient to justify conviction.
Gregory v. State, 42 So. 168.

Criminal prosecution for enticement of laborer: conviction erroneous upon facts.
Golsby v. State, — M. —, 54 So. 155.

Person leasing land to laborer, who has refused to enter upon contract with another, not liable to penalties.
Alford v. Pegues, 92 M. 558, 46 So. 76.

Section 1166.

Obtaining money under false pretenses. Fatally defective indictment.
State v. Hubanks, — M. —, 56 So. 163.

Section 1169.

Receiving cashier ignorant of insolvency, not indictable.
Stewart v. State, 95 M. 627, 49 So. 615.

Director with knowledge indictable, though he does not manually receive deposits.
State v. Mitchell, 96 M. 259, 51 So. 4.

Section 1177.

Indictment for entering satisfaction of trust deed on record's margin must allege attestation by chancery clerk.
Poythress v. State, — M. —, 56 So. 168.

Section 1189.

Forgery. Indictment must show how pecuniary obligation was to be affected.
State v. Starling, 90 M. 252, 42 So. 203.

Section 1208.

Gambling houses. Municipal ordinance.
Rosetto v. Bay St. Louis, 97 M. 409, 52 So. 785.

Section 1226.

Conviction of shooting in public highway will not be reversed for defects in affidavit, amendable on demurrer.
Evans v. State, 92 M. 34, 45 So. 706.

Section 1236.

Omission from instruction of "without malice, in the heat of passion," not prejudicial in instant case.
Guest v. State, 95 M. 871, 52 So. 211.

Section 1237.

Ineffectual to reduce from murder to manslaughter, unnecessary killing of trespasser.

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McMaster v. State, 29 So. 522.
See Brown v. State, — M. —, 54 So. 305.

Section 1259.

Indictment for receiving stolen goods must describe property with same particularity as is required of indictment for larceny.
Wells v. State, 90 M. 516, 43 So. 610.

Section 1264.

Indictment for larceny of bull. Evidence insufficient to justify conviction of trespass.
Barnes v. State, — M. —, 53 So. 956.

Section 1286.

Conviction will be reversed unless it has been proven that property raffled was put up or offered within state.
Jenkins v. State, 96 M. 461, 50 So. 495.

Section 1295.

Penalizes profanity in public places, &c. Not violated by injunction to "Go to hell, you low down devils."
Sanford v. State, 91 M. 158, 44 So. 801.

Section 1298.

Attempt to intimidate justice of peace. Indictment. Offense.
Frith v. State, 97 M. 519, 52 So. 786.

Section 1302.

Failure to submit question of increase in taxation to electors of municipality under Code 1906, § 3430, renders mayor and aldermen indictable for violation of duty.
State v. Glennen, 93 M. 836, 47 So. 550.

Sheriff. Removal from office. Jurisdiction of justice of peace. Affidavit.
Moore v. State, 45 So. 866.

Section 1305.

Public officer not to be interested in public contract. Indictment bad on demurrer.
Treen v. State, 92 M. 756, 46 So. 252.

Rescribes, and imposes penalty for violation of, Const. 1890, § 109. Levee commissioner is public officer: contract with board void.
State v. Board of Levee Commissioners, 96 M. 677, 51 So. 211.

Section 1317.

Adulterated cotton seed meal to be branded, &c. Unrepealed by Laws 1908, c. 107, § 14. Constitutionality. Violation.
Alcorn Cotton Oil Co. v. State, 54 So. 881.

Section 1331.

Indictment not double for alleging mingling of poison with intent to kill "and" injure, &c.
State v. Clark, 97 M. 806, 52 So. 691.

Section 1359.

In order to convict under this statute, indictment must allege previous chastity of female assaulted.
Frost v. State, 94 M. 104, 47 So. 898.

Prospective in operation. Assault with intent to rape. Indictment in statutory language. Sentence, erroneous on verdict of guilty as charged.
Barton v. State, 94 M. 375, 47 So. 521.

Section 1361.

Robbery. Indictment: requisites and sufficiency.
State v. Presley, 91 M. 377, 44 So. 827.

Robbery. Absence of allegation that danger was immediate, fatal to indictment.
Webb v. State, — M. —, 55 So. 356.

Section 1367.

Keeper of fruit stand is "merchant, shop-keeper, or other person."
Gulfport v. Stratakos, 90 M. 489, 43 So. 812.

Section 1372.

Seduction. Indictment. Unchaste female.
Norton v. State, 72 M. 128, 16 So. 264, 18 So. 916, 48 Am. St. 538.
See Hatton v. State, 92 M. 651, 46 So. 708.

Subsequent offer of marriage, unaccepted, will not defeat criminal prosecution of seducer.
Williams v. State, 92 M. 70, 45 So. 146.

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Seduction. Corroboration of prosecutrix as to "previous chaste character," and "false or feigned promise of marriage," necessary.
Carter v. State, — M. —, 54 So. 805.

Section 1377.
Penalizes posting, &c., of threatening letter. "Threat."
State v. Jamison, — M. —, 54 So. 843.

Section 1402.
Does not confer right to prosecute when prosecution has been "commenced" in another county.
State v. Hughes, 96 M. 581, 51 So. 464.

Sections 1404, 1405.
Bank cashier here embezzling foreign deposits by foreign and domestic checks, is prosecutable in this state.
Richburger v. State, 90 M. 806, 44 So. 772.

Sections 1414, 1415.
Limitation of prosecutions. Seduction. No presumption, to bring prosecution within statute, that accused was bound over within certain time.
Hatton v. State, 92 M. 651, 46 So. 708.

Section 1415.
Proceeding constituting "commencement" of prosecution for embezzlement.
State v. Hughes, 96 M. 581, 51 So. 464.

Section 1426.
Omission, going to very essence of offense, renders indictment for felony void and assailable at any time. "Did."
Cook v. State, 72 M. 517, 17 So. 228.
Hall v. State, 44 So. 810.

Sections 1426, 1427.
Quashal will not lie on filing of plea in bar alleging facts introducible under plea of not guilty.
State v. Mitchell, 95 M. 130, 48 So. 963.

Section 1436.
No single act of embezzlement prior to finding of indictment under Code 1906, § 1136,—where procedure was under § 1436,—prosecutable following acquittal on same.
State v. Caston, 96 M. 792, 50 So. 569.

Section 1459.
Reward for arrest of fleeing man-slayer. Liberal construction in favor of claimant.
Ex parte Webb, 96 M. 8, 49 So. 567.

Reward for man-slayer. Arrest must be made while homicide is fleeing or attempting to flee.
Wilkinson County v. Jones, — M. —, 52 So. 453.

Section 1464.
Discharge by sheriff of accused on deposit by third party, improper. No recovery by latter from sheriff.
Cooper v. Rivers, 95 M. 423, 48 So. 1024.

Section 1466.
Non-forfeiture of assault with intent to kill appearance bond when principal is indicted for murder.
McCaleb v. State, 96 M. 144, 50 So. 555.

Section 1476.
Making one order does not exhaust authority of trial judge.
Wray v. Kelly, — M. —, 53 So. 492.

Section 1495.
Pending appeal will be dismissed upon appellant's abandonment of same or escape from custody.
Harding v. State, 96 M. 204, 50 So. 694.

Section 1501.
That acts complained of, occurred in consequence of acceptance of plaintiff's challenge to fight, does not constitute defense to civil suit for assault and battery.
Lizana v. Lang, 90 M. 469, 43 So. 477.

Section 1508.
Indictment of convict overseer for murder of convict: proper amendment.
Thurmond v. State, 94 M. 1, 47 So. 434.

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Section 1509.

Indictment: quashal will lie for change by prosecuting officer, after presentation and filing of name of person assaulted.

Shurley v. State, 90 M. 415, 43 So. 299.

Indictment, order for amendment of which was not entered on minutes, good after verdict.

Richburger v. State, 90 M. 806, 44 So. 772.

Section 1548.

Jurisdiction lies where threats are made or hostile action occurs. Strictly neither a civil nor criminal proceeding. Resolution of reasonable doubt in favor of preservation of peace. Measure of bond. Error on appeal to circuit court, to submit cause to jury.

Ford v. State, 96 M. 85, 50 So. 497.

Section 1574.

Does not apply to judgment at law in civil case for failure to pay over taxes collected.

Adams v. Carter, 92 M. 579, 47 So. 409.

Section 1590.

Corporations cannot claim immunity provided by Code 1906, §§ 5013, 5014.

Cumberland Tel. &c. Co. v. State, — M. —, 53 So. 489.

Section 1607.

New notice after rejection of bids.

State v. Wall, — M. —, 54 So. 5.

Section 1651.

Descent of property as between husband and wife. "Child." To be construed with Code 1906, § 5086.

Norfleet v. Callicott, 90 M. 221, 43 So. 616.

Sections 1657, 1659.

Descent and distribution. Exempt property. Right of widow to occupy and use. Rent, &c. Partition.

Stevens v. Wilbourn, 88 M. 514, 41 So. 66.

Section 1673.

Wife may protect and enforce right to alimony through medium of lis pendens provided by Code 1906, ch. 89.

W. H. Gallaspy Sons Co. v. Massey, — M. —, 54 So. 805.

Does not apply where alimony is commuted to lump sum.

Guess v. Smith, — M. —, 56 So. 166.

Sections 1682–1727.

Drainage districts. Constitutionality.

Haley v. Drainage Commissioners, — M. —, 55 So. 353.

Section 1684.

Petition fulfilling requirements.

Haley v. Drainage Commissioners, — M. —, 55 So. 353.

Section 1693.

Must be followed in objecting to creation of drainage district.

Wilkinson v. Lee, — M. —, 51 So. 718.

Sections 1703, 1706, 1709.

Payment of interest on drainage district bonds.

Haley v. Drainage Commissioners, — M. —, 55 So. 353.

Section 1711.

Failure to notify non-resident landowners does not per se invalidate later proceedings.

Wilkinson v. Lee, — M. —, 51 So. 718.

Section 1721.

Provides for assessment by drainage commissioners, of roads benefited by drainage, &c. Constitutionality.

Holmes County v. Black Creek Drainage Dist., — M. —, 55 So. 963.

Section 1744.

"Each" refers to state, city, &c. No one plaintiff can recover more than one penalty up to filing suit.

Flora v. American Exp. Co., 92 M. 66, 45 So. 149.

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Section 1746.

Prosecution for unlawfully selling intoxicants. Insufficient proof. Erroneous instruction.

Tate v. State, 91 M. 382, 44 So. 836.

Forbids sale of certain liquors, &c. Malt ale.

Fuller v. Jackson, 97 M. 237, 52 So. 873.

Intoxicating liquors. Municipal ordinance.

Hurley v. Corinth, 97 M. 396, 52 So. 695.

Section 1747.

Amended, Laws 1908, ch. 115, p. 117. Conviction of unlawful sale of liquor, on undenied charge may be had on presumptive proof alone.

Gillespie v. State, — M. —, 51 So. 811, 926.

Section 1749.

Proceedings for seizure must be instituted before justice of peace. Latter must destroy unclaimed seized liquor.

Holberg Mercantile Co. v. State, 95 M. 21, 48 So. 622.

Must be strictly construed. Search affidavit must charge offense in statutory language or words of substantial import.

Livelar v. State, — M. —, 53 So. 681.

Section 1750.

Claims, each for less than $200, must be tried by justice: not transferrable to circuit court.

Holberg Mercantile Co. v. State, 95 M. 21, 48 So. 622.

Section 1762.

Inapplicable to trials occurring prior to its taking effect.

Kittrell v. State, 89 M. 666, 42 So. 609.

Applies to prosecutions for violation of city ordinances forbidding sale of intoxicants. Jury cannot convict on proof of either of two sales, one of which antedated one charged.

Thomas v. Yazoo City, 95 M. 395, 48 So. 821.

"Other sales" must be proven within statute of limitations and with same certainty as convicting sales.

Harvey v. State, 95 M. 601, 49 So. 268.

Plea of former conviction, date of offense not specified, good on demurrer.

Wadley v. State, 96 M. 77, 50 So. 494.

State cannot prove more than one sale and then elect on which to seek conviction.

King v. State, — M. —, 54 So. 657.

Section 1771.

Crime committed, when assistance given is rendered in place of prohibited sale. Place not issue.

Powell v. State, 96 M. 608, 51 So. 465.

Section 1777.

Appeal to circuit court from order of supervisors rejecting petition for local option election. Erroneous dismissal.

Spencer v. Washington County, 92 M. 230, 45 So. 863.

Section 1792.

Quashal will lie where indictment is founded on defendant's testimony before grand jury.

State v. Bramlett, 47 So. 433.

Section 1797.

Amended, Laws 1908, p. 116, ch. 114, § 1. Possession of intoxicating liquors, unlawful, &c. Requisites of affidavit.

Gulfport v. Martin, 96 M. 131, 50 So. 502.

Intoxicating liquors. Municipal ordinance.

Hurley v. Corinth, 97 M. 396, 52 So. 695.

Section 1798.

Open account not certified by affidavit to be "correct and due," must be proved.

Romoneda v. Jackson, 93 M. 92, 46 So. 258.

Section 1801.

Ejectment. Running of limitation.

Beresford v. Marble, 95 M. 461, 50 So. 68.

Section 1827.

Ejectment. Failure of defendant to comply with demand for bill of particulars. Evidence.

Early v. Long, 89 M. 285, 42 So. 348.

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Ejectment. Refusal to allow defendant to make, on trial, bill of particulars not furnished on demand, sustained.
Richards v. Lee, 91 M. 657, 45 So. 570.

Sections 1854, 1856.
Expressly limit application of Code 1906, ch. 43, to persons, either natural or artificial, having right to condemn. Application for organization of special course.
Cumberland Tel. &c. Co. v. Morgan, 92 M. 478, 45 So. 429.

Section 1854.
Municipality, undertaking to lay out new street requiring taking or damaging of property must proceed under Code 1906, ch. 43.
Illinois Cent. R. Co. v. State, 94 M. 759, 48 So. 561.

Section 1862.
Special court cannot adjudicate issue as to right of railroad company to exercise power of eminent domain.
Vinegar Bend Lumber Co. v. Oak Grove &c. R. Co., 89 M. 84, 43 So. 292; 89 M. 117, 43 So. 299.

Section 1865.
Eminent domain: instruction.
King v. Vicksburg R. &c. Co., 88 M. 456, 42 So. 204, 117 Am. St. 749, 6 L. R. A. (N. S.) 1036.

Section 1876.
Foreign telephone company can exercise power of eminent domain.
Cumberland Tel. &c. Co. v. Yazoo &c. R. Co., 90 M. 686, 44 So. 166.

Section 1917.
Grantee-heir cannot testify on trial of bill in chancery by other heirs, to set aside deed, &c.
Burnett v. Smith, 93 M. 566, 47 So. 117.

Section 1918.
Conviction of murder reversed for comment upon failure of accused to testify. Whitfield, C. J., regards cases establishing reversal as unexceptional penalty for comment, as unsound.
Prince v. State, 93 M. 263, 46 So. 537.

Section 1919.
Evidence of declarant's non-belief in Supreme Being admissible to impeach credibility of dying declaration.
Gambrell v. State, 92 M. 728, 46 So. 138, 17 L. R. A. (N. S.) 291.

Section 1923.
Question to co-defendant as to his having ever before been charged with criminal offense, fatal error.
Starling v. State, 89 M. 328, 42 So. 798.

Numerous convictions which would operate to discredit witness should be allowed to go to jury.
Brown v. State, 96 M. 534, 51 So. 273.

Witness may be examined touching conviction of crime, &c. To be strictly construed in favor of defendant taking stand in own behalf.
Dodds v. State, 45 So. 863.

Examination of witnesses touching interest: husband and wife testifying for defendant on trial for robbery, &c.
McClelland v. State, — M. —, 54 So. 251.

Section 1938.
Judgment of dismissal for plaintiff's failure to answer interrogatories is adjudication of merits and bars subsequent action.
Cedar Rapids Nat. Bank v. Berry, — M. —, 53 So. 393.

Interrogatories to non-resident party. Applies to and includes corporations.
Cumberland Tel. &c. Co. v. State, — M. —, 53 So. 489.

Section 1941.
Partition. Failure to file notice or agreement. Decree for sale for equal division between two owners, reversed.
Smith v. Stansel, 93 M. 69, 46 So. 538.

Section 1958.
Foreign corporation deposing under compulsion in prosecution for violation of Code 1906, ch. 145, may claim immunity granted by Code 1906, §§ 5017, 5018.
Cumberland Tel. &c. Co. v. State, — M. —, 53 So. 489.
Section number erroneous?—Ed.

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Section 1959.

Person holding certificate of location and receipt for purchase money, may sue for penalty provided by Code 1906, § 4983.
Johnson v. Davis, 91 M. 708, 45 So. 979.

Section 1978.

Failure to file counter affidavit. Peremptory instruction for plaintiff, &c.
Greenburg v. Saul, 91 M. 410, 45 So. 569.

Open accounts. Affidavits. Suits on bonds.
Adams v. Fidelity Mutual Life Ins. Co., 94 M. 443, 49 So. 119, 136 Am. St. 587.

Section 1983.

Confirmation of tax title. Bill and exhibit: sufficient statement of cause of action.
Smith v. Denny, 90 M. 434, 43 So. 479.

Section 1985.

Railroad. Live stock on or near track. Negligence.
Young v. Illinois Cent. R. Co., 88 M. 446, 40 So. 870.
Mobile &c. R. Co. v. Kea, 96 M. 195, 50 So. 628.

Presumption attaches to death of deceased entitled to benefit of Const. 1890, § 193.
Mobile &c. R. Co. v. Hicks, 91 M. 273, 46 So. 360.

Railroad train killing cattle on track. Prima facie evidence of negligence. Instruction.
Southern R. Co. v. Murray, 91 M. 546, 44 So. 785.

Suit against railroad company for killing of employe of licensee prior to taking effect of Code 1906. Presumption of negligence.
Combs v. Mobile &c. R. Co., 92 M. 532, 46 So. 168.

Suit by administrator for death of employe: declaration, good on general demurrer.
Hudson v. Mississippi Cent. R. Co., 95 M. 41, 48 So. 289.

Proof of injury inflicted by running of locomotive or cars, prima facie evidence, &c. Does not apply to street railroads.
Pascagoula &c. Power Co. v. Brondum, 96 M. 28, 50 So. 97.

Applies, regardless of whether facts attending injury are in evidence or not.
Hollingshed v. Yazoo &c. R. Co., — M. —, 55 So. 40.

Railroad company has burden of showing how injury occurred and facts in exoneration of liability.
Easley v. Alabama &c. R. Co., 96 M. 396, 50 So. 491.

Railroad train inflicting fatal injuries. Rebuttal of presumption of negligence.
Alabama &c. R. Co. v. Hunnicutt, — M. —, 53 So. 617.
See Korter v. Gulf &c. R. Co., 87 M. 482, 40 So. 258.

Section 2004.

Rights through will must be derived from its terms administered according to law of this state so far as it affects property situated here.
Heard v. Drennen, 93 M. 236, 46 So. 243.

Section 2006.

"If not legally disqualified" refers to legal disqualification under laws of this state.
Heard v. Drennen, 93 M. 236, 46 So. 243.

Section 2019.

Railroad defendant cannot move to revoke administration, granted after original plaintiff's death, for prosecution of personal injury suit.
Yazoo &c. R. Co. v. Jeffries, — M. —, 55 So. 354.

Section 2035.

Removal of testamentary trustee. Notice.
Nutt v. State, 96 M. 473, 51 So. 401.

Section 2057.

Gives administrator no authority to buy timber and operate mill.
Alexander v. Herring, — M. —, 55 So. 360.

Section 2072.

Authorizes correction in description of land sold by administrator. Non-effective to justify inclusion of realty "thought" to be embraced by property sold.
Pearson v. Caldwell, 93 M. 637, 47 So. 436.

Section 2082.

Acceptance by heirs of proceeds of sale of land by administrator does not prejudice their right to bring ejectment against purchaser.
Pearson v. Caldwell, 93 M. 637, 47 So. 436.

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Section 2093.

Railroad defendant cannot move to revoke administration granted after original plaintiff's death, for prosecution of personal injury suit.

Yazoo &c. R. Co. v. Jeffries, — M. —, 55 So. 354.

Section 2096a.

Claim for medical services during intestate's last illness not barred until after expiration of four years and six months.

Hardenstein v. Brien, 96 M. 493, 50 So. 979.

Section 2100.

Administrator may sue for value of cotton sold by him.

McGraw v. Robinson Mercantile Co., 95 M. 828, 49 So. 260.

Section 2103.

Insufficient notice to creditors of deceased.

Marshall v. Deere Plow Co., — M. —, 54 So. 948.

Section 2106.

Administrator, without authority to pay claim not presented in accordance with this section.

Lehman & Co. v. Powe, 95 M. 446, 49 So. 622.

Omission to sign statement not fatal. Signing of affidavit alone, sufficient.

Bankston v. Coopwood, — M. —, 55 So. 48.

Section 2107.

Suit cannot be maintained on note which was not probated.

Johnson v. Success Brick Mach. Co., 93 M. 169, 46 So. 957.

Insufficient notice to creditors of deceased.

Marshall v. Deere Plow Co., — M. —, 54 So. 948.

Section 2110.

Claim for medical services during intestate's last illness not barred until after expiration of four years and six months.

Hardenstein v. Brien, 96 M. 493, 50 So. 979.

Section 2123.

Removal of testamentary trustee. Notice.

Nutt v. State, 96 M. 473, 51 So. 401.

Section 2131.

Enforcement of attorney's claim over administrator's protest not within this section.

Murphy v. Harris, 93 M. 286, 48 So. 232.

Section 2137.

Proceeding by executor for commissioners to value estate of widow, renouncing will, and that of her deceased husband, is premature if commenced before expiration of one year, &c.

Jones v. Jones, 94 M. 460, 49 So. 115.

Section 2139, Clause 10, paragraph b.

Not applicable in absence of sale of mortgaged homestead and attempt to subject proceeds of sale to creditors' debts.

Bennett v. Dempsey, 94 M. 406, 48 So. 901, 136 Am. St. 584.

Section 2141.

Exemption may be claimed by insured or post mortem representative at any time before actual distribution to creditors. "Proceeds."

Dreyfus v. Barton, — M. —, 54 So. 254.

Section 2143.

Sheriff. Levy on fixtures attached to homestead. Bond of indemnity.

Chenault v. Adams Mach. Co., — M. —, 53 So. 629.

Section 2146.

Abandonment of homestead: insufficient evidence. Liberal construction as to exemption in favor of citizen head of family.

Gilmore v. Brown, 93 M. 63, 46 So. 840.

Section 2158.

Invalid good faith, homestead conveyance, treated by vendor as binding does not render property liable for owner's debts.

Zukoski v. McIntyre, 93 M. 806, 47 So. 435.

Parting with all title to property necessary to "disposition" within meaning.

Bennett v. Dempsey, 94 M. 406, 48 So. 901, 136 Am. St. 584.

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Section 2159.
Homestead. Conveyance. Joinder by wife.
Yazoo Lumber Co. v. Clark, 95 M. 244, 48 So. 516.

Section 2161.
Wife, living at time with husband, cannot convey homestead by deed unsigned and unacknowledged by latter.
Zukoski v. McIntyre, 93 M. 806, 47 So. 435.

Section 2182.
Does not authorize charging additional lump sum to bring amount up to maximum compensation.
Conerly v. Lincoln County, — M. —, 55 So. 963.

Section 2195.
Compensation of supervisors for general supervision of contracted highway work, contract price of which does not exceed $200.
State v. Wilson, — M. —, 51 So. 715.

Section 2200.
Affidavit and certificate of attendance, prerequisites to taxation of witness' fees and mileage as costs.
Hubbard v. Hemphill, 94 M. 388, 47 So. 657.

Section 2235.
Amendatory, Laws 1900, p. 164, ch. 124. Supervisors of county, without stock law, cannot tack sections of land in its boundaries to stock law district in adjoining county.
Dickerson v. Tishomingo County, 92 M. 223, 45 So. 21.

Section 2303.
Prior to enactment of this statute, widow recovering under similar law in foreign state, could not sue on judgment here.
Minkus v. Armstrong, 90 M. 751, 44 So. 32.
See Armstrong v. Minkus, 93 M. 621, 47 So. 467.

Sections 2304-2336.
Supervisors cannot prohibit non-resident club members shooting game in open season on property leased by club.
State v. Buckingham, 93 M. 846, 47 So. 501.

Section 2305.
Violative of Const. U. S., amendment 14, § 2, if construed to authorize supervisors to prohibit non-residents from fishing and hunting in county.
State v. Hill, — M. —, 53 So. 411.

Sections 2337, 2342.
Garnishment. Evidence. Failure to object in trial court. Set-off. Verdict proper on facts.
Melton Hardware Co. v. Heidelberg, 91 M. 598, 44 So. 857.

Section 2342.
Answer by garnishee merely denying all indebtedness to defendant insufficient.
Arky v. Cameron, 92 M. 632, 46 So. 54, 170.

Section 2346.
Suggestion of exemption necessitates summons for defendant, &c.
Illinois Cent. R. Co. v. Badley, 94 M. 437, 49 So. 114.

Section 2347.
Failure of garnishee to file answer in justice's court. Default judgment. Filing answer on appeal to circuit court.
Gulf &c. R. Co. v. Ramsey, — M. —, 54 So. 440.

Section 2353.
Garnishee's answer in justice's court cannot first be contested in circuit court on certiorari to review judgment against garnishee.
Hattiesburg Trust & Banking Co. v. Hood, 97 M. 340, 52 So. 790.

Section 2409.
Right to custody of ward and ward's estate. Habeas corpus to determine right. Vacation of guardian's appointment.
Herndon v. Bonner, 97 M. 328, 52 So. 513.

Section 2422.
Wards owning jointly. Process. Void sale.
Theobald v. Deslonde, 93 M. 208, 46 So. 712.

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Section 2430.

Proceeding before chancery court or clerk. Initiation. Testimony before jury. Confirmation of decree. Guardian. Costs of unsuccessful proceeding.

Baum v. Greenwald, 95 M. 765, 49 So. 836.

Section 2442.

Limitations do not run against action on bond of guardian for failure to deliver property until final account and discharge.

Dunn v. Clinghan, 93 M. 310, 47 So. 503.

Section 2445.

Sheriff may maintain habeas corpus to recover prisoner unlawfully held by another sheriff.

Wray v. Kelley, — M. —, 53 So. 492.

Section 2446.

Operates to deny bail to foreign offender. Immaterial that offense was bailable in state of its commission.

Ex parte Edwards, 91 M. 621, 44 So. 827.

Section 2448.

Judge or chancellor in one district cannot make writ running in another, returnable before himself.

McLeod v. McLeod, 88 M. 722, 42 So. 873.

Section 2509.

County health officer. Salary not fixed before appointment may be fixed at later date.

Adams County v. Aikman, 97 M. 6, 52 So. 513.

Section 2517.

Married woman may enter into partnership with husband.

Jones v. Jones, — M. —, 55 So. 361.

Section 2559.

Mutual fire insurance companies organized for purpose of insuring property of members only, not within provisions of Code 1906, ch. 69.

Farmers' Mut. Fire Ins. Co. v. Cole, 90 M. 508, 43 So. 949.

Includes within its provisions all organizations doing insurance business of any kind.

State v. Alley, 96 M. 720, 51 So. 467.

Section 2562.

Defines "company" as used in Code 1906, § 2606.

State v. Alley, 96 M. 720, 51 So. 467.

Section 2563.

"Insurance contract." "Party." Fire policy.

State v. Alley, 96 M. 720, 51 So. 467.

Section 2575.

Accident policy: violative provision.

General Accident &c. Co. v. Walker, — M. —, 55 So. 51.

Section 2582.

Mutual fire insurance company organized for purpose of insuring property of members only, cannot obtain certificate of authority to transact general insurance business, under Code 1906, § 2564.

Farmers' Mutual Fire Ins. Co. v. Cole, 90 M. 508, 43 So. 949.

Section 2592.

Insured's failure to furnish plans and specifications on demand as provided in policy, no defense on total loss.

Mississippi Home Ins. Co. v. Barron, 91 M. 722, 45 So. 875.

Fire policy: violative provision.

Palatine Ins. Co. v. Nunn, — M. —, 55 So. 44.

Section 2596.

Automatically written into every insurance contract where company allows insertion. Makes new, independent contract between mortgagee and company.

Bacot v. Phœnix Ins. Co., 96 M. 223, 50 So. 729.

Section 2600.

Forbids discrimination. Violative policy.

Cole v. State, 91 M. 628, 45 So. 11.

Violative agreement. Recovery of rebate by agent's administrator.

Rideout v. Mars, — M. —, 54 So. 801.

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Section 2606.
Definition of "company" to be found in Code 1906, § 2562.
State v. Alley, 96 M. 720, 51 So. 467.

Section 2678.
Amendatory, Code 1892, § 2348. Usury. Former right. "Received."
Mississippi Bldg. &c. Ass'n v. McElveen, — M. —, 56 So. 187.

Section 2685.
Prospective juror in capital case not disqualified by opinion.
Cook v. State, 90 M. 137, 43 So. 618.

No fixed and invariable rule can be established by which, in all cases, competency or incompetency of particular juror, can be determined.
Murphy v. State, 92 M. 203, 45 So. 865.

Venireman: non-disqualifying impressions.
Whitehead v. State, 97 M. 537, 52 So. 259.

Section 2688.
Manner of procuring list of jurors. Substantial compliance.
Cook v. State, 90 M. 137, 43 So. 618.

Does not allow discrimination by reason of race or color.
Lewis v. State, 91 M. 505, 45 So. 360.
See Farrow v. State, 91 M. 509, 45 So. 619.

Disregard, in selection of special venire ground for quashal.
Litford v. State, 93 M. 419, 46 So. 246.

Section 2689.
Jury list: number of names.
Cook v. State, 90 M. 137, 43 So. 618.

Section 2690.
Jury list. Certification to circuit court. Filing. Alteration.
Cook v. State, 90 M. 137, 43 So. 618.

Section 2696.
Regular jury. Drawing. Illegality. Officers.
Cook v. State, 90 M. 137, 43 So. 618.

Section 2704.
Drawing grand jury. Error, uncured. Dismissal of indictment.
Shepherd v. State, 89 M. 147, 42 So. 544.

Section 2706.
Circuit judge may, during term, if public interest requires it, reassemble discharged grand jury.
Hayes v. State, 93 M. 670, 47 So. 522.

Section 2718.
Preparation of jury list more than fifteen days before commencement of term, not ground for quashing panel.
Cook v. State, 90 M. 137, 43 So. 618.

Circuit judge may, during term, if public interest requires it, reassemble discharged grand jury.
Hayes v. State, 93 M. 670, 47 So. 522.

Section 2724.
Change of venue from justice: insufficient cause.
Evans v. State, 92 M. 34, 45 So. 706.

Justice's suit must be brought in household or freehold county of defendant.
Gibson Paving Co. v. Mills, 95 M. 726, 49 So. 568.

Section 2730.
Person suing before justice must file such written statement of cause of action as will give defendant benefit of plea of res adjudicata.
Greenburg v. Massey, 90 M. 121, 43 So. 1.

Section 2732.
Justice of peace. Appointment of special constable to execute and return summons. Ejectment against purchaser at execution sale. Presumption.
Alfred v. Batson, 91 M. 749, 45 So. 465.

Section 2765.
Prohibits estates tail. Does not apply to personalty.
Thomas v. Thomas, — M. —, 53 So. 630.

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Section 2766.
Unsealed corporation deed unavailable in ejectment.
Littelle v. Creek Lumber Co., — M. —, 54 So. 841.

Section 2768.
Non-resident alien mortgagee can acquire perfect title by adverse holding through tenants for more than ten years.
Scottish American Mortg. Co. v. Butler, — M. —, 54 So. 666.

Section 2772.
Deed of trust. Sale.
McClusky v. Trussel, 90 M. 544, 44 So. 69.
Provides that sales under deeds of trust shall be advertised, &c. Without application to instruments executed before its enactment.
Davis v. O'Connell, 92 M. 348, 47 So. 672.
Sale under mortgage or deed of trust. "Single tract."
Provine v. Thornton, 92 M. 395, 46 So. 950.

Section 2773.
Mortgage. Trustee to sell. Appointment not filed for record until after actual sale.
Searles v. Kelley &c. Co., 88 M. 228, 40 So. 484, 8 L. R. A. (N. S.) 491n.
Deed of trust. Substituted trustee. Appointment. Record.
Provine v. Thornton, 92 M. 395, 46 So. 950.
Polk v. Dale, 93 M. 664, 47 So. 386.
See White v. Jenkins, 79 M. 57, 28 So. 570.
Shipp v. New South B. & L. Ass'n, 81 M. 17, 32 So. 904.

Section 2774.
Deed to timber on sixteenth section lands.
Dantzler Lumber Co. v. State, 97 M. 355, 53 So. 1.
"Right and estate in such lands" does not embrace right of vendor to subject land sold to payment of purchase money.
Howell v. Hill, 94 M. 566, 48 So. 177.

Section 2779.
Grantor in deed of trust is owner against world, and against beneficiary and trustee before condition broken.
Smith v. Forbes, 89 M. 141, 42 So. 382.
Does not apply to active trusts.
Stansel v. Hahn, 96 M. 616, 50 So. 696.

Section 2781.
Deed of trust. Non-compliance with requests for entry of satisfaction. Omission in description of property.
Peirce v. Kingston Lumber Co., 90 M. 216, 43 So. 81.

Section 2787.
Conveyances, mortgages, &c. "Lodging" for record.
Brannon v. Pringle, 46 So. 161.

Section 2788.
Conveyances, covenants, &c. "Delivery" for record.
Brannon v. Pringle, 46 So. 161.

Section 2821.
Deed of trust. Notice and manner of sale.
Melsheimer v. McKnight, 92 M. 386, 46 So. 827.
See Davis v. O'Connell, 92 M. 348, 47 So. 672.
Governs place of sale under deed of trust designating, contrary to Laws 1896, p. 109, ch. 103, place outside county as one where sale is to be made.
Polk v. Dale, 93 M. 664, 47 So. 386.

Section 2845.
Attachment for rent. Effect of failure to give notice.
Wright v. Craig, 92 M. 218, 45 So. 835.

Sections 2863, 2871.
Attachment for rent. Replication by replevying claimant.
Wright v. Craig, 92 M. 218, 45 So. 835.

Section 3042.
Overseer, wrongfully discharged: lien.
Langford v. Leggett, — M. —, 54 So. 856.

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Section 3055.
Treasurer of levee board. Validity of bond. Failure of principal to sign.
Adams v. Williams, 97 M. 113, 52 So. 865.

Section 3058.
Mechanic's lien. Lis pendens notice.
McKenzie v. Fellows, 97 M. 31, 52 So. 628.

Section 3060.
Non-consenting wife not liable to personal judgment and sale of property for materials furnished husband on latter's account.
Schiaffino v. Christ, 96 M. 801, 51 So. 546.

Section 3063.
Suit to enforce mechanic's lien: parties.
Flake v. Central Hardware Co., 96 M. 838, 51 So. 461.

Section 3074.
Materialman's lien. Insufficient notice. Subrogation, &c.
Vicksburg Mfg. &c. Co. v. J. H. Jaffray Const. Co., 94 M. 282, 49 So. 116.

Lien of subcontractor, laborer, or materialman: priority of assignee of principal contractor.
Spengler v. Stiles-Tull Lumber Co., 94 M. 780, 48 So. 966.

Mechanic's lien. "Laborer."
Williams v. Alcorn Electric Light Co., — M. —, 53 So. 958.

Sections 3079, 3080.
Proceedings to subject personalty to purchase-money lien.
Quillin v. Paine, 94 M. 696, 47 So. 898.

Sections 3085–3087.
Do not abrogate common-law right to possessory lien for work done and materials furnished in repairing boat, &c.
Kornosky v. Hoyle. 97 M. 562, 52 So. 481.

Sections 3090, 3091.
Limitation. Bill to remove clouds.
Kennedy v. Sanders, 90 M. 524, 43 So. 913.

Section 3090.
Limitations. Actions concerning land.
Beresford v. Marble, 95 M. 461, 50 So. 68.

Section 3092.
Acquisition of title by mortgagee, by adverse possession, &c.
Garrett v. Ellis, — M. —, 52 So. 451.

Non-resident alien mortgagee can acquire perfect title by adverse holding through tenants for more than ten years.
Scottish-American Mortg. Co. v. Butler, — M. —, 54 So. 666.

Section 3095.
Three years' actual occupation under tax title, to bar suit. Does not apply when sale was absolutely void.
Eastland v. Yazoo Delta Lumber Co., 90 M. 330, 43 So. 956.

Section 3096.
Limitations in civil cases not to run against state, &c. Action for penalty for violation of anti-trust law.
Grenada Lumber Co. v. State, — M. —, 54 So. 8.

Section 3098.
Limitations do not run against action on bond of guardian for failure to deliver property until final account and discharge.
Dunn v. Clinghan, 93 M. 310, 47 So. 503.

Section 3101.
Limitation of actions for penalties. Does not apply to suit for actual damages for failure of clerk to give defaulting taxpayer notice of expiration of period of redemption.
McClendon v. Whitten, 95 M. 124, 48 So. 964.

Limitation of actions. Delayage charge provided by paragraph 4, rule 10, of Railroad Commission, adopted on June 4, 1904, not penalty.
Keystone Lumber Yard v. Yazoo &c. R. Co., — M. —, 53 So. 8.

Section 3105.
Claim for medical services during intestate's last illness not barred until after expiration of four years and six months.
Hardenstein v. Brien, 96 M. 493, 50 So. 979.

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Section 3108.
Limitation of actions. Absence from state. Ejectment.
Beresford v. Marble, 95 M. 461, 50 So. 68.

Section 3109.
Limitations. Check. Forged indorsement. Discovery by drawer.
Stringer Grand Lodge v. First Nat. Bank, — M. —, 55 So. 408.

Section 3115.
Completion of limitation. Former legal obligation, sufficient consideration to uphold new promise. Corrective deed.
Wade v. Barlow, — M. —, 54 So. 662.

Section 3118.
Limitation of actions. "Such acknowledgment or promise." Recitals in deed. Distinct identification of debt.
Stewart v. Forman, 90 M. 85, 43 So. 67.

Section 3122.
Limitation of actions. Property sold by order of chancery court, &c. Prospective in operation.
Jordan v. Bobbitt, 91 M. 1, 45 So. 311.

Section 3127.
Limitations, not to be changed by contract. Stipulation in telegram.
Dodson v. Western Union Tel. Co., 97 M. 104, 52 So. 693.

Section 3138.
"Special partner," not liable, upon facts, as "general partner."
Cropper v. Illinois Sewing Mach. Co., — M. —, 54 So. 849.

Sections 3147–3154.
Wife may protect and enforce right to alimony, under Code 1906, § 1673, through medium of lis pendens.
W. H. Gallaspy Sons' Co. v. Massey, — M. —, 54 So. 805.

Sections 3148, 3151.
Mechanic's lien. Lis pendens notice.
McKenzie v. Fellows, 97 M. 31, 52 So. 628.

Section 3219.
Proceeding intended as summary police regulation. Initiation. Doubt as to sanity should be solved in favor of community.
Baum v. Greenwald, 95 M. 765, 49 So. 836.

Sections 3220, 3221.
Clerk cannot set aside jury's verdict nor enter decree other than one in accord with finding.
Baum v. Greenwald, 95 M. 765, 49 So. 836.

Section 3300.
Judgment in suit against town, not void because rendered against mayor and board of aldermen.
Jonestown v. Ganong, — M. —, 52 So. 579, 692.

Section 3301.
Does not provide means whereby one municipality may absorb another.
Gandsi v. Seminary, 95 M. 315, 48 So. 908.

Section 3312.
Amended, Laws 1908, p. 196, ch. 187. Legislature has failed to provide means whereby one municipality may absorb another, &c.
Gandsi v. Seminary, 95 M. 315, 48 So. 908.

Section 3314.
Does not authorize municipality to issue bonds for purchase of real estate for parks.
Hazelhurst v. Mayes, 96 M. 656, 51 So. 890.

Section 3316.
Ordinance providing for establishment of city depositories, fixing securities, and prescribing mode of determining interest rates, valid.
Montgomery v. State, 97 M. 292, 52 So. 357.

Section 3317.
Municipal tax levy for "general funds": limit.
Herrick v. Pascagoula &c. R. Co., — M. —, 54 So. 660.
Mandamus cannot be issued to compel levy of tax beyond statutory limit.
Jonestown v. Ganong, 97 M. 67, 52 So. 579, 692.

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Section 3319.

Municipality cannot, by general ordinance, prohibit keeping of hogs, or erection of hog pens, within corporate limits.

Comfort v. Kosciusko, 88 M. 611, 41 So. 268.

See Crittenden v. Booneville, 92 M. 277, 45 So. 723.

Sections 3329, 3441.

Municipality may pass ordinance prohibiting within corporate limits commission of any act amounting to misdemeanor under laws of state.

Hurley v. Corinth, 97 M. 396, 52 So. 695.

Rosetto v. Bay St. Louis, 97 M. 409, 52 So. 785.

Section 3333.

Applies to voluntary municipal actions only. Is not limitation on compulsory power of courts to make effective their judgments.

Jonestown v. Ganong, — M. —, 52 So. 579, 692.

Section 3336.

Municipality. Vacation of street. Compensation. "Abutting landowner."

Poythress v. Mobile &c. R. Co., 92 M. 638, 46 So. 139.

Vacation of street by municipality. Due compensation. "Abutting property owner."

Alabama &c. R. Co. v. Turner, — M. —, 52 So. 261.

Section 3337.

Municipality, undertaking to lay out new street requiring taking or damaging of property, must proceed under Code 1906, ch. 43.

Illinois Cent. R. Co. v. State, 94 M. 759, 48 So. 561.

Section 3340.

Municipality cannot, by general ordinance, prohibit pool tables, legally operated.

Crittenden v. Booneville, 92 M. 277, 45 So. 723.

See Johnson v. Philadelphia, 94 M. 34, 47 So. 526, 19 L. R. A. (N. S.) 637.

Section 3346.

Does not authorize municipality to issue bonds for purchase of real estate for parks.

Hazelhurst v. Mayes, 96 M. 656, 51 So. 890.

Section 3379.

Judgment against town. Mandamus. Warrant: priority.

Jonestown v. Ganong, — M. —, 52 So. 579, 692.

Section 3394.

City marshal, ex officio constable: service of summons issued by justice of peace, presumed jurisdictionally correct.

Gulf &c. R. Co. v. Ramsey, — M. —, 54 So. 440.

Sections 3398, 3399.

Court of mayor as police justice, and as justice of peace, separate and distinct. Conviction of unlawful sale of intoxicating liquors reversed for confusion of jurisdiction.

Washington v. State, 93 M. 270, 46 So. 539.

Section 3398.

City of Laurel cannot elect police justice pro tem. by its mayor and board of aldermen.

Laurel v. Turner, 96 M. 631, 51 So. 403.

Section 3406.

Mandatory in requiring subject-matter of ordinance to be clearly expressed in title.

Sample v. Verona, 94 M. 264, 48 So. 2.

Section 3407.

Avoidance of all preceding valid ordinances of general nature, not effected by failure of clerk to make ordinance book.

Greenwood v. Jones, 91 M. 728, 46 So. 161.

Section 3409.

Ordinance produced at trial, presumed to have been adopted at proper time and place.

Greenwood v. Jones, 91 M. 728, 46 So. 161.

Section 3410.

Town ordinance declaring all state offenses committed within corporate limits, offenses against municipality, void.

Oakland v. Miller, 90 M. 275, 43 So. 467.

Sections 3411, 3412.

Not repugnant to Const. 1890, §§ 17, 112. Initiatory resolution. Double taxation. Special assessments. Bonds, &c.

Edwards House Co. v. Jackson, 91 M. 429, 45 So. 14.

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Section 3415.

Municipalities. Public works. Bonds. Special assessments under Code 1906, §§ 3411, 3412.

Edwards House Co. v. Jackson, 91 M. 429, 45 So. 14.

Does not limit bond issue of municipality operating under special charter.

Love v. Yazoo City, 91 M. 535, 44 So. 835.

Does not authorize municipality to issue bonds for purchase of real estate for parks.

Hazlehurst v. Mayes, 96 M. 656, 51 So. 890.

Sections 3416, 3419.

Municipal public works. Bonds. Special assessments under Code 1906, §§ 3411, 3412.

Edwards House Co. v. Jackson, 91 M. 429, 45 So. 14.

Section 3421.

Has no application to proceeding instituted by revenue agent under Code 1906, ch. 131.

Adams v. Clarksdale, 95 M. 88, 48 So. 242.

Section 3422.

Attempt of mayor and aldermen to equalize assessments after expiration of month of October, nullity.

Biloxi v. Biloxi Real Estate Co., 94 M. 653, 48 So. 729.

Equalization of municipal assessments. Time. Condition precedent. Minutes of board.

Herrick v. Pascagoula &c. R. Co., — M. —, 54 So. 660.

Section 3430.

Failure to submit question of increase in taxation to electors of municipality renders mayor and alderman indictable under Code 1906, § 1302.

State v. Glennen, 93 M. 836, 47 So. 550.

Sections 3435, 3436.

Special election called to fill "vacancy" in municipal office, caused by election thereto of disqualified person, nullity.

State v. Hays, 91 M. 755, 45 So. 728.

Sections 3441, 3329.

Municipality may pass ordinance prohibiting within corporate limits, commission of any act amounting to misdemeanor under laws of state.

Hurley v. Corinth, 97 M. 396, 52 So. 695.

Rosetto v. Bay St. Louis, 97 M. 409, 52 So. 785.

Section 3444.

Vicksburg charter. Amendment of February 17, 1904, Laws 1904, p. 168, ch. 116, constitutional.

Ex parte Dickson, 89 M. 778, 42 So. 233.

Yazoo City. Amendment of charter providing for ownership and operation of electric street railway and issuance of bonds therefor, valid.

Love v. Yazoo City, 91 M. 535, 44 So. 835.

Section 3446.

Mayor, aldermen, &c., not to be interested in municipal contract, &c. Prospective in operation.

Noxubee County Hardware Co. v. Macon, 90 M. 636, 43 So. 304.

Section 3463.

Treasurer of levee board. Validity of bond. Failure of principal to sign.

Adams v. Williams, 97 M. 113, 52 So. 865.

Section 3477.

Removals from office. Sheriff. Jurisdiction of justice of peace.

Moore v. State, 45 So. 866.

Section 3485.

Preference to tax collector and treasurer on insolvency of depository of county funds, assignable. Rights of assignee.

Commercial Bank v. Hardy, 53 So. 395.

Preference of custodian of public funds on insolvency of depository.

Greene v. Cole, 54 So. 65.

Sections 3521–3524.

Sale for partition is only ordered where it will better promote interest of all parties than partition in kind, or where equal division in kind cannot be made.

Smith v. Stansel, 93 M. 69, 46 So. 538.

Section 3536.

Partition: parties concluded.

Shuler v. Murphy, 91 M. 518, 44 So. 810.

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Section 3542.
Only one solicitor's fee allowable in single case.
Smith v. Stansel, 93 M. 69, 46 So. 538.

Sections 3561–3565.
Party walls. Inapplicable upon facts.
Binder v. Weinberg, 94 M. 817, 48 So. 1013.

Section 3598.
Clerk of penitentiary board subject to quo warranto proceeding under Code 1906, § 4017, &c.
Yerger v. State, 91 M. 802, 45 So. 849.

Section 3619.
Clerk of penitentiary board cannot be removed by incoming board on ground that removal of appointees of outgoing board would be to interest of public service.
Yerger v. State, 91 M. 802, 45 So. 849.

Section 3705.
Result of primary election not subject to judicial determination.
Ramey v. Woodward, 90 M. 777, 44 So. 769.

Section 3728.
Primary elections. Placards, &c. Affidavit, bad on demurrer.
Harkness v. State, 95 M. 506, 48 So. 294.
State v. Harkness, — M. —, 53 So. 413.

Section 3778.
Municipality cannot, by general ordinance, prohibit pool tables, legally operated.
Crittenden v. Booneville, 92 M. 277, 45 So. 723.

Section 3780.
Privilege tax. "Wharfboat."
Bluff City R. Co. v. Clarke, 95 M. 689, 49 So. 177.

Section 3790.
Imposes privilege tax on coca-cola, &c. Constitutionality.
Coca-Cola Co. v. Skillman, 91 M. 677, 44 So. 985.

Municipal ordinances. Privilege tax. Coca-cola. Selling without license. Prosecution.
Marco v. Clarksdale, 94 M. 4, 47 So. 780.

Section 3801.
Privilege tax. Cotton-seed oil mills. "Capital."
Crenshaw Oil Co. v. Johnson, 94 M. 773, 48 So. 5.

Sections 3826, 3827.
Privilege tax on insurance agents.
Cole v. American Surety Co., 90 M. 782, 44 So. 771.

Section 3828.
Privilege tax. Agent of surety company.
Cole v. American Surety Co., 90 M. 782, 44 So. 771.

Section 3832.
Amendment, Laws 1908, p. 59, ch. 73, § 7, violative of Const. 1890, § 71.
Board of Levee Com'rs of Yazoo-Mississippi Delta v. Royal Ins. Co., 96 M. 832, 51 So. 2.

Section 3849.
Conviction of peddling without license unsustainable if based on affidavit not bringing accused within any subdivision.
Ex parte Weems, 96 M. 635, 51 So. 2.

Privilege tax. Peddlers. "Taxable." Constitutionality.
Adams v. Standard Oil Co., 97 M. 879, 53 So. 692.

Section 3854.
Privilege tax cannot be required of individual plumber working by day or taking contracts for himself alone.
Wilby v. State, 93 M. 767, 47 So. 465, 23 L. R. A. (N. S.) 677n.

Section 3856.
Imposes privilege tax, not on iron rails, but on railroads. Classification of latter. Number of tracks immaterial.
Adams v. Illinois Cent. R. Co., 92 M. 566, 46 So. 50.

Section 3886.
Whenever supply of water to consumers, from any source, attains magnitude of water-

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works or water supply company, person conducting business becomes liable for privilege tax.
Randall v. Smith, 96 M. 647, 51 So. 917.

Section 3893.
Municipality cannot, by general ordinance, prohibit pool tables, legally operated.
Crittenden v. Booneville, 92 M. 277, 45 So. 723.

Section 3894.
Contracts made in course of business, delinquent as to privilege tax, actionable.
Young v. State Life Ins. Co., 91 M. 710, 45 So. 706.
Municipal ordinances. Privilege tax. Coca-cola. Selling without license. Prosecution.
Marco v. Clarksdale, 94 M. 4, 47 So. 780.
Contract made in 1905 in business delinquent as to privilege tax, actionable.
Sullivan v. Ammons, 95 M. 196, 48 So. 244.

Section 3895.
Privilege taxes. Exemption of Confederate soldiers. Constitutionality, &c.
Adams v. Standard Oil Co., 97 M. 879, 53 So. 692.

Section 3931.
Judgment in suit against town, not void because rendered against mayor and board of aldermen.
Jonestown v. Ganong, — M. —, 52 So. 579, 692.

Section 3932.
Return on summons for corporation, failing to state connection of individual served, insufficient.
Watkins Machine & Foundry Co. v. Cincinnati Rubber Mfg. Co., 52 So. 629.

Sections 3946, 3947.
Appearance conferring on circuit court jurisdiction of defendant appealing from justice's court.
Illinois Central R. Co. v. Swanson, 92 M. 485, 46 So. 83.

Section 3984.
Deed of trust. Advertisement of sale.
Melsheimer v. McKnight, 92 M. 286, 46 So. 827.
See Davis v. O'Connell, 92 M. 348, 47 So. 672.

Section 3987.
Deed of trust. Manner of sale.
Melsheimer v. McKnight, 92 M. 386, 46 So. 827.

Section 4017.
Clerk of penitentiary board, Code 1906, § 3598, subject to quo warranto proceeding.
Yerger v. State, 91 M. 802, 45 So. 849.

Section 4043.
Speed of trains within municipalities. Liability does not attach when injury is inflicted outside of corporate limits, &c.
Mississippi Cent. R. Co. v. Butler, 93 M. 654, 46 So. 558.
Questions of liability made to depend on lawfulness of speed at time danger is discovered or should have been discovered if train had been running at prescribed speed.
Louisville & N. R. Co. v. Dick, 95 M. 111, 48 So. 401.

Section 4045.
Railroad locomotive. Bell or whistle. Street or highway crossing. For protection of animals as well as persons.
Young v. Illinois Cent. R. Co., 88 M. 446, 40 So. 870.
Locomotive. Bell and whistle. Killing cattle. Instruction based on this section, proper under facts in evidence.
Southern R. Co. v. Murray, 91 M. 546, 44 So. 785.
Railroads. Applies whenever injuries at crossings are directly traceable to failure to ring bell, &c., as proximate cause.
Illinois Cent. R. Co. v. Armstrong, 93 M. 583, 47 So. 427.

Section 4046.
Action against railroad company for killing stock at highway crossing. Proof. Instruction.
Southern R. Co. v. Murray, 91 M. 546, 44 So. 785.
Kicking switch. Contributory negligence.
Driver v. Southern Ry. Co., 93 M. 190, 46 So. 824.

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Section 4054.

"Trains intended for both passengers and freight" synonymous with "mixed or accommodation trains." Freight train with caboose.

White v. Illinois Cent. R. Co., 97 M. 91, 52 So. 449, 55 So. 593.

Section 4056.

Railroad company in order to avail itself of defense of contributory negligence or even go to jury on question, must show that something more than mere knowledge of defects contributed to injury.

Yazoo &c. R. Co. v. Scott, 95 M. 43, 48 So. 239.

Engineer: assumption of risk bars suit for injuries.

Yazoo &c. R. Co. v. Woodruff, — M. —, 53 So. 687.

Section 4058.

Railroads. "Crossing." Use by licensee. "Necessary plantation roads."

Illinois Cent. R. Co. v. McGowan, 92 M. 603, 46 So. 55.

Failure of railroad to maintain stock gap and cattle-guard. Appeal by defendant. Time from which undated compromise agreement speaks. Second suit for penalty.

Yazoo &c. R. Co. v. Neal, 93 M. 680, 47 So. 673.

Sections 4060–4062.

Street railways. Separate accommodations for races. Action for ejection and arrest. Admissibility of evidence as to company's custom.

Waldauer v. Vicksburg &c. R. Co., 88 M. 200, 40 So. 751.

Section 4070.

Amended, Laws 1908, ch. 196. Penalty for failure of railroad to settle for damaged freight, &c. Constitutionality.

Mobile &c. R. Co. v. Brandon, — M. —, 53 So. 957.

Section 4221.

Replevin. Valuation of levying officer in return, prima facie evidence.

Wilburn v. Cologero, 97 M. 511, 52 So. 794.

Section 4233.

Replevin by grantor in deed of trust after default. Judgment on retaining bond. Proof and verdict fixing value.

Whittaker v. Goodwin, 97 M. 663, 53 So. 413.

Section 4237.

Replevin. Claim of property by third person. Inapplicable to instant case.

Lewis v. McCracken, 89 M. 229, 42 So. 671.

Section 4251d.

Property used by private, individual owner directly and exclusively for educational purposes is not subject to taxation.

Jackson v. Preston, 93 M. 366, 47 So. 547, 21 L. R. A. (N. S.) 164n.

Section 4256.

Makes taxes, debt, recoverable by "action." Back taxes. Prospective in operation, &c.

Delta &c. Land Co. v. Adams, 93 M. 340, 48 So. 190.

Section 4267.

Assessment of corporations. Constitutionality.

People's Warehouse Co. v. Yazoo City, 97 M. 500, 52 So. 481.

Section 4283.

Non-observance will not vitiate assessment.

Moores v. Thomas, 95 M. 644, 48 So. 1025.

Section 4284.

Together with Code 1906, § 4332, declares what, and only what, shall invalidate sale for taxes.

Moores v. Thomas, 95 M. 644, 48 So. 1025.

Section 4285.

Parol evidence, admissible, whether ambiguity is patent or latent, when it will identify land assessed and sold, and description in roll or conveyance can be thereby applied to particular tract.

Reed v. Heard, 97 M. 743, 53 So. 400.

Sections 4291, 4294.

Attempt of mayor and aldermen to equalize assessments after expiration of month of October, nullity.

Biloxi v. Biloxi Real Estate Co., 94 M. 653, 48 So. 729.

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Sections 4296, 4312.

Approval of assessment roll, under § 4296, by mayor and board of aldermen: subsequent order, not under § 4312, attempting to vacate same, void.

Adams v. Clarksdale, 95 M. 88, 48 So. 242.

Section 4296.

Affords means for correction of irregularity in assessing as one tract, land not contiguous, &c.

North v. Culpepper, 53 So. 419.

Section 4312.

Taxation. Assessment. Relief. Personal property.

Kuhn v. Warren County, — M. —, 54 So. 442.

Section 4328.

Tax sale of undivided half-interest in eighty-acre tract, does not pass title. Evidence.

Stevenson v. Reed, 90 M. 341, 43 So. 433.

Section 4330.

Tax sale. Two tracts of land belonging to different owners, assessed together. Redemption.

Moores v. Thomas, 95 M. 644, 48 So. 1025.

Section 4332.

Together with Code 1906, § 4284, declares what and only what shall invalidate sale for taxes.

Moores v. Thomas, 95 M. 644, 48 So. 1025.

Tax titles. Curative statute. Void sale.

Seals v. Perkins, 96 M. 704, 51 So. 806.

Presupposes that land was validly assessed, &c.

Reed v. Heard, 97 M. 743, 53 So. 400.

See North v. Culpepper, — M. —, 53 So. 419.

Section 4333.

One year limitation does not apply to suit for actual damages for failure of clerk to give defaulting taxpayer notice of expiration of period of redemption.

McClendon v. Whitten, 95 M. 124, 48 So. 964.

Sections 4334, 4335.

Sale of land for amount in excess of taxes and costs. Redemption. Interest. Liability of tax collector.

Bank of Indianola v. Dodds, 90 M. 767, 44 So. 767.

Section 4338.

Two years allowed for redemption from tax sale do not constitute statute of limitations within Const. 1890, § 104.

Tallahatchie County v. Little, 93 M. 88, 46 So. 257.

Tax conveyance: "filing."

Brannon v. Pringle, 94 M. 215, 46 So. 161, 47 So. 674.

Tax deed: district of filing.

Reed v. Heard, 97 M. 743, 53 So. 400.

Section 4339.

Sale of land for amount in excess of taxes and costs. Redemption. Interest. Liability of tax collector.

Bank of Indianola v. Dodds, 90 M. 767, 44 So. 767.

Tax sale. Two tracts of land belonging to different owners, assessed together. Redemption.

Moores v. Thomas, 95 M. 644, 48 So. 1025.

Section 4357.

Effect of Laws 1904, p. 216, ch. 161, on damages to be assessed against tax collector in default in payment of taxes collected.

Adams v. Saunders, 93 M. 520, 46 So. 960.

Section 4367.

Recovery of back taxes. Personal judgment. Remedy provided by Code 1906, § 4256, &c.

Delta &c. Land Co. v. Adams, 93 M. 340, 48 So. 190.

Section 4400.

Question whether public necessity demands new road, addressed to discretion of supervisors.

Strahan v. Attala County, 91 M. 529, 44 So. 857.

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Sections 4400–4402.
Apply to county roads only.
Illinois Cent. R. Co. v. State, 94 M. 759, 48 So. 561.

Section 4405.
Damages for property taken for road purposes. Bill of exceptions. Void bond.
Evans v. Sharkey County, 89 M. 302, 42 So. 173.

Sections 4423, 4424.
Justice cannot try person as delinquent, unnamed as such in overseer's report. Other affidavit than report unnecessary.
Bishop v. State, 97 M. 498, 52 So. 690.

Section 4457.
Bond conditioned "to keep said bridge in repair," conditioned against destruction by act of God.
Mitchell v. Hancock County, 91 M. 414, 45 So. 571.

Section 4465.
New notice after rejection of bids.
State v. Wall, — M. —, 54 So. 5.

Sections 4465–4475.
Working of roads. Bonds. Notice, &c.
Weston v. Hancock County, — M. —, 54 So. 307.

Section 4467.
Compensation of supervisors for general supervision of contracted highway work, contract price of which does not exceed $200.
State v. Wilson, — M. —, 51 So. 715.

Section 4468.
Supervisor not personally liable for injuries caused by defective bridge in his district.
Lee v. Styles, 95 M. 623, 49 So. 259.

Sections 4487, 4503.
Courts have jurisdiction over acts of school authorities beyond scope of powers and violative of law.
Hobbs v. Germany, 94 M. 469, 49 So. 515, 22 L. R. A. (N. S.) 983.

Section 4510.
Separate school district of unincorporated territory.
Jones County v. Grisson, 97 M. 193, 52 So. 629.

Section 4525.
Rule requiring pupils of school to remain in their homes and study between certain evening hours, nullity.
Hobbs v. Germany, 94 M. 469, 49 So. 515, 22 L. R. A. (N. S.) 983.

Section 4526.
Schools. Trustees. Election. Prospective in operation.
Tucker v. State, 89 M. 363, 42 So. 798.

Section 4527.
Term of office of school trustees. "Existing trustees shall remain in office unless selected under the general law." Prospective in operation.
Tucker v. State, 89 M. 363, 42 So. 798.

Sections 4530, 4533, 4534.
Separate school district of unincorporated territory.
Jones County v. Grisson, 97 M. 193, 52 So. 629.

Section 4530.
Creation of separate school district in municipality, &c. Neither showing as to ability to maintain seven months' term, nor petition, necessary.
Mebane v. Hickory Flat, — M. —, 55 So. 359.

Sections 4539, 4546.
Offer to sell examination questions. Proof necessary to conviction.
Bryant v. State, 92 M. 822, 46 So. 247.

Section 4563.
Indictment for forgery of certificate of attendance. Allegations and proof.
Griffin v. State, — M. —, 51 So. 466.

Section 4623.
Rule requiring pupils of school to remain in their homes and study between certain evening hours, nullity.
Hobbs v. Germany, 94 M. 469, 49 So. 515, 22 L. R. A. (N. S.) 983.

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Section 4631.
Unsealed corporation deed unavailable in ejectment.
Littelle v. Creek Lumber Co., — M. —, 54 So. 841.

Sections 4695–4716.
Sixteenth sections. Waste. Boards of supervisors. Delegation of power. "County."
Jefferson Davis County v. Simrall Lumber Co., 94 M. 530, 49 So. 611.

Section 4702.
Sixteenth sections. Sale of timber.
Dantzler Lumber Co. v. State, 97 M. 355, 53 So. 1.

Sections 4738, 4740, 4742, 4743.
Revenue agent. Recovery of back taxes. Personal judgment, &c.
Delta &c. Land Co. v. Adams, 93 M. 340, 48 So. 190.

Section 4739.
Revenue agent, proper party to bring action on bond of secretary and treasurer of levee board.
Adams v. Williams, 97 M. 113, 52 So. 865.

Section 4740.
Proceedings by revenue agent to back-assess city property. Notice.
Adams v. Clarksdale, 95 M. 88, 48 So. 242.

Section 4775a.
Stipulation, not collateral agreement within statute of frauds.
Meyer-Bridges Co. v. Badeau, 90 M. 27, 43 So. 609.

Section 4775c.
Contract to cut timber into logs, to haul same to certain place, and to ship them therefrom to purchaser, contract of sale of personalty.
Turner v. Planters' Lumber Co., 92 M. 767, 46 So. 399.

Section 4779.
Statute of frauds. Contract for sale of sheep: delivery of three pet lambs, not of flock, insufficient to validate.
Ladnier v. Ladnier, 90 M. 475, 43 So. 946.

Sufficient part delivery of personal property sold.
Becker Co. v. Davis Drug Co., 93 M. 803, 47 So. 468.

Letters passing between buyer and seller, sufficient memorandum of sale.
Willis v. Ellis, — M. —, 53 So. 498.

Section 4784.
Single sale insufficient to make seller, "trader."
Durham v. Slidell Liquor Co., 94 M. 140, 49 So. 739.

Sections 4790, 4791.
Court cannot grant additional time beyond ninety-day limit (Code 1906, § 797) for filing of stenographer's notes.
Chenault v. Adams, 97 M. 487, 52 So. 189.

Sections 4826–4899.
Telephone company: discrimination in rates.
Cumberland Tel. &c. Co. v. State, — M. —, 54 So. 446.

Section 4843.
State railroad commission may make rules as to reciprocal demurrage.
Yazoo &c. R. Co. v. Keystone Lumber Co., 90 M. 391, 43 So. 605.

Section 4849.
Railroad commission. Train schedules. Invalid order.
Gulf &c. R. Co. v. Railroad Commission, 94 M. 124, 49 So. 118.

Section 4851.
Bill of lading conclusive on carrier as to weight of shipment. Constitutionality, &c.
Yazoo &c. R. Co. v. Bent & Co., 94 M. 681, 47 So. 805, 22 L. R. A. (N. S.) 821n.

Section 4854.
Railroad commission. Necessary depots. Invalid orders.
Gulf &c. R. Co. v. Railroad Commission, 94 M. 124, 49 So. 118.

Railroads. Depots. Constitutionality.
Southern R. Co. v. State, 95 M. 657, 48 So. 236.

When and how person becomes "passenger."
Metcalf v. Yazoo &c. R. Co., 52 So. 355.

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Section 4879a.

Unenforceable, it not appearing in enrolled bill of code.
Postal Telegraph Co. v. Shannon, 91 M. 476, 44 So. 809.
Western Union Tel. Co. v. Morgan, 92 M. 108, 45 So. 427.

Section 4907.

Proceeding for forfeiture of corporate charter not entitled to advancement as preference case.
Jackson Loan &c. Co. v. State, — M. —, 54 So. 157.

Case of public importance to county may be advanced on docket though not of strict preference nature.
Weston v. Hancock County, — M. —, 54 So. 307.

Section 4910.

Attempts to deprive trial court of authority to require remittitur. Unconstitutional in denying defendant equal protection of laws, &c.
Yazoo &c. R. Co. v. Wallace, 90 M. 609, 43 So. 469, 122 Am. St. 321.
See Yazoo &c. R. Co. v. Reid, 90 M. 616, 43 So. 952.
Mississippi Eastern R. Co. v. Wymond Cooperage Co., 93 M. 73, 46 So. 557.

Section 4911.

Appeal, by defendant for whom peremptory instruction has been given, from order granting new trial, is not from final judgment and will be dismissed.
Yazoo &c. R. Co. v. Reid, 90 M. 616, 43 So. 952.

Section 4914.

Rule fixing time for hearing of criminal docket proper and necessary.
Bennett v. State, — M. —, 55 So. 481.

Section 4921.

Right to dismiss unprejudiced by denial of motion to strike out stenographer's notes.
Evans v. Ham, — M. —, 54 So. 250.

Section 4936.

Conviction of misdemeanor will not be reversed for failure of clerk to enter on minutes, order calling special term at which trial was had.
Ex parte Neil, 90 M. 518, 43 So. 615.

Indictment for embezzlement under Code 1906, § 1136. Allegation as to official position of defendant. Failure to satisfy Code 1906, § 1509, requiring entry of order for amendment on minutes.
Richburger v. State, 90 M. 806, 44 So. 772.

Conviction of shooting in public highway will not be reversed for defects in affidavit, amendable on demurrer.
Evans v. State, 92 M. 34, 45 So. 706.

Section 4944.

Reversal of judgment against administrator of deceased maker of note, on ground of tardy probate of latter, entitles surety thereon to reversal.
Johnson v. Success Brick Machinery Co., 93 M. 169, 46 So. 957.

Section 4945.

Does not apply to judgment at law in civil case for failure to pay over taxes collected.
Adams v. Carter, 92 M. 579, 47 So. 409.

Section 4946.

Perpetuation of injunction and remand of cause on appeal from decree of dismissal: operation, effect, &c.
George v. Caldwell, — M. —, 54 So. 316.

Section 4977.

Action for penalty for cutting trees sustained by proof that plaintiff was in possession under color of title claiming as owner.
Carpenter v. Savage, 93 M. 233, 46 So. 537.

Action for recovery of penalty for cutting trees: instructions.
Rector v. Outzen, 93 M. 254, 46 So. 408.

Act not rendering perpetrator liable to penalty.
Cumberland Tel. &c. Co. v. Martin, 93 M. 505, 46 So. 247.

Section 4983.

Penalty recoverable by person holding certificate of location of land and receipt for purchase money, under Code 1906, § 1959.
Johnson v. Davis, 91 M. 708, 45 So. 979.

Person in actual possession of land and owner of trees may sue for penalty provided.
Harrison Naval Stores Co. v. Johnson, 91 M. 747, 45 So. 465.

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Section 4990.
Operation and effect: proceedings to subject personalty to purchase-money lien.
Quillin v. Paine, 94 M. 696, 47 So. 898.

Sections 4992, 4993.
Attachment: time for joinder of issue by claimant.
White v. Roach, — M. —, 53 So. 622.
See Mehaffey v. Russell, — M. —, 54 So. 807.

Section 4993.
Execution. Trial of right of property. Default in making up issue.
Bedford &c. Co. v. Adams Machine Co., 93 M. 537, 47 So. 429.

Sections 5002, 5004, 5007.
Telephone company: discrimination in rates.
Cumberland Tel. &c. Co. v. State, — M. —, 54 So. 446.

Section 5002.
Amended, Laws 1908, p. 124. Trusts and combines. Telephone corporation. Contract.
Cumberland Telephone &c. Co. v. State, — M. —, 54 So. 670.

Sections 5002–5021.
Trusts and combines. Violation.
Retail Lumber Dealers' Assn. v. State, 95 M. 337, 48 So. 1021.

Section 5004.
Penalty for violation of law prohibiting trusts, &c., unenforceable in case determinable under Laws 1900, p. 125.
State v. Jackson Cotton Oil Co., 95 M. 6, 48 So. 300.
Trusts and combines. Penalty. Constitutionality. "Civil cause."
Grenada Lumber Co. v. State, — M. —, 54 So. 8.
Trusts and combines. Penalty.
Cumberland Telephone &c. Co. v. State, — M. —, 54 So. 670.

Section 5005.
Agent of one corporation, not personally liable on subscription for principal, to capital stock of another.
Merchants' &c. Packet Co. v. Streuby, 91 M. 211, 44 So. 791, 124 Am. St. 651.
Amended, Laws 1910, p. 222. Trust. Purchase of stock. Corporate and individual, contracting parties.
Cumberland Telephone &c. Co. v. State, — M. —, 54 So. 670.

Sections 5013, 5014.
Corporations cannot claim immunity provided.
Cumberland Tel. &c. Co. v. State, — M. —, 53 So. 489.

Sections 5017, 5018.
Immunity granted may be claimed by foreign corporation deposing under compulsion in prosecution for violation of Code 1906, ch. 145.
Cumberland Tel. &c. Co. v. State, — M. —, 53 So. 489.

Section 5020.
Penalty prescribed by Code 1906, § 5004, for anti-trust law violation, unenforceable in case determinable under Laws 1900, p. 125.
State v. Jackson Cotton Oil Co., 95 M. 6, 48 So. 300.

Section 5039.
Forcible entry and detainer cannot be maintained by lessee where one under whom he claims has never been in possession, &c.
Taylor v. Orlansky, 92 M. 761, 46 So. 50, 136.
Unlawful entry and detainer must be brought within one year after deprivation of possession.
Robinson v. Boggan, — M. —, 52 So. 705.

Section 5055.
Does not prevent prosecution for keeping bawdy house.
Gavin v. State, 96 M. 377, 50 So. 498.

Sections 5079, 5080.
Wills. Applies to acts of direct and express revocation, only.
Hoy v. Hoy, 93 M. 732, 48 So. 903, 136 Am. St. 548.

Section 5086.
Will. Widow. Renunciation. To be construed with Code 1906, § 1651. "Child."
Norfleet v. Callicott, 90 M. 221, 43 So. 616.

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Section 5089.

Widow. "Separate property at the time of the death of her husband." Proceeds of life insurance in benevolent society, &c.

O'Reily v. Laughlin, 92 M. 1, 45 So. 19.

Proceeding by executor for commissioners to value estate of widow, renouncing will, and that of her deceased husband, is premature if commenced before expiration of one year, &c.

Jones v. Jones, 94 M. 460, 49 So. 115.

CONFEDERATE CONGRESS

Act of February 17, 1864.

Renders persons designated liable to military duty in Confederate states' service from date, &c. Effect of enrollment in service of state, &c.

Simmons v. Miller, 40 M. 19.

UNCODIFIED LEGISLATIVE ACTS

Territorial Act of 1799.

Justices of peace. Jurisdiction.

Bell v. West Point, 51 M. 262.

Act of 1814.

Justices of peace. Jurisdiction.

Bell v. West Point, 51 M. 262.

1818, Page 201.

School lands. Leases. Justices of county courts.

Jones v. Madison County, 72 M. 777, 18 So. 87.

See Lauderdale County v. East Miss. Mills, 18 So. 94.

Authorizes justices of county courts to lease sixteenth sections. Waste.

Moss Point Lumber Co. v. Harrison County, 89 M. 448, 42 So. 290, 873.

Act of 1820.

Modifies common law action of detinue.

Gilliam v. Moore, 10 S. & M. 130.

Act of 1821.

Chancery. Non-resident defendant. Publication. Affidavit. H. & H., p. 522, § 65.

McKiernan v. Massingill, 6 S. & M. 375.

Action or suit can be neither commenced nor sustained against executor or administrator after estate be represented insolvent. Amended, H. C., p. 673.

Pool v. Ellis, 64 M. 555, 1 So. 725.

Act of 1821, Section 93.

Executor or administrator. Removal of property beyond limits of state. Widow as usee in action. H. C., p. 665, § 93.

Bridges v. Maxwell, 34 M. 309.

Act of 1821, Section 100.

Administrator's application to sell land. Non-resident heir. Publication. H. C., p. 667, § 100. Repealed by Laws 1854, p. 65, § 1.

Sellers v. Talby, 33 M. 582.

Act of 1821, Section 114.

Probate court. Decree directing conveyance, by administrator, of lands sold by deceased by title bond. Constitutionality. H. C., p. 671, § 114.

Servis v. Beatty, 32 M. 52.

Act of 1821, Section 125.

Orphans' court. Guardian: choice and appointment. "Fatherless child." H. C., p. 504, § 125.

Stewart v. Morrison, 38 M. 417.

Act of February 9, 1821.

Gives carpenters and joiners lien for price of labor and for materials furnished. Filing of contract, notice to subsequent purchaser.

Buck v. Brian, 2 H. 874.

See Buchanan v. Smith, 43 M. 90.

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1821, Page 72, Section 103.

Forbids, by express terms, actions against executor or administrator of insolvent estate, after declaration of insolvency, except, &c.
Nutt v. Brandon, 85 M. 702, 38 So. 104.

Rev. Stat. of 1822.

Justices of peace. Jurisdiction.
Bell v. West Point, 51 M. 262.

Act of 1822.

Interest: rate.
Eastin v. Vandorn, W. 214.

Motion against sheriff. Not violative of Const. 1832, Art. 1, § 28. H. & H., p. 642, § 42.
Lewis v. Garrett, 5 H. 434.

Second suit not barred by general statute of limitations, not required to be brought within one year after arrest or reversal. H. & H., p. 571, § 101.
Lang v. Fatheree, 7 S. & M. 404.

Attachment. Security. Presumption, &c.
Prosky v. West, 8 S. & M. 711.

Sheriff. Execution. Return. "Omission to levy." Liability. H. & H., p. 642, § 42.
Garrett v. Hamblin, 11 S. & M. 219, 49 Am. Dec. 53.

Publication in state of defendant's residence, discretionary. Unordered, ordinary publication as for absconding debtor sufficient.
Ridley v. Ridley, 24 M. 648.

Created office of notary public. Unrepugnant to Const. 1832. Poindexter's Code, p. 263, ch. 47.
Dennistoun v. Potts, 26 M. 13.

Importation of slaves as merchandise and for sale. Evidence as to knowledge of act. H. C., p. 513.
Holman v. Murdock, 34 M. 275.

Slaves. Emancipation.
Mitchell v. Wells, 37 M. 235.

Amendatory, H. C., p. 667. Non-abatement of suits pending against personal representative at time of representation of estate's insolvency. Execution.
Pool v. Ellis, 64 M. 555, 1 So. 725.

Act of 1822, Section 1.

Appointment of commissioners of insolvency for estate of deceased. Presentation of claim, pending in suit at law. H. C., p. 673, art. 2, § 1.
Trezevant v. McQueen, 12 S. & M. 575.

Limitation. "Real" action. Writ of right. H. C., p. 824, § 1.
Ellis v. Murray, 28 M. 129.

Act of 1822, Section 2.

Levy and sale under second execution, before return of first, legal. H. & H., p. 629, § 2.
Alexander v. Polk, 39 M. 737.

Act of 1822, Section 3.

Judgments and decrees: interest. H. C., p. 642, art. 2, § 3.
Hamer v. Kirkwood, 25 M. 95.
See Illinois Cent. R. Co. v. Adams, 78 M. 895, 29 So. 996.

Limitation of actions. Did not fix bar to writ of right. H. C., p. 825, § 3.
Ellis v. Murray, 28 M. 129.

Act of 1822, Section 4.

Exception from limitation of six years of "such actions as concern the trade of merchandise," &c., confined to open and current accounts, &c. Poindexter's Code, p. 184, § 4.
Davis v. Tiernan, 2 H. 786.

Deed to personalty: where to be recorded. Removal of property from county by permission, &c. "Creditor," marriage settlement, &c. H. & H., p. 344, § 4.
Palmer v. Cross, 1 S. & M. 48.
Dixon v. Lacoste, 1 S. & M. 70.
Moss v. Davidson, 1 S. & M. 112.
Pickett v. Banks, 11 S. & M. 445.

Plaintiff in unlawful detainer is not entitled to recover rent, unless he has demanded it in his declaration. H. C., p. 813, § 4.
Johnson v. Tuggle, 27 M. 836.

Chancery. Practice. Non-resident defendant. Rehearing. H. C., p. 765, § 4.
Head v. Wash, 31 M. 358.

Act of 1822, Sections 4, 5.

"Domestic bill." H. C., p. 639, §§ 4, 5.
Ragsdale v. Franklin, 25 M. 143.

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Act of 1822, Section 6.

Written contracts "in relation to" land. Registration. Embraces power of attorney for sale of land. H. C., p. 606, § 6.

Hughes v. Wilkinson, 37 M. 482.

Act of 1822, Sections 6–31.

Amended, Laws 1848, p. 147, ch. 43. Foreign attachments. Jurisdiction of chancery court. H. C., p. 801, art. 4.

Freeman v. Guion, 11 S. & M. 58.

Attachment against steamboat. Service of process by constable. H. C. p. 801, art. 4.

Wallace v. Seales, 36 M. 53.

Act of 1822, Section 7.

Attachment. Affidavit by agent of absent creditor. Record. H. C., p. 802, § 7.

Linder v. Aaron, 5 H. 581.

Act of 1822, Section 9.

Common law inhibition on assignments of choses in action removed in specified cases. Judgments not embraced by provisions. H. C., p. 640, § 9.

Wilson v. McElroy, 2 S. & M. 241.

Act of 1822, Section 10.

Divorce. Non-resident defendant. Publication for three months. Repealed by Laws 1848, p. 148. H. C., p. 496, § 10.

Plummer v. Plummer, 37 M. 185.

Act of 1822, Section 12.

Joint tenants: survivorship abolished. H. C., p. 614, § 12.

Day v. Davis, 64 M. 253, 8 So. 203.

Act of 1822, Section 14.

New action within one year after arrest or reversal must be by original plaintiff. H. C., p. 827, § 14.

Ross v. Sims, 27 M. 359.

Joint action against principal and sureties on attachment bond: when maintainable H. C., p. 804, § 14.

Holcomb v. Foxworth, 34 M. 265.

Does not save suit brought within one year after abatement by death of defendant, &c. H. C., p. 827, § 14.

Crane v. French, 38 M. 503.

Act of 1822, Section 15.

Allows minors and insane persons, one year after removal of disabilities, to redeem land sold for taxes: in force in 1856. H. C., p. 172, § 15.

Richards v. Patterson, 30 M. 583.

Act of 1822, Section 19.

Seems to give sanction to conveyances made by married women under requisite ceremonies. H. & H., p. 347, § 19.

Surget v. Little, 24 M. 118.

Conveyance of lands by feme covert. "Previous acknowledgment on private examination" must be shown positively and distinctly. H. C., p. 608, § 19.

Garrison v. Fisher, 26 M. 352.

Act of 1822, Section 24.

Proviso. Limitation may be to specified class of heirs of body of remainderman. H. C., p. 609, § 24.

Cannon v. Barry, 59 M. 289.

Act of 1822, Sections 24, 25, 27.

County tax levy. H. C., p. 708, art. 3.

State v. Hathorn, 36 M. 491.

Act of 1822, Section 27.

Executor, who is principal legatee and devisee under will, competent witness to sustain same. H. C., p. 651, § 27.

Kelly v. Miller, 39 M. 17.

Act of 1822, Sections 35, 36, 37.

Board of police. Courthouse and jail to be erected and kept in repair, &c. Tax levy. H. C., p. 708, art. 4, §§ 35, 36, 37.

State v. Hathorn, 36 M. 491.

Act of 1822, Section 44.

Penalizes infliction on slave by overseer, of cruel or unusual punishment. H. C., p. 519, § 44.

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Scott v. State, 31 M. 473.
See Kelly v. State, 3 S. & M. 518.

Act of 1822, Section 57.
Debts due by judgment, sentence or decree. Interest. H. C., p. 643, § 57.
Hamer v. Kirkwood, 25 M. 95.
See Illinois Cent. R. Co. v. Adams, 78 M. 895, 29 So. 996.
Interest on open accounts. H. C., p. 643, § 57.
Houston v. Crutcher, 31 M. 51.
See Thompson v. Matthews, 56 M. 368.

Act of 1822, Section 87.
Grantee in land certificate, and assignee. Title. Ejectment, execution, &c. H. C., p. 858, § 87.
Linsdey v. Henderson, 27 M. 502.
Martin v. Nash, 31 M. 324.
Huntingdon v. Grantland, 33 M. 453.

Act of 1822, Section 90.
Probate of claim not condition precedent to suit against executor or administrator. H. C., p. 664, § 90.
Rawlins v. Poindexter, 26 M. 654.
Branch Bank v. Rhew, 37 M. 110.

Act of 1822, Section 96.
Amendment of judgment or decree. Inapplicable to instant case. H. C., p. 877, § 96.
Ralph v. Prester, 28 M. 744.

Act of 1822, Section 158.
Circuit clerk cannot take affidavit to complaint, under Laws 1850, p. 59, § 6. H. C., p. 433, § 158.
Ayres v. Taylor, 25 M. 200.

Act of June 7, 1822.
Attachment. Service. Death of defendant. Abatement. Judgment and sale, or final process against garnishee and property attached. Code 1871, § 1486.
Holman v. Fisher, 49 M. 472.

Act of June 10, 1822.
Partition of land held by coparceners, joint tenants, and tenants in common: jurisdiction. Effect of Laws 1833 (November), p. 29, § 2.
Smith v. Craig, 10 S. & M. 447.

Act of June 11, 1822, Section 4.
Essentially same as Code 1871, § 1409. Habeas corpus. Bail bond.
Jacquemine v. State, 48 M. 280.

Act of June 22, 1822.
Every joint bond, bill or promissory note to be deemed in law, joint and several.
Mhoon v. Colment, 51 M. 60.

Act of June 28, 1822.
Continuance by operation of law of suits and proceedings "remaining undecided" at any term of court. Code 1880, § 2265.
Moore v. Hoskins, 66 M. 496, 6 So. 500.

Act of June 29, 1822.
Criminal practice. Error as to defendant. Bill of exceptions. Record.
Haynie v. State, 32 M. 400.

1822, Page 25.
Courts. "From any cause." Discontinuance.
Palmer v. State, 73 M. 780, 20 So. 156.

1822, Page 85, Section 1.
Estate. Representation of insolvency. Suits pending against executor or administrator, permitted to proceed to trial and judgment.
Nutt v. Brandon, 85 M. 702, 38 So. 104.

1822, Page 151.
Roads, ferries, &c. Appointment of members of boards of police.
Sullivan v. Lafayette County, 58 M. 790.

1824–1838, Pages 20–21, Sections 1–3.
Promissory note. Defendant sued as surviving partner. Evidence.
Baughan v. Graham, 1 H. 220.

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1824–1838, Page 52.
Judgments. Liens. Priority. After acquired property.
Moody v. Harper, 25 M. 484.

1824–1838, Page 52, Section 12.
Judgment or decree, legally enrolled, lien on after-acquired property of defendant.
Jenkins v. Gowen, 37 M. 444.

1824–1838, Page 153.
Tardy return of execution. Motion against sheriff. "The court to which such execution is returnable."
Steen v. Briggs, 3 S. & M. 326.

1824–1838, Page 702.
Grants privilege of banking to Mississippi R. Co. Supplemental to Laws 1836, p. 173.
King v. Elliott, 5 S. & M. 428.

1824–1838, Page 717, Section 1.
Drawers and indorsers of note, &c., to be sued in one action. Does not apply to makers of unindorsed note.
Thompson v. Planters' Bank, 2 S. & M. 476.

Applicable to actions brought after passage on bills and notes made and indorsed prior thereto.
Rappelye v. Hill, 4 H. 295.

1824–1838, Page 718, Section 6.
Note. Affidavit as to insolvency of first indorser not required as condition precedent to levy on property of second. Presumption.
Hamblin v. Foster, 4 S. & M. 139.

1824–1838, Page 753, Sections 1–4.
Writ of error. Petition. Bond. Failure or refusal of clerk to issue writ within three years.
Butler v. Craig, 27 M. 628.

1824–1838, Page 892.
Rankin county. Return of execution. Middle of twelve-day term.
Steen v. Briggs, 3 S. & M. 326.

Act of 1824.
Judgment, lien from date of rendition on all property of defendant in state.
Burney v. Boyett, 1 H. 39.
Com'l Bank of Manchester v. Helderburn, 6 H. 536.
Andrews v. Wilkes, 6 H. 554.
See Planters' Bank v. Walker, 3 S. & M. 409.
Cayce v. Stovall, 50 M. 396.

Sale under junior judgment: disposition of proceeds.
Michie v. Planters' Bank, 4 H. 130, 34 Am. Dec. 112.
Robinson v. Green, 6 H. 223.
Hand v. Grant, 10 S. & M. 514.

Judgments. Liens. Priority. After acquired property.
Moody v. Harper, 25 M. 484.

Judgment or decree, legally enrolled, lien on after acquired property of defendant.
Jenkins v. Gowen, 37 M. 444.

Act of 1824 Sections 1–3.
Promissory note. Defendant sued as surviving partner. Evidence.
Baughan v. Graham, 1 H. 220.

1824, Page 17.
Leases of sixteenth-section school lands. Trustees. Waste.
Moss Point Lumber Co. v. Harrison County, 89 M. 448, 42 So. 290, 873.

1824, Page 106.
Judgment, lien from time of entry. Fraction of day.
Smith v. Ship, 1 H. 234.

Judgment. Property of defendant bound and liable "from the time of entering such judgment."
Reed v. Haviland, 38 M. 323.

1827, Page 96.
Forthcoming bonds: forfeiture, and effect of same. Constitutionality.
Wanzer v. Barker, 4 H. 363.
Jones v. Mississippi &c. R. Co., 5 H. 407.

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Act of 1828, Section 2.
Bill of discovery at law. Discretion of court. Diligence on part of applicant. H. C., p. 865, art. 6, § 2.
Dillahunty v. Smith, 7 H. 673.

1828, Page 64.
Designed to expedite proceedings in equity. Depositions. Setting down cause for hearing. Answer. Record.
Carman v. Watson, 1 H. 333.

1828, Page 78, Section 6.
Tardy return of execution. Motion against sheriff. "The court to which such execution is returnable."
Steen v. Briggs, 3 S. & M. 326.

1829-30, Page 61.
Execution by administrator of bond for application of proceeds, necessary to validity of order of sale under this act.
Currie v. Stewart, 26 M. 646.
Probate court. Proceedings to sell lands of intestate "for the interest" of heirs. Publication. Non-resident defendants.
Lum v. Reed, 53 M. 73.

Act of 1830.
Issues for trial of right of property triable by same rules as issues in "detinue," —meaning "detinue" of Act of 1820.
Gilliam v. Moore, 10 S. & M. 130.

Act of December 6, 1830.
Lien of carpenter and joiner. Subsequent purchaser. Notice.
Buck v. Brian, 2 H. 874.
See Buchanan v. Smith, 43 M. 90.

Act of December 16, 1830.
Exception to new trial decision: grounds of motion and substance of evidence, may be reduced to writing, signed by judge and made part of record.
Brown v. Carraway, 47 M. 668.

1830, Page 50, Section 3.
Prohibits circuit judges from charging jury unless counsel differ as to law and request charge on distinctly specified point.
Keithler v. State, 10 S. & M. 192.

1830, Page 293.
Justices of peace. Jurisdiction. Debt. Principal and interest.
Planters' Bank v. Coulson, 6 H. 395.

1830, Page 314.
Gives power, by terms, to except to decision of circuit judge as to new trial. Bill of exceptions. Assignment of error.
Phillips v. Lane, 4 H. 122.

1830 (January), Page 5, Chapter 1.
Extends laws of state over persons and property of resident Indians. Chickasaws. Marriage. Property of wife. Debts of husband.
Fisher v. Allen, 2 H. 611.

1830 (January), Page 33, Section 4.
Writ of error, writ of right: no conditions annexed to emanation.
Hardaway v. Biles, 1 S. & M. 657.

1830 (January), Page 38, Chapter 32.
Prohibits persons other than Indians from settling within their territory. Indictment.
State v. Craft, W. 409, 1 Mor. St. Cas. 41.

1830 (January), Page 92, Chapter 74.
Planters' Bank. Incorporation. Subscription by governor to stock, &c.
Swann v. Wilson, 24 M. 471.

1830 (November), Page 7, Section 4.
Planters' Bank. Governor to subscribe for five thousand shares of stock, &c.
Swann v. Wilson, 24 M. 471.

Act of 1833.
Sixteenth section: liability of lessee for waste.
Moss Point Lumber Co. v. Harrison County, 89 M. 448, 42 So. 290, 873.

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1833, Page 6, Section 3.
Gives boards of police general power to levy special tax on respective counties, whenever, &c.
State v. Hathorn, 36 M. 491.

1833, Page 34.
Printed statute laws of foreign states, published by authority, are competent evidence in our courts.
Baughan v. Graham, 1 H. 220.

1833, Page 108, Section 11.
Planters' Bank. Governor to execute bonds for payment of loan, &c.
Swann v. Wilson, 24 M. 471.

1833, Page 146, Chapter 64.
School land. Lease. Submission to vote.
Jones v. Madison County, 72 M. 777, 18 So. 87.
See Lauderdale County v. East Miss. Mills, 18 So. 94.

1833, Page 166, Chapter 70.
Promissory note. Protest. Notary public. Notice.
Bowling v. Arthur, 34 M. 41.

1833, Page 205, Chapter 83.
Suits against state, involving matters either of law or equity, may be brought in superior court of chancery.
Farish v. State, 4 H. 170.
Suits against state. Superior court of chancery.
Swann v. Buck, 40 M. 268.

1833 (January), Page 166, Chapter 70.
Certificate and record of notary, admissible to establish fact that notice was given, &c.
Fleming v. Fulton, 6 H. 473.
Wood v. American Life Ins. &c. Co., 7 H. 609.
Grimball v. Marshall, 3 S. & M. 359.
Booth v. Watson, 5 S. & M. 295.

1833 (November), Page 29, Section 2.
Amends, Acts of June 10, 1822. Transfers to probate judge personally and not to court, power of presiding justice of county court to make partition, &c.
Smith v. Craig, 10 S. & M. 447.

1833 (November), Page 46, Section 1.
Partition. Evidently applies only where, by death of joint tenant, &c., his land may descend to his minor heirs.
Smith v. Craig, 10 S. & M. 447.
See Currie v. Stewart, 26 M. 646.

1834, Page 29, Section 3.
Deed to land: before whom proof or acknowledgment may be made.
Tillman v. Cowand, 12 S. & M. 262.
Justice of peace may take and certify acknowledgment to deed conveying land situated out of his county.
Dennistoun v. Potts, 26 M. 13.
See Love v. Taylor, 26 M. 567.
Authorizes notary public to take acknowledgment out of county of residence.
Hughes v. Wilkinson, 37 M. 482.

1836, Page 63, Section 4.
Pleas to be deemed and adjudged as admitting parties and character of parties suing, &c. Applies to corporations.
Reed v. Benton &c. Banking Co., 4 H. 257.
See Vicksburg Waterworks &c. Co. v. Washington, 1 S. & M. 536.
Carmichael v. Trustees of School Lands, 3 H. 84.

1836, Pages 99–100, Sections 1–6.
Justice of peace may take and certify acknowledgment to deed conveying land situated out of his county.
Dennistoun v. Potts, 26 M. 13.
See Love v. Taylor, 26 M. 567.

1836, Pages 99–100, Sections 1–5.
Authorizes justices of peace to exercise all powers previously belonging to notaries public.
Hughes v. Wilkinson, 37 M. 482.

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1836, Page 118.
Bills of exchange drawn on sister state. Protest. Five per cent. damages.
Sadler v. Murrah, 3 H. 195.

1836, Page 119.
Charter of Commercial and Railroad Bank of Vicksburg, &c. Eminent domain.
Ewing v. Alabama &c. R. Co., 68 M. 551, 9 So. 295.

1836, Page 173.
Charters Mississippi R. Co. to construct railroad.
King v. Elliott, 5 S. & M. 428.

1836, Page 399.
Smith county: location of public buildings.
Kelly v. State, 3 S. & M. 518.

Act of 1837.
Applicable to actions brought after passage, on bills and notes made and indorsed prior thereto.
Rappelye v. Hill, 4 H. 295.

Requires makers and indorsers of bill or note to be sued in joint action. Neither repugnant nor contradictory in provisions. Constitutionality.
McMillan v. Sprague, 4 H. 647, 35 Am. Dec. 412.

Drawers and indorsers of note, &c., to be sued in one action. Does not apply to makers of unindorsed note.
Thompson v. Planters' Bank, 2 S. & M. 476.

Note. Affidavit as to insolvency of first indorser not required as condition precedent to levy on property of second. Presumption.
Hamblin v. Foster, 4 S. & M. 139.

Writ of error. Petition. Bond. Failure or refusal of clerk to issue writ within three years.
Butler v. Craig, 27 M. 628.

Act of May 12, 1837.
Grants privilege of banking to Mississippi R. Co. Supplemental to Laws 1836, p. 173.
King v. Elliott, 5 S. & M. 428.

1837, Page 175.
Bills of exchange drawn on sister state. Protest. Damages. Prospective in operation.
Sadler v. Murrah, 3 H. 195.

1837, Page 205.
Aberdeen. Charter. Liquor licenses. Effect of Laws 1839, p. 27, § 2, Laws 1842, p. 108, § 1, and Laws 1846, p. 100, § 7.
Aberdeen v. Sanderson, 8 S. & M. 663.

Aberdeen. Charter. Town to have sole power to license sale within corporate limits, of vinous and spirituous liquors. Proceeds appropriable to municipal purposes. Laws 1848, p. 477, ch. 255, devoting revenue arising from licenses to Aberdeen Female Academy, unconstitutional.
Aberdeen Female Academy v. Aberdeen, 13 S. & M. 645.
See Bobo v. Board of Levee Com'rs for Yazoo-Mississippi Delta, 92 M. 792, 46 So. 819.

1838, Page 9.
Mississippi Union Bank: charter.
State v. Johnson, 25 M. 625.

1838, Page 33.
Supplementary to Laws 1838, p. 9, incorporating Mississippi Union Bank.
State v. Johnson, 25 M. 625.

1838, Page 60, Section 1.
Rankin county. Terms of circuit court limited in length to twelve judicial days each.
Steen v. Briggs, 3 S. & M. 326.

1838, Page 95.
Town of Raleigh: incorporation. Judicial notice.
Kelly v. State, 3 S. & M. 518.

1838, Page 153, Section 6.
Tardy return of execution. Motion against sheriff. "The court to which such execution is returnable."
Steen v. Briggs, 3 S. & M. 326.

1838, Page 226.
Mechanics' lien: operation, enforcement, &c.

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Andrews v. Washburn, 3 S. & M. 109.
English v. Foote, 8 S. & M. 444.
Kirk v. Taliaferro, 8 S. & M. 754.

1838, Page 269.

Notes for purchase of lots in city of Jackson. Discount. Does not confer authority upon governor to bind state by indorsement.
State v. Mayes, 23 M. 516.

1838, Page 302, Section 1.

Boards of police. Special tax. Amount of levy, for purpose specified, unrestricted.
State v. Hathorn, 36 M. 491.

1838, Page 303, Section 3.

Tax collector. In absence of special bond, sureties in general bond liable for special tax.
State v. Hathorn, 36 M. 491.

1838, Page 329.

Rankin county. Return of execution. Middle of twelve-day term.
Steen v. Briggs, 3 S. & M. 326.

Act of 1839.

Dismissal for failure of plaintiff in error to file record on first day of return term. Does not repeal H. & H., p. 533, § 12.
McGehe v. Caruthers, 2 S. & M. 443.

1839, Pages 23, 24, Chapter 15, Sections 1, 2.

Suit by distributee on bond of administrator. Ten per cent. damages. Prospective in operation.
Steen v. Finley, 25 M. 535.

1839, Page 27, Section 2.

"Gallon law": effect upon charter right of town of Aberdeen to grant liquor licenses.
Aberdeen v. Saunderson, 8 S. & M. 663.

1839, Page 33.

Year's provision may, if absolutely necessary, be set aside in money. Presentation of widow's claim. Insolvent estate.
McNulty v. Lewis, 8 S. & M. 520.
See Nelson v. Smith, 12 S. & M. 662.

1839, Page 33, Section 2.

Exempt personal property of husband descends to widow and in latter's hands continues free from execution.
Lowry v. Herbert, 25 M. 101.

Exempt property of husband. Descent to widow. Testamentary disposition.
Turner v. Turner, 30 M. 428.

1839, Page 72, Chapter 46.

See H. & H., p. 332, §§ 22-26; H. C., p. 496, art. 4.

Secures to wife specific property: proceeds and profits of same, and other property purchased therewith, liable to creditors of husband.
Grand Gulf Bank v. Barnes, 2 S. & M. 165.

Proceeds of separate property of wife belong to husband and are subject to executions against him.
Beatty v. Smith, 2 S. & M. 567.

Does not alter common-law rule that husband may, during coverture, execute valid lease of wife's realty.
Baynton v. Finnall, 4 S. & M. 193.

Married woman. Power to contract, &c. Joinder with husband in execution of note.
Davis v. Foy, 7 S. & M. 64.

Separate estate of wife. Slaves. Sale. Promissory note, executed by husband and wife.
Frost v. Doyle, 7 S. & M. 68.

Debts of wife contracted dum sola. Bankruptcy of husband, &c.
Dickson v. Miller, 11 S. & M. 594, 49 Am. Dec. 71.

Property, inherited by wife, inures to her separate benefit, &c.
Clarke v. McCreary, 12 S. & M. 347.
Duncan v. Johnson, 23 M. 130.
Kilcrease v. Shelby, 23 M. 161.
See Tinnin v. Price, 27 M. 619.

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Verbal gift of slave by married woman, without consent of husband, does not pass title. Statute of limitations.
Curll v. Compton, 14 S. & M. 56.

Wife. Separate estate. Adultery. Slaves: rights of husband.
Carter v. Carter, 14 S. & M. 59.

Married woman. Separate property. Children: vested right.
Marshall v. King, 24 M. 85.
Bates v. Cotton, 32 M. 266.

Contract by wife as agent for husband. Declaration.
McKee v. Kent, 24 M. 131.

Enabling act. Gifts from husband to wife.
Ratcliffe v. Dougherty, 24 M. 181.

Promissory note, payable directly to wife, prima facie her separate property: suit for recovery should be in joint name of husband and wife.
Bodgett v. Ebbing, 24 M. 245.

No action at law can be maintained against married woman for purpose of charging separate estate.
Swett v. Penrice, 24 M. 416.

Separate property of married woman. Slave: legal title in wife, use in husband, &c.
Harvey v. Edington, 25 M. 22.

Enabling act. Feme covert: acknowledgment. Advancements by husband: purchases of property voluntarily made in name of wife.
Warren v. Brown, 25 M. 66.

Married woman. Acquisition of property. Sale of same. Slaves.
Garrison v. Fisher, 26 M. 352.

Wife. Separate estate. Slaves. Interest and rights of husband, &c.
Lyon v. Knott, 26 M. 548.
Cameron v. Cameron, 29 M. 112.
Walton v. Olive, 29 M. 270.

Title to slaves of married woman vests, at her death, in her personal representatives.
May v. Rockett, 25 M. 233.
Parr v. Gibbons, 27 M. 375.

Recognizes absolute property of wife in her slaves. Rights of husband.
Wells v. Treadwell, 28 M. 717.

Enabling act. Femes covert. Contracts. Conflict of laws.
Dalton v. Murphy, 30 M. 59.

Wife: right to sue to protect title to separate property.
Pennington v. Acker, 30 M. 161.

Enabling act. Feme covert. Disposition of separate estate. Right to make will.
Lee v. Bennett, 31 M. 119.

Slaves of wife. Contract by husband to part with possession binding on wife during coverture.
Friley v. White, 31 M. 442.

Wife. Separate estate. Descent.
Olive v. Walton, 33 M. 103.
Richmond v. Delay, 34 M. 83.

Promissory note payable to husband and wife. Presumption. Indorsement.
Work v. Glaskins, 33 M. 539.

Judgment against husband and wife. Separate estate of latter. Decease. Right of husband as against administrator, to possession of slaves.
Steadman v. Holman, 33 M. 550.

Slaves of wife: sale.
Clark v. Slaughter, 34 M. 65.

Married woman. Separate estate. Money as "property." Action at law, upon death of husband, against latter's executor.
Mitchell v. Mitchell, 35 M. 108.

Slave of wife: sale by husband.
Smith v. Williams, 36 M. 545.

Wife. Decree of divorce. Slaves.
Clark v. Slaughter, 38 M. 64.

Husband and wife: provision for separation ceases on reconciliation.
Weathersby v. Weathersby, 39 M. 652.

Enabling act. Feme covert subject to common law disabilities except as to class and subjects of contracts enumerated, &c.
Whitworth v. Carter, 43 M. 61.
Dunbar v. Meyer &c. Co., 43 M. 679.

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Married woman. Separate estate. Money: repayment.
Willis v. Gattman, 53 M. 721.

Married woman. Separate estate. "Distribution." Conflict between premises and habendum of deed, &c.
Robinson v. Payne, 58 M. 690.

1839, Page 105, Section 4.
Murder defined. "Premeditated design." Presumption as to malice.
Hawthorne v. State, 58 M. 778.

1839, Page 328, Section 41.
Charter of Vicksburg. Gives mayor power of justices of peace to take recognizances in all "criminal and penal cases."
Dean v. State, 2 S. & M. 200.

1839, Page 427, Section 16.
Levee. Proprietor to pay for work let out. Conclusive proof of claim. Lien.
Skipwith v. Dodd, 24 M. 487.

Act of 1840, Section 1 (H. C., Page 985, Section 1).
Penitentiary. Officers. Election. Term of office. Governor to fill vacancy in superintendency.
McAffee v. Russell, 29 M. 84.

1840, Page 14, Section 5.
Banks: right to purchase real estate.
Ingraham v. Speed, 30 M. 410.

1840, Page 15, Section 7.
Prohibits banks from transferring by indorsement or otherwise, any note, &c. Constitutionality. Action unmaintainable by assignee in own name.
Payne v. Baldwin, 3 S. & M. 661.

Prohibits transfer by banks, by indorsement or otherwise, of notes, bills receivable, or other evidences of debt. Constitutionality. Plea in abatement, &c.
Planters' Bank v. Sharpe, 4 S. & M. 17.
Maury v. Jeffers, 4 S. & M. 87.
Hazlip v. Leggett, 6 S. & M. 326.
Lanier v. Trigg, 6 S. & M. 641, 45 Am. Dec. 293.
Commercial Bank v. Thompson, 7 S. & M. 443.
Wade v. Thrasher, 10 S. & M. 358.
Grand Gulf Bank v. State, 10 S. & M. 428.
Montgomery v. Galbraith, 11 S. & M. 555.
Marsh v. Mandeville, 28 M. 122.
McIntyre v. Ingraham, 35 M. 25.

1840, Page 16, Section 10.
Bank whose charter has been declared forfeited may sue for and recover debts due.
Campbell v. Mississippi Union Bank, 6 H. 625.

1840, Page 21.
Banks: reception of notes at par.
King v. Elliott, 5 S. & M. 428.

1840, Page 21, Section 2.
Compels banks to receive their own notes, at par, in liquidation of bills receivable and other claims owing.
Robson v. Benton &c. Banking Co., 7 S. & M. 724.
See Railey v. Bacon, 26 M. 455.

1840, Pages 22–24, Sections 1–7.
Prohibit issuance of notes to circulate as money, unless same be authorized by law. Bond of agent of foreign bank.
Bank of Newberry v. Stegall, 41 M. 142.

1840, Page 25, Chapter 5.
Delivery bond, not "contract" within Laws 1841, p. 113, ch. 15.
Smith v. Brown, 28 M. 810.

1840, Page 29.
Forbids execution sale of cotton or corn, unmatured and ungathered. No judgment lien on growing crop.
Planters' Bank v. Walker, 3 S. & M. 409.
Cayce v. Stovall, 50 M. 396.

1840, Page 40.
Abolishes imprisonment for debt, unless, &c. Defendant in attachment for debt due may appear and plead without bond.
Rowley v. Cummings, 1 S. & M. 340.

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1840, Page 43, Chapter 12.
Bill of exceptions: signing and sealing by two attorneys. Constitutionality.
Van Buren v. State, 24 M. 512.

1840, Page 58, Chapter 21.
Mechanic's lien: operation, priority, enforcement, &c.
Richardson v. Warwick, 7 H. 131.
Andrews v. Washburn, 3 S. & M. 109.
Falconer v. Frazier, 7 S. & M. 235.
English v. Foote, 8 S. & M. 444.
Kirk v. Taliaferro, 8 S. & M. 754.
Jones v. Alexander, 10 S. & M. 627.
Hoover v. Wheeler, 23 M. 314.
Laud v. Muirhead, 31 M. 89.
Hawley v. Henderson, 34 M. 261.
Otley v. Haviland, 36 M. 19.
See Buchanan v. Smith, 43 M. 90.

1840, Pages 63, 64.
Retained to bank all corporate franchises, except banking privileges, for ten years.
Bank of Mississippi v. Duncan, 52 M. 740.

1840, Page 129, Chapter 72.
Attachment against steamboat. Remedial. Liberal construction to advance remedy. Affidavit.
Auter v. The James Jacobs, 34 M. 269.

Attachment against steamboats. In pari materia with H. C., p. 801, art. 4. Service of process by constable.
Wallace v. Seales, 36 M. 53.

1840, Page 132, Section 1.
Requires pleadings to be made up, and issues of law to be disposed of, at return term.
Wharton v. Porter, 10 S. & M. 305.

1840, Page 132.
Replication. Demurrer. Failure to apply for leave to amend. Judgment final. Practice on appeal.
Agnew v. McElroy, 10 S. & M. 552, 48 Am. Dec. 772n.

1840, Page 133, Section 3.
Granting of amendments, matter of obligation and of right.
Dent v. Coleman, 10 S. & M. 83.
Wharton v. Porter, 10 S. & M. 305.
Shields v. Taylor, 13 S. & M. 127.

1841, Page 56, Section 11.
County assessor: compensation. Unrepealed by Laws 1846, p. 69, § 10.
Holmes County v. Morton, 24 M. 240.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

1841, Page 68, Section 38.
Sale of land for taxes. Designation of particular eighth-section first offered.
Hodge v. Wilson, 12 S. & M. 498.
See Nelson v. Abernathy, 74 M. 164, 21 So. 150.

1841, Page 93.
Does not compromit rights of state as judgment creditor.
Raymond v. State, 54 M. 562, 28 Am. Rep. 382.

1841, Page 93, Chapter 9.
Liens of judgments and decrees: priority, &c.
Gresham v. Roberts, 2 S. & M. 471.

Liens of judgments and decrees. Constitutionality. Judgments of federal courts.
Tarpley v. Hamer, 9 S. & M. 310.
See Brown v. Bacon, 27 M. 589.

Lien of judgment: enrollment of latter, &c.
Huntington v. Allen, 44 M. 654.

1841, Page 112, Section 9.
Suit against state. Assistant counsel, employed by attorney general. Contract for payment of fee.
State v. Mayes, 28 M. 706.

1841, Page 113.
Head of family. Free white citizen. Exemption.
Morrison v. McDaniel, 30 M. 213.

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1841, Page 113, Chapter 15.
Homestead exemption. Delivery bond, not "contract" within meaning. Prospective in operation.
Smith v. Brown, 28 M. 810.

1841, Page 127.
Suits by lessees of sixteenth-section school lands.
Moss Point Lumber Co. v. Harrison County, 89 M. 448, 42 So. 290, 873.

1841, Page 129, Chapter 28.
Attachment against steamboat: affidavit.
Lum v. Steamboat Buckeye, 24 M. 564.
Attachment against steamboat. Extension of remedy. Affidavit.
Auter v. The James Jacobs, 34 M. 269.

1841, Page 132, Chapter 30.
Foreign authentication, &c., entitling deed to land in this state, to record here. Not retroactive in operation.
Tillman v. Cowand, 12 S. & M. 262.

1841, Page 283.
Rescission of contracts for purchase of lots in city of Jackson, &c. Applies only to cases expressly specified.
State v. Mayes, 23 M. 516.

Act of 1842.
Repealed act authorizing appeal to jury of five men.
Pollard v. Parish, 23 M. 573.

1842, Page 69, Section 11.
Slaves: testamentary emancipation.
Mahorner v. Hooe, 9 S. & M. 247.
Weathersby v. Weathersby, 13 S. & M. 685.
Read v. Manning, 30 M. 308.
Lusk v. Lewis, 32 M. 297.
Mitchell v. Wells, 37 M. 235.

1842, Page 108, Section 1.
Right of town of Aberdeen to grant liquor licenses.
Aberdeen v. Saunderson, 8 S. & M. 663.
See State Board of Education v. Aberdeen, 56 M. 518.

1842, Page 127, Section 1.
Execution. Redemption. Vendee of judgment debtor.
Watson v. Hannum, 10 S. & M. 521.

1842, Page 140.
Debtors to bank. Garnishment proceedings. Payment and satisfaction. Final judgment. "Issues of the bank."
King v. Elliott, 5 S. & M. 428.

1842, Page 141, Section 3.
Gave right to garnishees of bank to pay in issues of same.
Robson v. Benton &c. Banking Co., 7 S. & M. 724.

1842, Page 213.
County warrants: registration within one year. Repeal.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

1842, Pages 213, 214.
Action on county warrants: absence of registration is complete defense.
Taylor v. Chickasaw County, 16 So. 907.

Act of 1843.
Unauthorized banking. Quo warranto. Constitutionality. Judgment of forfeiture. Trustees.
Commercial Bank v. State, 4 S. & M. 439.
Nevitt v. Port Gibson Bank, 6 S. & M. 513.
Commercial Bank v. Chambers, 8 S. & M. 9.
State v. Commercial &c. Bank, 12 S. & M. 276.
Bacon v. Cohea, 12 S. & M. 516.
State v. Commercial Bank, 24 M. 144.
Torry v. Robertson, 24 M. 192.
Coulter v. Robertson, 24 M. 278, 57 Am. Dec. 168.
Bingaman v. Robertson, 25 M. 390.
Whitney v. Freeland, 26 N. 481.

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Fitz v. Lawson, 28 M. 790.
See Bank of Newberry v. Stegall, 41 M. 142.

Act of 1843, Sections 1, 4 (H. C., Pages 819, 820, Sections 1, 4).
Defendant's execution of forthcoming bond does not destroy attachment lien. Priority of latter.
Gray v. Perkins, 12 S. & M. 622.
See Phillips v. Hines, 33 M. 163.
Montague v. Gaddis, 37 M. 453.

Act of 1844, Section 1.
Enrollment act. Judgments and decrees of federal courts.
Brown v. Bacon, 27 M. 589.

Act of 1844, Section 1 (H. C., Page 829, Section 1).
Intended to fix period of limitation for bringing action after right of property is disturbed. Applies only to defendants.
Ellis v. Murray, 28 M. 129.

Act of 1844, Sections 1, 2 (H. C., Page 829, Sections 1, 2).
Apply to mortgages forfeited before passage, &c.
Benson v. Stewart, 30 M. 49.
Limitations. Husband and wife.
Merrit v. Doss, 31 M. 275.
Period within which ejectment may be brought extended to ten years by Laws 1854, p. 134, § 3.
Harper v. Tapley, 35 M. 506.

Act of 1844, Section 1 (H. C., Page 829, Section 1).
Limitations. Possessory actions, &c. Chancery practice.
Mitchell v. Woodson, 37 M. 567.

Act of 1844, Sections 1-14 (H. C., Page 891, Article 16).
Enrollment of judgments, &c.
Planters' Bank v. Conger, 12 S. & M. 527.

Act of 1844, Section 3 (H. C., Page 829, Section 3).
Intended to secure right of property by ten years' possession. Applies to parties suing.
Ellis v. Murray, 28 M. 129.
Shearer v. Winston, 33 M. 149.
Ford v. Wilson, 35 M. 490.
Ten years' continuous, actual, adverse possession of land under claim of ownership, vests title in occupant.
Davis v. Bowmar, 55 M. 671.

Act of 1844, Section 4 (H. C., Page 830, Section 4).
Limitation. Instant case not action of debt "founded on a contract not under seal."
Lee v. Gardiner, 26 M. 521.

Act of 1844, Section 6.
Judgment to operate as lien from enrollment on "judgment roll," &c.
Wyatt v. Beaty, 10 S. & M. 463.

Act of 1844, Section 8 (H. C., Page 830, Section 8).
Limitation. Execution. Prospective in operation.
Brown v. Wilcox, 14 S. & M. 127.
Limitation. Judgments. Executions ineffectual to save bar.
Harris v. West, 25 M. 156.
Limitation. Action of debt on judgment.
Lee v. Gardiner, 26 M. 521.
Bars bill in equity to recover amount of judgment at law, filed after expiration of seven years.
Mandevill v. Lane, 28 M. 312.

Act of 1844, Section 8.
Enrollment act. Lien of judgment does not bind property of defendant where there has been resale of same to sub- or remote purchaser.
Stevens v. Mangum, 27 M. 481.

Act of 1844, Section 9 (H. C., Page 831, Section 9).
Limitation. Suits against surety on bond of public officer. Applies exclusively to actions brought by individuals or third persons.
State v. Joiner, 23 M. 500.

Act of 1844, Section 9 (H. C., Page 892, Section 9).
Enrollment act. Priority of lien.

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Bonaffee v. Fisk, 13 S. & M. 682.
Brown v. Bacon, 27 M. 589.

Act of 1844, Section 10 (H. C., Page 831, Section 10).
Limitation. Action on account. Insufficient acknowledgment.
Westbrook v. Beverly, 11 S. & M. 419.

Act of 1844, Section 11.
Limitation of actions. Time of absence not to be computed.
Fisher v. Fisher, 43 M. 212.

Act of 1844, Section 11 (H. C., Page 892, Section 11).
Judgment, decree, &c. Enrollment. Lien. Limitation. Did not, by reason of H. C., p. 832, art. 7, repeal H. C., p. 832, § 13.
Planters' Bank v. Black, 11 S. & M. 43.

Enrollment act. Liens of judgments, decrees, &c. Limitation in favor of "purchasers" or creditors of debtor.
Fowler v. McCartney, 27 M. 509.

Act of 1844, Section 12 (H. C., Page 831, Section 12).
Limitations. Actions against executor or administrator. Prospective in operation, &c.
West Feliciana R. Co. v. Stockett, 13 S. & M. 395.
See Turner v. Ellis, 24 M. 173.

Limitation of actions. Applies only to cases in which cause of action existed against deceased.
Pope v. Bowman, 27 M. 194.

Limitation. Executor or administrator. Action, suit, or scire facias.
Branch Bank v. Windham, 31 M. 317.

Act of 1844, Section 13 (H. C., Page 832, Section 13).
Limitations. Judgment liens. Unrepealed, by reason of H. C., p. 832, art. 7, by H. C., p. 892, § 11.
Planters' Bank v. Black, 11 S. & M. 43.

Expiration of judgment liens, &c.
Emanuel v. Jones, 12 S. & M. 473.
Rupert v. Dantzler, 12 S. & M. 697.
Kilpatrick v. Byrne, 25 M. 571.

Act of 1844, Section 14 (H. C., Page 832, Section 14).
Limitations. Actions on foreign judgments obtained prior to passage of act.
McClintock v. Rogers, 12 S. & M. 702.

Death of judgment defendant extends limitation nine months.
Barringer v. Boyd, 27 M. 473.

Limitation. Action on foreign judgment or decree. Proviso.
Branch Bank v. Windham, 31 M. 317.

Act of 1844, Section 14 (H. C., Section 14).
Enrollment act: time of taking effect. Prior and subsequent judgments.
Wyatt v. Beaty, 10 S. & M. 463.

Act of 1844, Section 16 (H. C., Page 832, Section 16).
Action on account. Insufficient acknowledgment to avoid bar of limitations.
Westbrook v. Beverly, 11 S. & M 419.

Several joint debtors: promise or acknowledgment of one, ineffective to bind others.
Foute v. Bacon, 24 M. 156.
Briscoe v. Anketell, 28 M. 361, 61 Am. Rep. 553.

Act of 1844, Section 18 (H. C., Page 832, Section 18).
Limitations established by Act of February 24, 1844, to commence running from date of passage of same. Proviso.
Branch Bank v. Windham, 31 M. 317.
See Brown v. Wilcox, 14 S. & M. 127.

1844, Chapter 15 (H. C., Page 820).
Extends remedy by attachment and garnishment. Lien not established by appearance of defendant. Affidavit.
Wharton v. Conger, 9 S. & M. 510.

1844, Page 97.
Does not compromit rights of state as judgment creditor.
Raymond v. State, 54 M. 562.

1844, Page 179.
Cited in argument.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

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Act of 1846 (H. C., Page 501).
Legitimate daughter cannot inherit from her father's illegitimate son.
Irvine v. Newlin, 63 M. 192.

Act of 1846, Section 4 (H. C., Page 501, Section 4).
Illegitimate children: right to inherit.
Edwards v. Gaulding, 38 M. 118.

Act of March 3, 1846.
Expressly confined to civil suits in circuit courts. Indorsed instructions part of record without bill of exceptions.
Haynie v. State, 32 M. 400.

1846, Page 69, Section 10.
Compensation of county assessor. Did not repeal Laws 1841, p. 56, § 11.
Holmes County v. Morton, 24 M. 240.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

1846, Page 76.
Cited in argument.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

1846, Page 77, Section 27.
Does not expressly repeal H. C., p. 172, § 15, as to time allowed persons under disabilities to redeem land sold for taxes.
Richards v. Patterson, 30 M. 583.

1846, Page 93, Sections 60, 61.
Rule for taxation of bank stock.
Bank of Oxford v. Oxford, 70 M. 504, 12 So. 203.

1846, Page 100, Section 7.
Charter right of town of Aberdeen to grant liquor licenses.
Aberdeen v. Saunderson, 8 S. & M. 663.

1846, Page 118, Chapter 9.
Amendatory, H. C., p. 329, art. 22. Unconstitutional and void.
Commercial Bank v. Chambers, 8 S. & M. 9.
Bingaman v. Robertson, 25 M. 390.

1846, Page 125, Section 1.
Written charges and modifications: right of jury to take same to consultation room.
Keithler v. State, 10 S. & M. 192.

Indorsed instructions, part of record.
Van Buren v. State, 24 M. 512.

1846, Page 145, Section 2.
Decrees of probate court: enforcement.
Vertner v. Martin, 10 S. & M. 103.

Fieri facias to enforce judgment or decree of probate court. Prospective in operation.
Caruth v. Anderson, 24 M. 60.

1846, Page 146, Section 3.
Probate court. Bill of review to open and falsify account of executor, &c. Constitutionality.
McCullom v. Box, 8 S. & M. 619.

Bills of review in probate court. Prospective in operation.
Stewart v. Davidson, 10 S. & M. 351.
Hooker v. Hooker, 10 S. & M. 599.
Pendleton v. Prestridge, 12 S. & M. 302.
Austin v. Lamar, 23 M. 189.
Hardy v. Gholson, 26 M. 70.

Bill of review maintainable within two years, for error unapparent on face of account, and without showing discovery of new matter.
Gadberry v. Perry, 27 M. 119.

Probate court. Bills of review. Interlocutory decrees.
West Feliciana R. Co. v. Stockett, 27 M. 739.

1846, Page 147, Section 5.
Not intended to change principles of H. C., p. 671, § 115, but only period of time within which claims must be presented. Presumption.
Robertson v. Demoss, 23 M. 298.

Does not embrace administrations granted previous to passage. Non-resident creditor.
Wilkinson v. Barringer, 23 M. 319.

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Probate of claim not condition precedent to suit against executor or administrator.
Rawlins v. Poindexter, 26 M. 654.
Branch Bank v. Rhew, 37 M. 110.

1846, Page 150, Section 13.

Order of probate court awarding publication of citation against non-resident distributee. Affidavit.
Cason v. Cason, 31 M. 578.

1846, Page 152, Section 4.

Married woman may contract jointly with husband, &c. "Acknowledgment." Bill of sale of slave, executed by infant feme covert.
Cason v. Hubbard, 38 M. 35.

1846, Page 152, Chapter 13 (See H. C., Page 498, Article 7).

Note given by wife for horse. Proof required of plaintiff.
Robertson v. Ward, 12 S. & M. 490.

Married woman. Contract with mechanic to build or repair house on separate estate.
Self v. Howland, 23 M. 264.

Married woman. Separate estate. Descent to children of first and second marriages. Impairment of vested right.
Marshall v. King, 24 M. 85.
See Bates v. Cotton, 32 M. 266.

Promissory note, payable directly to wife, prima facie her separate property. Suit for recovery should be in joint name of husband and wife.
Bodgett v. Ebbing, 24 M. 245.

Married women. Contracts, &c. Not retroactive in operation.
McKee v. Kent, 24 M. 131.
Swett v. Penrice, 24 M. 416.
See Carter v. Carter, 14 S. & M. 59.

Wife. Realty inherited from father. Rights of surviving husband as to separate estate.
Rabb v. Griffin, 26 M. 579.

Trover by husband to recover slave held by wife, dying without issue.
Varner v. Gregg, 26 M. 590.

Married woman. Failure to record schedule of separate estate does not work forfeiture of property.
Wells v. Treadwell, 28 M. 717.

Wife. Separate estate. Slaves. Interest and rights of husband, &c.
Walton v. Olive, 29 M. 270.
See Lyon v. Knott, 26 M. 548.

Enabling act. Femes covert: contracts. Conflict of laws.
Dalton v. Murphy, 30 M. 59.

Enabling act. Feme covert. Disposition of separate estate. Right to make will.
Lee v. Bennett, 31 M. 119.

Wife. Separate estate. Descent.
Olive v. Walton, 33 M. 103.
Richmond v. Delay, 34 M. 83.

Promissory note payable to husband and wife executed before date of this act but after passage of Laws 1839, p. 72, ch. 46. Presumption. Indorsement.
Work v. Glaskins, 33 M. 539.

Slaves of wife: sale.
Clark v. Slaughter, 34 M. 65.

Married woman. Separate estate. Injurious agreements with husband. Presumption.
Allen v. Miles, 36 M. 640.
Burks v. Loggins, 39 M. 462.

Enabling act. Feme covert subject to common law disabilities except as to class and subjects of contracts enumerated, &c.
Whitworth v. Carter, 43 M. 61.
Dunbar v. Meyer &c. Co., 43 M. 679.

1846, Page 152, Chapter 13, Section 2.

Married woman. Realty, acquired by descent. Rents, issues, and profits.
Robinson v. Payne, 58 M. 690.

1846, Page 153, Section 6.

Realty and personalty of wife: rights of surviving husband.
Rabb v. Griffin, 26 M. 579.

1846, Page 159, Chapter 17.

Saved H. C., p. 832, § 13, as to limitations upon judgment liens, from repeal by H. C., p. 892, § 11.
Planters' Bank v. Black, 11 S. & M. 43.

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1846, Page 191, Chapter 30.
Bail in criminal cases. Does not refer to commitments under process issued from circuit court.
State v. Brown, 32 M. 275.

1846, Page 207.
Plaintiff in unlawful detainer is not entitled to recover rent, unless he has demanded it in his complaint.
Johnson v. Tuggle, 27 M. 836.

1846, Page 226.
Does not impliedly repeal Laws 1842, p. 213.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

1846, Page 228, Chapter 57, Section 1.
Widow to hold exempt personalty of husband free from execution.
Lowry v. Herbert, 25 M. 101.
Widow "shall be allowed and entitled" to deceased husband's exempt personal estate: testamentary disposition.
Turner v. Turner, 30 M. 428.

1846, Page 231, Chapter 60.
Legitimate children of bastard, dying prior to act, cannot inherit from illegitimate uncle or aunt, dying subsequently to same.
Edwards v. Gaulding, 38 M. 118.

1846, Page 233, Chapter 62.
Limitation of actions. Foreign judgment.
Clements v. Brown, 31 M. 93.

1846, Page 233, Chapter 62, Section 1.
Limitations. Foreign judgment. Resident creditor. Prospective in operation.
Boyd v. Barringer, 23 M. 269.
Garrett v. Beaumont, 24 M. 377.

1846, Page 238, Section 1.
Mesne profits unrecoverable in ejectment.
Davis v. Delpit, 25 M. 445.

1846, Page 239, Section 3.
Ejectment. Allowance for improvements. Judgment. Practice, &c.
Abbey v. Merrick, 27 M. 320.

1846, Page 240, Section 6.
Ejectment: notice of intention to claim allowance for improvements, &c.
Abbey v. Merrick, 27 M. 320.

1846, Page 415, Chapter 145.
Hancock county. County seat. Constitutionality.
Monet v. Jones, 10 S. & M. 237.

Act of March 3, 1848.
Non-resident creditors may attach non-resident debtors.
Barrow v. Burbridge, 41 M. 622.

1848, Page 136, Chapter 34.
Sinking fund in treasury appropriated to payment of Planters' Bank bonds.
Swann v. Wilson, 24 M. 471.

1848, Page 147, Chapter 43.
Amendatory of H. C., p. 801, art. 4. Foreign attachments. Jurisdiction of chancery court.
Freeman v. Guion, 11 S. & M. 58.

1848, Page 148.
Publication in chancery generally. Applies to suits for divorce. Repeals H. C., p. 496, § 10.
Plummer v. Plummer, 37 M. 185.

1848, Page 151, Chapter 45.
Prohibits sale of liquors within five miles of state university, &c. Indictment. Defense. Representation of purchaser. Instructions.
Haynie v. State, 32 M. 400.
McGuire v. State, 37 M. 369.
See Riley v. State, 43 M. 397.

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1848, Page 157, Section 3.

Distributee residing in county where estate is administered, is entitled to personal service of notice of final settlement.

Roberts v. Roberts, 34 M. 322.

1848, Page 187, Section 6.

Notes to be filed before they become due. Presumption of payment. Execution quashable on motion.

Matthews v. Parker, 27 M. 642.

1848, Page 447, Chapter 255.

Devotes revenue arising from liquor licenses, granted by town of Aberdeen, appropriable under Laws 1837, p. 205, to municipal purposes, to Aberdeen Female Academy. Constitutionality.

Aberdeen Female Academy v. Aberdeen, 13 S. & M. 645.

See Bobo v. Board of Levee Commissioners for Yazoo-Mississippi Delta, 92 M. 792, 46 So. 819.

1850, Page 28.

Repealed as to absolute deed by tax collector to land sold for levee taxes, by Laws 1854, p. 114.

Morris v. Henderson, 37 M. 492.

1850, Page 45, Section 7.

Compensation of assessor.

Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

1850, Page 50.

Prescribes forfeiture of land for non-payment of taxes. To be strictly construed.

Hopkins v. Sandidge, 31 M. 668.

So much as provides for forfeiture on failure to pay taxes due violates Const. 1832, art. 1, §§ 10, 13.

Griffin v. Mixon, 38 M. 424.

1850, Page 57.

Party is not bound by issue made up at appearance term but may without cost "amend" pleadings at second term, &c.

Morrison v. Gaillard, 25 M. 194.

Common-law forms of pleading abolished, &c.

Brantley v. Carter, 26 M. 282.

Pleading. Demurrer. Amendment of course, without cost. Original or amended answer at third term of court, discretionary, unless, &c.

Lewis v. Block, 27 M. 425.

Action in nature of writ of right. Fundamental common-law rules. Proof required of demandant. Plea by defendant of statute of limitations, not required.

Ellis v. Murray, 28 M. 129.

Pleadings in actions at law.

Mandevill v. Lane, 28 M. 312.

Pleading act. Common-law form of, but not ejectment for recovery of land itself, abolished.

Cooper v. Benson, 28 M. 766.

Allegations of complaint, undenied by answer, are to be taken as true.

Adams v. Guice, 30 M. 397.

Every material allegation of new matter in answer, not specifically controverted by reply, to be taken as true: applies only to new matter proper for plea of confession and avoidance.

Houston v. Crutcher, 31 M. 51.

Tenants in common may sue in ejectment, jointly.

Corbin v. Cannon, 31 M. 570.

Rents and mesne profits recoverable in action of ejectment.

Garner v. Jones, 34 M. 505.

Pleading act. Allegation in answer not denied, to be taken as admitted.

Shewalter v. Brown, 35 M. 423.

Pleading act. Declaration. Judgment.

Brewer v. Beckwith, 35 M. 467.

Pleading act. Joinder in demurrer unnecessary.

Hawkins v. Mississippi &c. R. Co., 35 M. 688.

Pleading act. Statute of limitations may be specially pleaded to action of ejectment.

Tegarden v. Carpenter, 36 M. 404.

Right of defendant to file additional pleas, &c.

Rowland v. Dalton, 36 M. 702.

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Error or defect in pleadings or proceedings not affecting substantial rights of adverse party, to be disregarded on trial and appeal.
Root v. McFerrin, 37 M. 17.

Pleading act. Plea in bar admits character in which plaintiff sues.
Branch Bank v. Rhew, 37 M. 110.

Pleading act. Rights of real parties plaintiff. Technical rules of common law.
Pearson v. McMillan, 37 M. 588.

1850, Page 59, Section 5.
Prevents all objection to replication on ground of duplicity.
Joslin v. Caughlin, 32 M. 104.

1850, Page 59, Section 6.
Circuit clerk cannot take affidavit to complaint filed in his office.
Ayres v. Taylor, 25 M. 200.

1850, Page 60, Section 6.
Requires verified copy of account to be filed with declaration; otherwise plaintiff is "precluded from giving evidence thereof."
Brantley v. Carter, 26 M. 282.

1850, Page 100, Chapter 31.
Indictment for sale of liquor to slave: proof, &c.
Murphy v. State, 24 M. 590, 1 Mor. St. Cas. 618.
Garrard v. State, 25 M. 469.
Murphy v. State, 28 M. 637, 1 Mor. St. Cas. 765.

1850, Pages 115, 116, Sections 1, 5.
Compensation of grand and petit jurors.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

1850, Page 133, Chapter 69.
Lease of sixteenth section. Madison county.
Jones v. Madison County, 72 M. 777, 18 So. 87.
See Lauderdale County v. East Miss. Mills, 18 So. 94.

1850, Page 214.
Levee scrip. Issaquena county.
Anderson v. Issaquena County, 75 M. 873, 23 So. 310.

1850, Page 218.
Coahoma county. Levee commissioner, civil officer within meaning of Const. 1832, art. 3, § 26.
Shelby v. Alcorn, 36 M. 273, 72 Am. Dec. 169n.

1850, Page 236.
Distinctly recognized, as being then in force, Laws 1842, p. 213, making registration of county warrants essential to legal validity.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

1850, Page 237.
Cited in argument.
Taylor v. Chickasaw County, 74 M. 23, 19 So. 834.

1852, Page 30, Chapter 9.
Charter of Mississippi &c. R. Co. Amended, Laws 1856, p. 323, ch. 122.
Hawkins v. Mississippi &c. R. Co., 35 M. 688.

1852, Page 33.
Swamp land commissioner. Bond. Scrip issued under Laws 1854, p. 81, § 12.
Thompson v. State, 37 M. 518.

1852, Pages 33, 41, Chapters 14, 16.
Swamp lands. Location of scrip. Patent.
Jackson v. Dilworth, 39 M. 772.
Clements v. Anderson, 46 M. 581.

1852, Page 66, Chapter 36.
Debts, of husband and father dying after passage, antedating October 20, 1852, unenforceable against exempt estate.
Morrison v. McDaniel, 30 M. 213.

Deceased husband's exempt property, real and personal. Marriage of widow.
Carpenter v. Brownlee, 38 M. 200.

1852, Page 66.
Homestead exemption continued to widow and children, "upon the death of the husband, dying intestate."

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Johnson v. Cooper, 56 M. 608.
Homestead exemption: effect of adoption of Code 1857.
Washburn v. Blundell, 75 M. 266, 22 So. 946.

1852, Page 86, Chapter 56.
Limitation of actions. Executor or administrator. Absence from state.
French v. Davis, 38 M. 218.
See Fisher v. Fisher, 43 M. 212.

1852, Page 91.
Three per cent. fund: right of counties. Effect of act of November 18, 1857.
McAfee v. Southern R. Co., 36 M. 669.

1852, Pages 94, 95.
Granted to Warren county swamp and overflowed lands, &c. Not void for uncertainty of description. Right of selection.
Warren County v. Nall, 78 M. 726, 29 So. 755.

1852, Page 320, Chapter 197, Section 2.
Husband's exempt personalty "shall descend to the widow": testamentary disposition.
Turner v. Turner, 30 M. 428.

1852, Page 375.
Incorporates Board of Trustees for Collegiate High School of I. O. O. F., in Columbus: right to become lessee, covenant in lease, &c.
Abby v. Billups, 35 M. 618.

Act of 1854, Section 5.
City of Columbus cannot issue bonds in aid of railroad.
Sykes v. Columbus, 55 M. 115.

Act of March 2, 1854.
Void. Did not abrogate Const. 1832, art. 4, § 16.
Green v. Weller, 32 M. 650.

1854, Page 65, Chapter 2, Section 1.
Administrator's application to sell land. Non-resident heir. Publication. Repeals H. C., p. 667, § 100.
Sellers v. Talby, 33 M. 582.

1854, Page 65.
Probate court. Decree for sale of land. Petition of guardian. Wards not cited.
Rule v. Broach, 58 M. 552.

1854, Page 69, Chapter 2, Section 14.
Foreign guardian: compliance with this section subsequently to filing suit.
Grist v. Forehand, 36 M. 69.

1854, Page 81, Section 12.
Scrip. Bond of swamp land commissioner appointed in pursuance of Laws 1852, p. 33.
Thompson v. State, 37 M. 518.

1854, Page 89, Section 4.
Attachment. "Absconding debtor." Steamboat. Service of process by constable.
Wallace v. Seales, 36 M. 53.

1854, Page 114.
Repealed Laws 1850, p. 28, as to absolute deed by tax collector to land sold for levee taxes.
Morris v. Henderson, 37 M. 492.

1854, Page 126.
Does not abridge jurisdiction of circuit court over capital crimes committed by slaves: preliminary examination provided may be omitted.
Jordan v. State, 32 M. 382, 1 Mor. St. Cas. 928.

1854, Page 134, Section 3.
Period for bringing ejectment prescribed by H. C., p. 829, art. 6, §§ 1, 2, extended to ten years.
Harper v. Tapley, 35 M. 506.

1854, Page 134.
Limitation of actions. Right of entry into lands barred after ten years. Deed of trust.
Green v. Gaston, 56 M. 748.

1854, Page 186.
Coahoma county. Levee commissioner, civil officer within meaning of Const. 1832, art. 3, § 26.
Shelby v. Alcorn, 36 M. 273, 72 Am. Dec. 169n.

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1854, Page 224.
Town of Aberdeen. Charter: supersedes all former charters and amendments. Proceeds of liquor licenses.
State Board of Education v. Aberdeen, 56 M. 518.

1854, Page 456, Chapter 331.
Lauderdale county. Sale of school lands under this act, invalid.
Lauderdale County v. East Miss. Mills Co., 16 So. 210.

1854, Page 478, Section 13.
Tishomingo county. School fund. Board of supervisors: power conferred by implication.
Gaines v. Faris, 39 M. 403.

1854, Page 499, Section 14.
Shieldsborough: act of incorporation. Exclusive franchise to keep public wharf: revocation.
Martin v. O'Brien, 34 M. 21.

1854, Page 516, Section 15.
Exempts property of railroad companies from municipal, as well as state and county taxes.
Southern R. Co. v. Jackson, 38 M. 334.

1854, Page 516.
Taxation. Exemption: abandonment.
Mobile &c. R. Co. v. Moseley, 52 M. 127.

1856, Page 85, Section 12.
Counties in Chickasaw cession. School funds. Boards of supervisors: power conferred by implication.
Gaines v. Faris, 39 M. 403.

1856, Page 323, Chapter 122.
Amendatory, charter of Mississippi &c. R. Co., Laws 1852, p. 30, ch. 9.
Hawkins v. Mississippi &c. R. Co., 35 M. 688.

1856–1857, Page 36.
Tax on sale of slaves, mules, &c.
Shewalter & Co. v. Brown, 35 M. 423.
Read v. Beall, 42 M. 472.

1856–1857, Page 105.
Southern R. Co.: power to issue bonds and execute mortgages.
McAllister v. Plant, 54 M. 106.

Act of 1857.
Tax on circulation of foreign banks: object.
Bank of Newberry v. Stegall, 41 M. 142.

Act of November 18, 1857.
Effect upon right of counties to three per cent. fund under Laws 1852, p. 91.
McAfee v. Southern R. Co., 36 M. 669.

1857, Pages 35, 36.
Traders in slaves, &c., are liable for county levies on amount of sales: assessment condition precedent to collection.
Shewalter & Co. v. Brown, 35 M. 423.

1857, Page 87.
Levee scrip. Issaquena county.
Anderson v. Issaquena County, 75 M. 873, 23 So. 310.

1857, Page 106.
Process. Publication by posting: showing prerequisite to order. General presumption.
Foster v. Simmons, 40 M. 585.

Act of 1858.
Court of chancery, appointing receiver, may grant relief to person damaged by breach of his bond.
Bank of Mississippi v. Duncan, 52 M. 740.

Act of December 3, 1858.
Remedial as to evils occasioned by burning of Attala courthouse.
Nash v. Fletcher, 44 M. 609.

1858, Page 32.
Taxation. Lands outside of levee.
Owens v. Yazoo &c. R. Co., 74 M. 821, 21 So. 244.

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1858, Page 33.

"An act to aid in repairing and perfecting the levee" in counties of, &c., is constitutional.

Alcorn v. Hamer, 38 M. 652.

Land sold for levee taxes. Right of delinquent to redeem.
Heard v. Walton, 39 M. 388.

Chancery pleading. Levee tax. Bill to confirm tax title.
Belcher v. Mhoon, 47 M. 613.
See Beirne v. Burdett, 52 M. 795.

Levee tax sales. Infants. Redemption. Improvements. Rents.
Baird v. McNamara, 78 M. 455, 30 So. 69.

1858, Page 37.

Sale for levee taxes. Quantity of land to be sold.
Vasser v. George, 47 M. 713.

1858, Pages 49, 50.

Our courts, without jurisdiction of crimes on Ship island or within 1,760 yards from low water mark thereon.
State v. Seymour, 78 M. 134, 28 So. 799.

1858, Page 54.

Divides Hinds county into two court districts: non-violative of Const. 1832, art. 1, § 10.
Alfred v. State, 37 M. 296.

Divides Hinds county into two judicial districts. Holding in Alfred v. State, 37 M. 296, condensed but not overruled.
Lindsley v. Coahoma County, 69 M. 815, 11 So. 336.

1858, Page 178, Chapter 96.

Amendatory, Code 1857, p. 22. Neither appeal nor writ of error can be taken from county court by accused found guilty of crime by jury.
Dawkins v. State, 42 M. 632, 2 Mor. St. Cas. 1574.

1858, Page 187.

Failure to require bond of administrator invalidates subsequent sale to pay debts.
Hamilton v. Lockhart, 41 M. 460.
See Rucker v. Dyer, 44 M. 591.
Yerger v. Ferguson, 55 M. 190.

Estate of deceased. Sale of lands to pay debts. Bond of executor.
Buckner v. Wood, 45 M. 57.

1859–1860, Page 128.

Contract in aid of Confederacy: purchase of arms by state.
Whitney v. State, 52 M. 732.

1859–1860, Page 213.

Tax titles. Constitutional law. Chancery jurisdiction.
Belcher v. Mhoon, 47 M. 613.
See Beirne v. Burdett, 52 M. 795.

Tax title. Duty of officers. Confirmation. Pleadings. Parties.
Griffin v. Dogan, 48 M. 11.
Meeks v. Whatley, 48 M. 337.

Bill to confirm tax title: defenses.
Bell v. Coates, 54 M. 538.
See Boyle v. Manion, 22 So. 947.

Tax title. Evidence. Presumption.
Hardee v. Chrisman, 60 M. 671.

Effect on tax title of lapse of five years.
Metcalfe v. Perry, 66 M. 68, 5 So. 232.
Sigman v. Lundy, 66 M. 522, 6 So. 245.
Paxton v. Valley Land Co., 68 M. 739, 10 So. 77.

Tax title. Curative statute. Five years' limitation.
Ricks v. Baskett, 68 M. 250, 8 So. 514.

Tax title. Lapse of five years: curative effect.
Bennett v. Chaffe, 69 M. 279, 13 So. 731.
Carlisle v. Yoder, 69 M. 384, 12 So. 255.

1859–1860, Page 390.

Gave to Bank of Mississippi right to sue to collect "debts and choses in action due to it." Scire facias on bond of receiver.
Bank of Mississippi v. Duncan, 56 M. 166.
See Bank of Mississippi v. Duncan, 52 M. 740.

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1859–1860, Page 412.
Amended, Laws 1871, p. 180. Municipal bonds in aid of railroad. Date of payment. Purchaser for value. Recital. Want of power.
Woodruff v. Okolona, 57 M. 806.

1859–1860, Page 414.
Deed of trust. Title to revest in grantor upon entry of satisfaction, &c. Proof of payment: effect.
Heard v. Baird, 40 M. 793.

1859–1860, Page 434.
Levee scrip. Issaquena county.
Anderson v. Issaquena County, 75 M. 873, 23 So. 310.

1859–1860, Page 490, Chapter 371.
Relief from evils occasioned by burning of Attala courthouse. "Bona fide" purchaser. Constitutionality, &c.
Nash v. Fletcher, 44 M. 609.

1859–1860, Page 535.
Construction of statutes. Transfer of part of Tallahatchie county to Sunflower county. Sale for taxes.
Eskridge v. Magruder, 45 M. 294.

1860, Page 202.
Separation of husband and wife. Divorce from bonds. Retrospective. Non-violative of Const. 1832, art. 1, § 19.
Carson v. Carson, 40 M. 349.

1860, Page 203.
Constable executing attachment returnable to circuit court cannot make return. Judgment by default on constable's return erroneous.
Tucker v. Byars, 46 M. 549.

1860, Page 213.
Applies to levee tax titles. "District."
Belcher v. Mhoon, 47 M. 613.
Title to lands sold to levee board for taxes. Curative statute.
Woodruff v. State, 77 M. 68, 25 So. 483.

1860, Page 304.
Jackson. Amendment of charter, self-executing.
Chrisman v. Jackson, 84 M. 787, 37 So. 1015.

1860, Page 375.
Exempt personalty. Widow. Separate property. Children. Appraisers. Amendatory of Code 1857, p. 469, art. 172.
Wally v. Wally, 41 M. 657.
Hardin v. Osborne, 43 M. 532.
See Holliday v. Holland, 41 M. 528.
Mason v. O'Brien, 42 M. 420.
Thoms v. Thoms, 45 M. 263.

1860, Pages 412, 413–14.
Incorporation of Grenada &c. R. Co. Subscription to stock by four counties. Tax receipts convertible into stock certificates. Duties of sheriffs.
Musgrove v. Vicksburg &c. R. Co., 50 M. 677.

Federal Act of July 29, 1861 (Rev. Stat. U. S., Section 788).
United States deputy marshal: right to carry concealed weapons.
State v. Williams, 72 M. 992, 18 So. 486.

Act Approved August 2, 1861.
Void. Accountability of guardian for money of ward invested in Confederate bonds.
Bailey v. Fitz-Gerald, 56 M. 578.
Fitz-Gerald v. Bailey, 58 M. 658.

1861 (January), Page 37, Chapter 11.
Suits against Southern soldiers, penalized. Constitutionality.
State v. McGinty, 41 M. 435, 93 Am. Dec. 264.

1861–1862, Page 235.
Statute of limitations: suspension during war.
Hill v. Boyland, 40 M. 618.
Woods v. Elliott, 49 M. 168.
See Buchanan v. Smith, 43 M. 90.

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1862, Page 133.
Amendatory of law of criminal evidence. Severance. Repealed by Laws 1871, pp. 87, 88.
Greer v. State, 54 M. 378.

1862, Page 264.
Does not apply to publication in chancery.
Foster v. Simmons, 40 M. 585.
Process. Order of publication. Affidavit of applicant. Direction to clerk to mail copy.
Ingersoll v. Ingersoll, 42 M. 155.
Winston v. McLendon, 43 M. 254.
Attachment. Publication. Notice.
Hinds v. Miller, 52 M. 845.

1862-1863, Page 78.
Limitations: suspension of statute.
Griffin v. Mills, 40 M. 611.
Hill v. Boyland, 40 M. 618.
Mister v. McLean, 43 M. 268.
McCutchen v. Dougherty, 44 M. 419.
Dixon v. Cook, 47 M. 220.
Lawson v. Jeffries, 47 M. 686.
Clopton v. Matheny, 48 M. 285.
See Buchanan v. Smith, 43 M. 90.
Buckingham v. Walker, 48 M. 609.

1863, Page 111.
Amendatory, Code 1857, pp. 80, 81, arts. 36, 39. Tax title. Sale to state. Lodgment of deed with clerk. Acknowledgment, &c.
Edmondson v. Granberry, 73 M. 723, 19 So. 676.
Sale to state for taxes, made on wrong day, absolutely void.
McLemore v. Anderson, 92 M. 42, 43 So. 878.
See Hardie v. Chrisman, 60 M. 671.

1863, Page 129.
Special court to try replevin: trial anew on merits on appeal, &c.
Porter v. Fooshee, 41 M. 337.
Special court to try replevin: time for appeal, &c. Code 1857, p. 409, art. 23, relative to appeals, has no application to this act.
Bloom v. Price, 44 M. 73.

1863, Page 142, Chapter 25.
Trust deed: destruction of book in which recorded. Lien. Notice.
Myers v. Buchanan, 46 M. 397.

1863, Page 146.
Common carrier: liability for loss of goods. Repealed by Code 1871.
Mobile &c. R. Co. v. Weiner, 49 M. 725.

1863, Page 160, Chapter 42.
Railroad companies: payment of borrowed moneys. Void.
Mississippi Cent. R. Co. v. State, 46 M. 157.

1864-1865, Page 137.
Exemption laws: amendment. Power of legislature.
Stephenson v. Osborne, 41 M. 119.

Act 1865, Section 24.
Neither writ of error nor appeal lies from county court to High Court.
Davis v. Wingfield, 42 M. 251.

Act of November 22, 1865.
Probate court: apprenticing freed minor. Notice. Guardian ad litem.
Jack v. Thompson, 41 M. 49.

Act Approved December 2, 1865. (Omitted from Published Laws.)
Treasurer to pay all auditor's warrants issued by authority of legislature, &c. Effective after passage.
Swann v. Buck, 40 M. 268.

1865, Page 51.
Eminent domain. Levee law. Defective proceedings.
Levee Commissioners v. Allen, 60 M. 93.
See Louisville &c. R. Co. v. Buford, 73 M. 494, 19 So. 584.

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Amended, Laws 1884, p. 163. Lands, conveyed by mortgagor, for levee purposes. Suit for damages by vendee of foreclosure purchaser.
Miller v. Board of Levee Commissioners, 78 M. 201, 28 So. 834.

1865, Page 62, Section 17.
Eminent domain. Jury of inquest. Certiorari.
Allen v. Levee Commissioners, 57 M. 163.

1865, Page 73, Section 14.
County court. Waiver of jury by defendant. Judgment on jury's verdict, final. Writ of error to circuit court.
Dawkins v. State, 42 M. 631, 2 Mor. St. Cas. 1574.

1865, Page 75, Section 19.
Appeal by criminal convicted by jury in county court.
Dawkins v. State, 42 M. 631, 2 Mor. St. Cas. 1574.

1865, Page 78, Section 24.
Appeal from county court. Trial in circuit court, on record sent up.
Lyles v. Barnes, 40 M. 608.

1865, Page 82.
Slave marriages.
Andrews v. Simmons, 68 M. 732, 10 So. 65.
Reed v. Mosely, 76 M. 1, 23 So. 451.
Haines v. Haines, 90 M. 100, 43 So. 465.

1865, Page 137.
Homestead exemption. Ownership of husband. Descent.
Thoms v. Thoms, 45 M. 263.

Exempt property: allotment under execution.
Perry v. Lewis, 49 M. 443.

Homestead exemption. Occupancy. Abandonment. Increased exemption. Pre-existing debts. Constitutionality.
Pennington v. Seal, 49 M. 518.

Obligations of contracts. Homestead exemption: right of state to increase.
Lessley v. Phipps, 49 M. 790.

Homestead. Married woman. Head of family.
Partee v. Stewart, 50 M. 717.
See Hand v. Winn, 52 M. 784.

Descent of homestead. Interest of children vendible by probate court.
Morton v. McCanless, 68 M. 810, 10 So. 72.

Homestead exemption: widow's right.
Birmingham v. Birmingham, 53 M. 610.

Homestead exemption. Death of debtor. Reversion subject to sale.
Acker v. Trueland, 56 M. 30.

1865, Page 138.
Descent of exempt property on death of husband: widow.
Grafton v. Smith, 66 M. 408, 6 So. 209.

1865, Page 138, Section 3.
Deceased husband's exempt property, real and personal. Widow and children. Marriage or death of former.
Hardin v. Osborne, 43 M. 532.

1865, Page 140.
Executor or administrator. Hiring of labor to cultivate existing farm. Lease. Conversion of waste or wild lands into plantations.
Murphy v. Thomas, 41 M. 429.

Homestead. Dower.
Smith v. Wells, 46 M. 64.

1865, Page 142.
Depreciated money: administrator chargeable only with actual value of unused amount on hand.
Williams v. Williams, 43 M. 430.

1865, Page 157, Chapter 17.
Incorporated cities and towns: authority to issue liquor licenses, &c. Liability of licensees for state and county taxes, &c.
Read v. Beall, 42 M. 472.
See Licks v. State, 42 M. 316, 2 Mor. St. Cas. 1546.

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1865, Page 161.
Chickasaw school fund: control by board.
Vernon v. Board of Police of Tippah County, 47 M. 181.

1865, Page 176, Chapter 34.
Auditor to issue warrants for legal claims accruing from October 16, 1865. Effective after passage.
Swann v. Buck, 40 M. 268.

1865, Page 222.
Tax on liquor licenses. Constitutionality.
Read v. Beall, 42 M. 472.

State tax on county or municipal license to retail spirituous, vinous or malt liquors. County taxes. Constitutionality.
Coulson v. Harris, 43 M. 728.

1865, Page 248.
Past claims against state: auditor not to issue warrants without special authority from legislature.
Whitney v. State, 52 M. 732.

1865, Page 249, Chapter 92.
Treasurer not to pay out moneys, &c., until further orders.
Swann v. Buck, 40 M. 268.
See Whitney v. State, 52 M. 732.

1865, Page 252, Chapter 98.
Directs auditor of public accounts to issue no more warrants for payment of money until further orders. Salary of state officer. Constitutionality.
Swann v. Buck, 40 M. 268.
See Whitney v. State, 52 M. 732.

1865, Page 256, Chapter 105.
Treasurer to receive public moneys in hands of provisional government.
Swann v. Buck, 40 M. 268.

Act of February 21, 1867.
Divides state into four districts. Terms of High Court. Deputy clerks, &c. Constitutionality.
Mobile &c. R. Co. v. Mattan, 41 M. 692.

1867, Page 221, Section 1.
Homestead. Sale for reinvestment: proceeds exempt for twelve months.
Thoms v. Thoms, 45 M. 263.

1867, Page 221.
Homestead exemption. Rights of vendee of exemptionist. Application of purchase money.
Parker v. Dean, 45 M. 408.

Homestead. Sale: provisional one-year immunity of purchase money.
State National Bank of Louisiana v. Lyons, 52 M. 181.

1867, Page 222, Section 3.
Homestead: abandonment made necessary by havoc of war, &c.
Campbell v. Adair, 45 M. 170.

1867, Page 237.
Levee bonds. Contract. Constitutional law.
Gibbs v. Green, 54 M. 592.
Bunch v. Wolerstein, 62 M. 56.
See Woodruff v. State, 77 M. 68, 25 So. 483.

Tax title. Liquidating levee board. Void sale.
Mayer v. Peebles, 58 M. 628.
See Louisville &c. R. Co. v. Buford, 73 M. 494, 19 So. 584.

Sale for levee taxes made on first Monday in May, will not pass title.
Davis v. Schmidt, 68 M. 736, 10 So. 64.

Levee taxes: when first payable.
Carlisle v. Yoder, 69 M. 384, 12 So. 255.

Taxation. Lands outside levee.
Owens v. Yazoo &c. R. Co., 74 M. 821, 21 So. 244.

1867, Page 241.
Levee scrip. Issaquena county.
Anderson v. Issaquena County, 75 M. 873, 23 So. 310.

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1867, Page 332, Sections 4, 6, 7.
New Orleans, &c. R. Co.: charter. Condemnation of land: notice to parties in interest. Injunction.
New Orleans &c. R. Co. v. Frederic, 46 M. 1.

1867, Page 349, Chapter 256.
Charters Mississippi Agricultural &c. Aid Society to conduct lottery, &c. Constitutionality.
Moore v. State, 48 M. 147, 12 Am. Rep. 367.

1867, Page 373, Chapter 282.
Changes rules of evidence in certain cases. "Confederate money." Non-violative of Const. 1832, art. 1, § 19.
Cowan v. McCutchen, 43 M. 207.

1867, Page 373.
Contract. Confederate money. Rule of evidence.
Darcey v. Shotwell, 49 M. 631.
Contract to pay "dollars and cents." Confederate money.
Rogers v. Tullos, 51 M. 685.

1867, Page 407.
Probate court. Practice. Issuance of process.
Yerger v. Ferguson, 55 M. 190.

1867, Page 430.
Does not confer administration upon "county administrator."
Sandifer v. Mackey, 3 So. 570.

1867, Page 526.
Probate jurisdiction. Specific performance of contract.
Mitchell v. Shell, 49 M. 118.

1867, Page 569.
Agricultural lien. Validity as against execution of prior judgment. Jurisdiction of equity, &c.
Howard v. Simmons, 43 M. 75.
Agricultural lien. Writing: when necessary.
Bain v. Brooks, 46 M. 537.
Cannot be extended, by contract, to include rent for lands.
Stewart v. Hollins, 47 M. 708.
Agricultural lien: filing and enrollment.
Cooper v. Frierson, 48 M. 300.
See Meridian Nat. Bank v. Hoyt &c. Co., 74 M. 221, 21 So. 12.
Agricultural lien. Enrollment. Priority.
French v. Picard, 49 M. 320.
Provides for agricultural lien, mortgage of growing crop, &c. Repeal.
Cayce v. Stovall, 50 M. 396.
Betts v. Ratliff, 50 M. 561.
Buck v. Paine, 50 M. 648.
Contract of lease stipulating for lien on crop not to be grown within fifteen months, valid as between parties.
White v. Thomas, 52 M. 49.
Agricultural lien. "Other things necessary." Crop mortgage prior in date.
Herman v. Perkins, 52 M. 813.
See Marye v. Dyche &c. Co., 42 M. 347.
Agricultural lien. Vested right.
Leake v. Cook, 52 M. 799.
Lien not right of property in products covered, but only privilege to subject same.
Cloud v. State, 53 M. 662.

1867, Page 621.
Levee taxes. Constitutionality. Sale. Deed, &c.
Vasser v. George, 47 M. 713.
See Creegan v. Hyman, 93 M. 481, 46 So. 952.

1867, Page 647.
Chickasaw county: judicial districts.
Lindsley v. Coahoma County, 69 M. 815, 11 So. 336.

1867, Page 725.
Conveyance from husband to wife: consideration.
Kaufman v. Whitney, 50 M. 103.

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Married woman: right to dispose of separate estate by last will and testament, without consent of husband. Curtesy.
Stewart v. Ross, 50 M. 776.

1867, Page 727, Section 6.
Repealed Code 1857, p. 336, art. 23, validating deed from husband to wife except as to creditors of former.
Baygents v. Beard, 41 M. 531.

Ordinance of Constitutional Convention, Passed April 29, 1868.
Grants new trials on affidavit, &c. Judicial act. Unauthorized.
Lawson v. Jeffries, 47 M. 686. 12 Am. Rep. 342.

Act of April 22, 1870.
Apportions counties into fifteen districts. Effective from and after passage.
Leachman v. Musgrove, 45 M. 511.

Act Approved June 3, 1870, Section 11.
Board of supervisors: allowance of illegal commissions to county treasurer.
Howe v. State, 53 M. 57.

Act of December 7, 1870.
Issaquena county. Tax to pay claim. Injunction against tax-collector.
Richardson v. Scott, 47 M. 236.

1870, Page 11.
Schoolhouse warrants. Mandamus. Petition.
Jarvis v. Warren County, 49 M. 603.
See Tunica County v. Rhodes, 85 M. 500, 37 So. 1005.

1870, Page 24.
Imposes privilege tax on licensed vendors of intoxicating liquors. Unrepealed by Laws 1871, p. 816.
Pons v. State, 49 M. 1.

County taxes: effect of Code 1871, §§ 1685, 1690, upon time for making levy.
Brigins v. Chandler, 60 M. 862.

1870, Page 38.
Supplemental to Laws 1870, p. 24. County taxes: assessment, &c.
Brigins v. Chandler, 60 M. 862.

1870, Page 40.
Chancery court: probate jurisdiction. Scire facias.
Isom v. McGehee, 45 M. 712.

1870, Page 46, Section 3.
Chancery courts: jurisdiction. Omits proviso found in Code 1857, p. 540, art. 2.
Champenois v. Fort, 45 M. 355.

1870, Pages 54, 55, Sections 25, 27.
Jurisdiction of chancery court: sale of realty for payment of debts.
Wells v. Smith, 44 M. 296.

1870, Page 66, Chapter 7.
Warren county. Time of holding circuit court. "Regular" meeting of board of supervisors.
Arthur v. Adam, 49 M. 404.

1870, Page 80, Chapter 12.
Board of supervisors: "regular" meeting.
Arthur v. Adam, 49 M. 404.

1870, Page 83.
Appeal to circuit court. Case transferred from county court.
Moore v. Dunn, 50 M. 32.

Circuit court: jurisdiction. Judgment of county court.
Martin v. Harvey, 54 M. 685.

1870, Page 88.
Constitution of grand jury. Quashal of indictment.
Head v. State, 44 M. 731, 17 Mor. St. Cas. 1700.

1870, Page 104.
Justice of the peace. Jurisdiction. Transfer of causes from circuit court.
Randall v. Kline, 44 M. 313.
Roberts v. Weiler, 55 M. 249.

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1870, Page 145, Section 3.
Makes it imperative duty of attorney general to enforce Const. 1869, art. 12, § 15, prohibiting authorization of lotteries, &c.
Moore v. State, 48 M. 147.

1870, Page 150.
Public offices. Power of governor to fill vacancies, and remove appointees. Tenure of office.
Newsom v. Cocke, 44 M. 352.
Election of public printer.
Kimball v. Alcorn, 45 M. 151.

1870, Page 165.
School funds: suit to recover. County superintendent of education.
Simmons v. Holmes, 49 M. 134.

1870, Page 165, Chapter 71.
Leases of sixteenth-section lands. Curative statute.
Sexton v. Coahoma County, 86 M. 380, 38 So. 636.

1870, Page 255.
Louisville &c. R. Co.: exemption from taxation.
Louisville &c. R. Co. v. Taylor, 68 M. 361, 8 So. 675.
Mobile &c. R. Co.: exemption from taxation.
Natchez &c. R. Co. v. Lambert, 70 M. 779, 13 So. 33.
See Yazoo &c. R. Co. v. Adams, 81 M. 90, 32 So. 937.

1870, Page 316.
Memphis &c. R. Co.: exemption from taxation.
Yazoo &c. R. Co. v. Adams, 81 M. 90, 32 So. 937.

1870, Page 327.
Natchez &c. R. Co.: exemption from taxation.
Natchez &c. R. Co. v. Lambert, 70 M. 779, 13 So. 33.
See Yazoo &c. R. Co. v. Adams, 81 M. 90, 32 So. 937.

1870, Page 344.
Municipal bonds. Charter of Vicksburg.
Vicksburg v. Lombard, 51 M. 111.

1870, Page 364.
Mandamus. Elections. Charter of Vicksburg.
Vicksburg v. Rainwater, 47 M. 547.

1870, Page 624, Section 1.
Provides for appointment of commissioners to codify general statutes.
Greer v. State, 54 M. 378.

Act of May 13, 1871.
Vacancy in office of public printer: how filled.
Kimball &c. Co. v. Alcorn, 45 M. 151.
Election under this act, on first Tuesday after first Monday of November, 1871, was biennial within Const. 1869, art. 4, § 7. Constitutionality, &c.
State v. Williams, 49 M. 640.

1871, Pages 1-57.
Levee district No. 1. Taxes. Lands liable and sold. Bondholders. Trust: enforcement. Equity jurisdiction. Limitation of actions. Pleadings. Mandamus.
Woodruff v. State, 77 M. 68, 25 So. 483.

1871, Page 37.
Imposes levee tax, &c. Constitutionality.
Daily v. Swope, 47 M. 367.
Issuance of levee bonds.
Woodruff v. State, 66 M. 298, 6 So. 235.
Reversed: Woodruff v. State, 162 U. S. 291.
Levee district No. 1. Trust fund for creditors. Legislative power.
Shotwell v. Louisville &c. R. Co., 69 M. 541, 11 So. 455.
State is proper party to suit against commissioners of levee district No. 1, &c.
State v. Woodruff, 83 M. 111, 36 So. 79, 37 So. 706.

1871, Page 57.
Taxation. Lands outside levee.
Owens v. Yazoo &c. R. Co., 74 M. 821, 21 So. 244.

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1871, Pages 87, 88.
Repealed Laws 1862, p. 133, amendatory of law of criminal evidence. Severance. Inadvertently omitted from Code 1871.
Greer v. State, 54 M. 378.

1871, Page 92.
Assessment for taxation. Errors and mistakes. Appeals.
Brooks v. Shelton, 47 M. 243.

1871, Page 96.
Tax title: time of presentation of assessment roll.
Mitchum v. McInnis, 60 M. 945.

1871, Page 101.
Board of supervisors: "ratification" will not validate void public contract. Constitutionality.
Jefferson County v. Arrighi, 54 M. 668.

1871, Page 180.
Amendatory, Laws 1859-1860, p. 412. Municipal bonds in aid of railroad. Date of payment. Purchaser for value. Recital. Want of power.
Woodruff v. Okolona, 57 M. 806.

1871, Page 397.
Natchez: extension of corporate limits. Constitutionality.
Martin v. Dix, 52 M. 53.

1871, Page 482.
Grant of land. Patent: condition precedent.
Hardy v. Hartman, 65 M. 504, 4 So. 545.

1871, Page 482, Chapter 169.
Patent to Pearl River Imp. &c. Co., void by reason of provisions of Const. 1869, art. 8, § 6.
Tynes v. Southern Pine Co., — M. —, 54 So. 885.

1871, Page 566.
Regulation of weights. Charter of Planters' Cotton Press &c. Association.
Gaines v. Coates, 51 M. 335.

1871, Page 657.
Taxes. Special statute: repeal by general law.
Beck v. Allen, 58 M. 143.

1871, Page 759, Chapter 375.
Tax deed to individual to land in first district of Hinds county, to be filed in office of chancery clerk at Jackson.
Wheeler &c. Mfg. Co. v. Ligon, 62 M. 560.

1871, Page 759.
Amendatory of Laws 1858, p. 54, ch. 7, dividing Hinds county into two judicial districts.
Lindsley v. Coahoma County, 69 M. 815, 11 So. 336.

1871, Page 800, Chapter 430.
Colfax county: creation. Provision omitted from Laws 1872, p. 107, ch. 96.
Clay County v. Chickasaw County, 64 M. 534, 1 So. 753.

1871, Page 816.
Privilege tax on vendor of liquors. Former statute not repealed.
Pons v. State, 49 M. 1.

1872, Page 1.
Tax sale: return of delinquent list.
Weir v. Kitchens, 52 M. 74.
See Howard v. Walters, 2 Miss. Dec. 187.

Delinquent taxes. Sale. "Indefeasible title" in purchaser. Redemption. Saving in favor of infants, lunatics, &c. Amended by Laws 1873, p. 86, and, professedly, by Laws 1874 (special session), p. 14.
Caruthers v. McLaran, 56 M. 371.

Constitutional law. Tax title. Legislative power.
Vaughn v. Swayzie, 56 M. 704.

Tax title. Notice. Statute.
Caston v. Caston, 60 M. 475.

Tax collector's deed not prima facie evidence of existence of those things requisite to valid sale.
McInnis v. Mitchum, 2 Miss. Dec. 126.

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1872, Page 9.
Tax title. Presumption. Purchaser from state.
Allen v. Poole, 54 M. 323.
Tax title. Presumption. Statute.
Christman v. Currie, 60 M. 858.
Tax title. Statute. Deed. Redemption.
Clay v. Moore, 65 M. 81, 3 So. 142.
Redemption of tax lands. Release of state's title.
Ricks v. Baskett, 68 M. 250, 8 So. 514.

1872, Page 19.
Restricts boards of supervisors in amount of taxes leviable in any one year. Schoolhouse warrants. Mandamus. Petition.
Jarvis v. Warren County, 49 M. 603.
Limits taxing power of boards of supervisors, for all purposes, to 25 mills on the dollar. Unrepealed by Laws 1873, p. 1.
Beard v. Lee County, 51 M. 542.
See Gamble v. Witty, 55 M. 26.

1872, Page 19, Section 12.
Boards of supervisors. Power to levy special tax.
Beck v. Allen, 58 M. 143.

1872, Page 25.
Ejectment. Improvements. Notice.
Wilson v. Williams, 52 M. 487.

1872, Page 27.
Amendatory, Code 1871, § 1159. Estate of deceased. Special commissioner to sell land.
Alcorn v. State, 57 M. 273.
See Swafford v. Garmon, 51 M. 348.

1872, Page 30.
Tax collector's bond. Affidavit by sureties. Estoppel, &c.
State v. Harney, 57 M. 863.

1872, Page 34.
Distress for rent. Replevin. Bond.
Moore v. Lee, 51 M. 375.
Attachment for rent. Replevin.
Maxey v. White, 53 M. 80.

1872, Page 53.
Equity of redemption. Process. Code 1871, § 703, not affected.
Vicksburg &c. R. Co. v. McCutchen, 52 M. 645.

1872, Pages 62, 63.
Employment by supervisors, of advisory attorney. Annual salary. Object.
Lewenthall v. State, 51 M. 645.

1872, Page 65.
Exemption from taxation. Property used in manufactures. Mississippi Mills.
State v. Simmons, 70 M. 485, 12 So. 477.
See Mississippi Mills v. Cook, 56 M. 40.
Attala County v. Kelly, 68 M. 40, 8 So. 376.

1872, Page 86, Section 9.
Criminal law. Recognizance. Release.
Doniphan v. State, 50 M. 54.

1872, Page 86.
Judgment upon recognizance is final.
Lee v. State, 51 M. 665.
Criminal law. Limitation of prosecution. Lost indictment.
Thompson v. State, 54 M. 740.
Criminal law. Jurors. Conscientious scruples.
Spain v. State, 59 M. 19.

1872, Page 101.
Does not contemplate legal controversy with auditor to determine validity of indebtedness of county, &c. Repealed by Laws 1874, p. 53.
Musgrove v. Vicksburg &c. R. Co., 50 M. 677.

1872, Page 107, Chapter 96.
Colfax county. Creation. Provision of Laws 1871, p. 800, ch. 430, omitted.
Clay County v. Chickasaw County, 64 M. 534, 1 So. 753.

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1872, Page 131.
Mortgage. Crop to be grown. Agricultural lien. Labor on shares.
Betts v. Ratliff, 50 M. 561.
Agricultural lien. Priority.
Buck v. Paine, 50 M. 648.
Agricultural lien. Purchaser of crops.
Westmoreland v. Wooten, 51 M. 825.
Wooten v. Gwin, 56 M. 422.
See Dunn v. Kelly, 57 M. 825.
Cohn v. Smith, 64 M. 816, 2 So. 244.
Agricultural lien. Overseer. Wages.
Hester v. Allen, 52 M. 102.
Agricultural lien. Superiority. Laborer. Waiver.
Buck v. Paine, 52 M. 271.
Agricultural lien. Mortgage. Priority.
Leake v. Cook, 52 M. 799.
Laborer's lien: assignability. Circuit court.
Kerr v. Moore, 54 M. 286.

1872, Page 135, Section 13.
Expressly refers to Laws 1867, p. 569, and recognizes same as in force.
Cayce v. Stovall, 50 M. 396.

1872, Page 149.
Notes and bills. Proceedings on protest. Objection.
Stiles v. Inman, 55 M. 469

1872, Page 217.
Authorizes bill by levee commissioners against "all persons," &c. Constitutionality.
Brown v. Levee Commissioners, 50 M. 468.

1872, Page 313.
Municipal bonds. Illegality. Curative legislation.
Sykes v. Columbus, 55 M. 115.

Act of October 22, 1873.
Expressly repeals Laws 1867, p. 569, providing agricultural lien, &c.
Cayce v. Stovall, 50 M. 396.
Buck v. Paine, 50 M. 648.

1873, Page 1, Section 27.
Officer. Qualification. Superintendent of education.
Burnham v. Sumner, 50 M. 517.
See Wynn v. State, 67 M. 312, 7 So. 353.

1873, Page 1.
School funds. Levy of taxes. Board of supervisors.
Beard v. Lee County, 51 M. 542.
Annulment of certificate of school teacher: compensation.
Jamison v. Senter, 56 M. 194.

1873, Pages 27, 28.
Tax title. Redemption. Special statute.
Caruthers v. McLaran, 56 M. 371.

1873, Page 38, Chapter 20.
Circuit clerk: fees in criminal cases. Repealed by Laws 1875, p. 137.
Myers v. Marshall County, 55 M. 344.

1873, Page 41.
Voidable probate sale. Relief of purchaser. "Good faith."
Cole v. Johnson, 53 M. 94.
Gaines v. Kennedy, 53 M. 103.

1873, Page 42.
Official bond. Sealed instrument. Limitation.
Furlong v. State, 58 M. 717.

1873, Page 45.
Appointment of clerk for chancery court of Tate county. Constitutional law.
Brady v. West, 50 M. 68.

1873, Page 66.
Civil rights. Constitutionality. Admission to theater.
Donnell v. State, 48 M. 661.

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1873, Page 70.

Administrator de bonis non: right to sue upon bond of former administrator. Effect of Code 1880, § 1998.
Weir v. Monahan, 67 M. 434, 7 So. 291.

1873, Page 78.

Sale of homestead: joinder by wife.
Collins v. Collins, 51 M. 311.

Homesteads. Chancery jurisdiction. Reformation. Mistake of law.
Sparks v. Pittman, 51 M. 511.

Homestead: failure of wife to join in conveyance.
State National Bank v. Lyons, 52 M. 181.
Taylor v. Smith, 54 M. 50.
Howell v. Bush, 54 M. 437.
See Billingsley v. Niblett, 56 M. 537.
Pounds v. Clarke, 70 M. 263, 14 So. 22.
Jarvis v. Armstrong, 94 M. 145, 48 So. 1.

Homestead exemption. Abandonment. Sale before removal. Failure of wife to join in conveyance.
Wilson v. Gray, 59 M. 525.

Homestead. Alienation. Wife's interest.
Smith v. Scherck, 60 M. 491.

Homestead: mode of alienation. Vested right.
Massey v. Womble, 69 M. 347, 11 So. 188.

Landowner's right to determine homestead. Realty not included: sale or incumbrance.
Nixon v. Hewes, 80 M. 88, 31 So. 899.

1873, Page 79.

Landlord and tenant. Lien for rent. Mortgage. Priority. Constitutionality.
Arbuckle v. Nelms, 50 M. 556.

Amended and enlarged operation of Laws 1872, p. 131.
Betts v. Ratliff, 50 M. 561.

Landlord and tenant. Lien. Priority.
Storm v. Green, 51 M. 103.

Agricultural lien. Purchaser of crops.
Westmoreland v. Wooten, 51 M. 825.
Wooten v. Gwinn, 56 M. 422.
See Dunn v. Kelly, 57 M. 825.
Cohn v. Smith, 64 M. 816.

Agricultural lien. Overseer. Wages.
Hester v. Allen, 52 M. 162.

Judgment lien. Merger. Growing crop.
Cooper v. Turnage, 52 M. 431.

Landlord's lien. Rent payable in money.
Phillips v. Douglass, 53 M. 175.

Agricultural lien: assignability.
Taylor v. Nelson, 54 M. 524.
See Gross v. Bartley, 66 M. 116, 5 So. 225.
Newman v. Bank, 66 M. 323, 5 So. 753.

1873, Page 82.

Process for corporation: service and return.
Express Co. v. Hunt, 54 M. 664.

1873, Page 84.

Drunkennenss in office. Indictment. Expiration of term.
Shanks v. State, 51 M. 464.
Stubbs v. State, 53 M. 437.

1873, Page 86.

Amendatory, Laws 1872, p. 1. Delinquent taxes. Sale. "Indefeasible title" in purchaser. Redemption. Saving in favor of infants, lunatics, &c.
Caruthers v. McLaran, 56 M. 371.

1873, Page 90.

Sale of lands for taxes of 1874, on first Monday in February, 1875, proper.
Gamble v. Witty, 55 M. 26.

Taxes unpaid on January 1 of each year, collectible by distress and sale. Report of delinquent lands, &c.
Caruthers v. McLaran, 56 M. 371.

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1873, Page 91.
Tax title. Tax collector. Purchaser from state.
Allen v. Poole, 54 M. 323.
Tax title. Limitation. Sale under special statute.
Clay v. Moore, 65 M. 81, 3 So. 142.

1873, Page 97.
Sale of liquors. Indictment. Proof of guilt.
Dahmer v. State, 56 M. 787.

1873, Page 102.
Indictment against druggist for selling liquor without physician's prescription must allege sale in less quantity than gallon.
Blakely v. State, 57 M. 680.

1873, Page 139.
Creates Tate county. Constitutionality.
Brady v. West, 50 M. 68.
New county to pay proportion of debts.
Tate County v. De Soto County, 51 M. 588.

1873, Page 150.
Tax title. Deed, prima facie evidence. Constitutionality.
Powers v. Penny, 59 M. 5.

1873, Page 161.
Carroll county. Judicial districts. Recording of instruments. Amended, Laws 1874, p. 81.
Lindsley v. Coahoma County, 69 M. 815, 11 So. 336.

1873, Page 166.
Yalobusha county. Judicial districts. Recording of instruments. Amended, Laws 1874, p. 95.
Lindsley v. Coahoma County, 69 M. 815, 11 So. 336.

1873, Page 173.
Election. Special act for Pike county. Registrars.
Barnes v. Pike County, 51 M. 305.

1873, Page 212.
Mississippi Mills: exemption from taxation. Constitutionality.
Mississippi Mills v. Cook, 56 M. 40.
See Attala County v. Kelly, 68 M. 40, 8 So. 376.

1873, Page 270.
Arrest of fugitive. Reward. Special act.
Jones v. Gibbs, 51 M. 401.

1873, Page 321.
Taxes. Special statute. Conformity to general law.
Beck v. Allen, 58 M. 143.

1873, Page 516.
Railroads. Legislative aid. Proviso.
Hemingway v. Vicksburg &c. R. Co., 52 M. 16.

1873 (Special Session), Page 5.
Fee and salary bill. Enactment: evidence, &c.
Brady v. West, 50 M. 68.

1873 (Special Session), Page 22.
Quo warranto: trial in vacation.
Bowen v. Gilleylen, 58 M. 813.

Act of April 6, 1874.
Amendatory, Code 1871, § 1747. Tax upon practicing lawyers. Constitutionality.
Stewart v. Potts, 49 M. 749.

1874, Page 27.
Appeal to Supreme Court: return days.
Childs v. Rowell, 58 M. 512.

1874, Page 29.
Intoxicating liquors: licenses to sell.
Rohrbacher v. Jackson, 51 M. 735.

1874, Page 46.
Taxation. Transient vendor.
Bagle v. Holden, 52 M. 804.

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1874, Page 49, Chapter 33.
Offered to remit all taxes on lands acquired by state for taxes which had accrued prior to 1866.
Prophet v. Lundy, 63 M. 603.

1874, Page 53.
Statute. Repeal. Vested rights. Laws 1872, p. 101, repealed.
Musgrove v. Vicksburg &c. R. Co., 50 M. 677.

1874, Page 81.
Amendatory of Laws 1873, p. 161, dividing Carroll county into judicial districts, &c.
Lindsley v. Coahoma County, 69 M. 815, 11 So. 336.

1874, Page 95.
Amends Laws 1873, p. 166, dividing Yalobusha county into court districts. Amended, Laws 1875, p. 159.
Lindsley v. Coahoma County, 69 M. 815, 11 So. 336.

1874, Page 200.
Constitutional law. Special act for town of Durant.
New Orleans &c. R. Co. v. McDonald, 53 M. 240.

1874, Page 220.
Sumner county not liable for any part of debt of Chickasaw county.
Chickasaw County v. Sumner County, 58 M. 619.

1874 (Special Session), Page 14.
Tax title. Redemption. Repeal of former statute. Proviso.
Caruthers v. McLaran, 56 M. 371.
See Gamble v. Witty, 55 M. 26.

Federal act of March 3, 1875.
Removal of causes to federal court. Jurisdiction. Procedure.
Jackson v. Alabama &c. R. Co., 58 M. 648.
Goodsell v. Delta &c. Land Co., 72 M. 580, 18 So. 452.

1875, Page 3.
Privilege tax: power of municipality to levy.
Holberg v. Macon, 55 M. 112.

1875, Page 8.
Privilege tax. Municipality: limitation of power.
Smith v. Vicksburg, 54 M. 613.

1875, Page 10, Section 5.
Privilege tax: failure to pay. Illegal contract.
Anding v. Levy, 57 M. 51.
See Sullivan v. Ammons, 95 M. 196, 48 So. 244.

1875, Page 10.
Privilege tax: failure to pay. Repeal.
Decell v. Lewenthall, 57 M. 331.

1875, Page 11.
Abatement act: constitutionality.
Gibbs v. Green, 54 M. 592.
Bunch v. Wolerstein, 62 M. 56.
Woodruff v. State, 77 M. 68, 25 So. 483.

Tax sales. Abatement act.
Gamble v. Witty, 55 M. 26.

Tax title. Special redemption act.
Caruthers v. McLaran, 56 M. 371.
See Coltrane v. Cox, 60 M. 537.

Tax title. Abatement act. Assessment. Irregularities cured.
Cochran v. Baker, 60 M. 282.
Cato v. Gordon, 62 M. 373.
See Sutton v. Nevin, 2 Miss. Dec. 409.

Tax title. Abatement act. Case.
Chambers v. Myrick, 61 M. 459.

Tax title. Abatement act.
Prophet v. Lundy, 63 M. 603.
Owens v. Yazoo &c. R. Co., 74 M. 821, 21 So. 244.
Winton v. Day, 96 M. 1, 49 So. 264.

Tax title. Abatement act: effect on land neglected to be sold.
Paxton v. Valley Land Co., 68 M. 739, 10 So. 77.

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Tax title. Abatement act.
Chamberlain v. Lawrence County, 71 M. 949, 15 So. 40.
See Dingey v. Paxton, 60 M. 1038.
Outlaw v. Mayo, 1 Miss. Dec. 423.

Tax title. Abatement act. Right of infant to redeem.
McNamara v. Baird, 72 M. 89, 16 So. 384.
See Baird v. McNamara, 78 M. 455, 30 So. 69.

Sale of land for levee taxes for 1874, cannot be made under this act.
Brougher v. Stone, 72 M. 647, 17 So. 509.

Abatement act. Lands not delinquent for any year prior to 1874, not subject to sale.
Lyebrook v. Hall, 73 M. 509, 19 So. 348.

1875, Pages 20–21, Section 20.

Abatement act. Chancery clerk's office proper place of deposit for lists of lands sold to state for taxes.
Coltrane v. Cox, 60 M. 537.

1875, Page 25.

Cedes portion of territory of Chickasaw county to Sumner county. Latter, non-liable for any part of former's debt.
Chickasaw County v. Sumner County, 58 M. 619.

1875, Page 30.

Repeal of statute: effect on pending suit. Special revenue agent.
French v. State, 53 M. 651.

1875, Page 41, Section 3.

Circuit clerk: fees in state cases. Repealed by Laws 1875, p. 137.
Myers v. Marshall County, 55 M. 344.

1875, Page 49.

Tax title. List of lands. Abatement act.
Coltrane v. Cox, 60 M. 537.

Abatement act. Sale at other than prescribed time.
Kennedy v. Sanders, 90 M. 524, 43 So. 913.

1875, Page 50.

Tax levy under Laws 1876, p. 258, on first Monday in September, 1876, void.
Harris v. Stockett, 58 M. 825.

Did not repeal six-day limitation on sitting of supervisors to examine assessment rolls, contained in Code 1871, § 1685.
Bowman v. Roe, 62 M. 513.

1875, Page 52, Section 1.

Boards of supervisors: power to levy special tax.
Beck v. Allen, 58 M. 143.

1875, Page 52.

Tax title. Levy: limit. Constitutionality.
Peterson v. Kittredge, 65 M. 33, 3 So. 65, 5 So. 824.

1875, Page 60.

Claim of ex-chancellor Dennis as de facto chancellor. Payment of salary.
Christian v. Gibbs, 53 M. 314.

1875, Page 66.

Railroads. Privilege tax.
Natchez &c. R. Co. v. Lambert, 70 M. 779, 13 So. 33.
See Yazoo &c. R. Co. v. Adams, 81 M. 90, 32 So. 937.

1875, Page 79.

Bail. Capital case.
Ex parte Fortenberry, 53 M. 428.

Murder. Penalty. Disagreement of jury. Verdict.
Green v. State, 55 M. 454.
Fleming v. State, 60 M. 434.
Penn v. State, 62 M. 450.

Criminal law. Murder. Jury. Instruction.
Walton v. State, 57 M. 533.

1875, Page 119.

Partition. Indivisibility of land. Evidence.
Kirkland v. Express Co., 57 M. 316.

Amendatory, Code 1871, § 1810. Partition. Solicitor's fee.
Potts v. Gray, 60 M. 57.

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1875, Page 122, Chapter 96.
Exemption: increase. After-acquired property.
Johnson v. Fletcher, 54 M. 628.

1875, Page 122, Chapter 97.
Marriage license. Bond of circuit clerk. Action for penalty.
Holland v. Beard, 59 M. 161.
Beard v. Holland, 59 M. 164.

1875, Page 137.
Officer's fees. Repeal.
Myers v. Marshall County, 55 M. 344.
Chancery clerk: allowance for ex officio services.
Ex parte Patty, 56 M. 499.
Chancery clerk: fees.
Patty v. Sparkman, 58 M. 76.

1875, Page 159.
Amendatory of Laws 1874, p. 95, which itself amended Laws 1873, p. 166, dividing Yalobusha county into court districts.
Lindsley v. Coahoma County, 69 M. 815, 11 So. 336.

1875, Page 161.
Amendatory, Code 1871, § 782. Action on open account sworn to as provided: issue raised by affidavit of defendant.
Tichenor v. Sarven Wheel Co., 54 M. 589.
See Ware v. McQuillan, 54 M. 703.

1875 (Special Session), Page 10.
Tax title. Board of supervisors. Unauthorized meeting.
Fanning v. Funches, 60 M. 541.
Bowman v. Roe, 62 M. 513.
Tax title. Assessment roll. Curative act. Legislative power.
Porter v. Still, 63 M. 357.

1875 (Special Session), Page 25.
Chancery clerk: compensation for ex officio services.
Ex parte Patty, 56 M. 499.

Act of April 15, 1876.
Provisions relate to assessments to be made during, and subsequently to year 1879.
Selden v. Coffee, 55 M. 41.
Stovall v. Connor, 58 M. 138.

1876, Page 8.
Tax collector. Official bond. Legislative power. Forfeiture. Quo warranto.
Hyde v. State, 52 M. 665.

1876, Page 31.
County warrants. Special act. Failure to register.
Honea v. Monroe County, 63 M. 171.

1876, Page 33.
Justice of peace. Mayor. Criminal jurisdiction.
Bell v. McKinney, 63 M. 187.

1876, Page 35.
Judgment against co-obligors. Reversal as to one. Supreme Court.
French v. State, 53 M. 651.
Supreme Court. Judgment reversed as to one appellant.
Cook v. Ligon, 54 M. 368.
Parties: affirmance as to one. Judgment on bond.
Cook v. Ligon, 54 M. 625.

1876, Page 46.
Supervisors: suit on official bonds under Code 1871, § 1386.
Paxton v. Baum, 59 M. 531.

1876, Pages 52, 53.
Chancery court districts. Chancellors: compensation.
Bailey v. State. 56 M. 637.

1876, Page 56.
Mandamus. Fiat not necessary. Office of petition.
Kline v. Smith County, 54 M. 254.

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1876, Page 90.

Wilkinson county. Tax sale for taxes abolished.
Havard v. Day, 62 M. 748.

1876, Page 109.

Agricultural lien. Writ of seizure. Replevin.
Dogan v. Bloodworth, 56 M. 419.

Agricultural lien. Judgment in personam.
Hartsell v. Myers, 57 M. 135.
Burrow v. Sanders, 57 M. 211.
Love v. Law, 57 M. 596.
Mitchell v. Drake, 57 M. 605.
Allen v. Standifer, 57 M. 612.

Agricultural lien. Justice of the peace: jurisdiction.
Breckenridge v. Johnson, 57 M. 371.

Agricultural lien. Purchaser of crops.
Dunn v. Kelly, 57 M. 825.
See Cohn v. Smith, 64 M. 816, 2 So. 244.

Landlord's lien. Replevin. Defense.
Strauss v. Baley, 58 M. 131.

Agricultural lien. Lien for supplies. Priority.
Paxton v. Meyer, 58 M. 445.

Agricultural lien. Availability of remedy.
Tucker v. Whitehead, 58 M. 762.

Agricultural lien for rent and supplies: enforcement.
Fitzgerald v. Fowlkes, 60 M. 270.

Attachment for rent. Lienor. Writ of seizure, &c.
Horton v. Heath, 2 Miss. Dec. 144.

1876, Page 115.

Divided state into chancery districts: validity. Chancellors in office.
Bailey v. State, 56 M. 637.

1876, Page 129.

Tax title. Redemption. Statute. Construction.
Bonds v. Greer, 56 M. 710.

Tax title. Assessment. When statute operative.
Stovall v. Conner, 58 M. 138.

Tax title. "Repurchase." Lien. Effect of Laws 1877, p. 2, and Laws 1878, pp. 50, 53.
Greene v. Williams, 58 M. 752.

Wilkinson county. Tax sale for taxes abolished.
Havard v. Day, 62 M. 748.

Tax title. Redemption.
Peavy v. Wood, 71 M. 981, 19 So. 929.

1876, Page 139.

Taxes. Assessment. Uncertain description. Parol evidence.
Selden v. Coffee, 55 M. 41.
Stovall v. Connor, 58 M. 138.

1876, Page 166.

Liquidating levee commissioner. Constitutional law. Legislative power.
Gibbs v. Green, 54 M. 592.
See Woodruff v. State, 77 M. 68, 25 So. 483,

Redemption of lands in liquidating levee district which have been struck off to state, &c.: limitations. Constitutionality.
Dingey v. Paxton, 60 M. 1038.
See Kennedy v. Sanders, 90 M. 524, 43 So. 913.

Abolishes office of liquidating levee commissioners, &c.
Shotwell v. Louisville &c. R. Co., 69 M. 541, 11 So. 455.
See Louisville &c. R. Co. v. Buford, 73 M. 494, 19 So. 584.

1876, Page 174.

Substitutes certain state officers for levee commissioners, &c.: validity.
Shotwell v. Louisville &c. R. Co., 69 M. 541, 11 So. 455.

State land commissioner, not proper party to suit against successors of board of levee commissioners.
State v. Woodruff, 83 M. 111, 36 So. 79, 37 So. 706.

1876, Page 178–194.

Modifies Code 1871, ch. 9. Descent and distribution.

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Gibbons v. Brittenum, 56 M. 232.
See Lombard v. Lombard, 57 M. 171.

1876, Page 190.
Guardian. Defective bond. Removal.
Fant v. McGowan, 57 M. 779.

1876, Pages 193, 194, Sections 54, 55.
Amendatory, Code 1871, §§ 1281, 1282. Partial intestacy of childless husband. Devise to widow. Effect on right of inheritance, of failure to renounce will.
Wall v. Dickens, 66 M. 655, 6 So. 515.

1876, Pages 229.
Construction of telegraph lines. Repealed by Code 1880.
Southern Tel. Co. v. Alabama &c. R. Co., 1 Miss. Dec. 489.

1876, Page 237.
Taxation. Equality and uniformity. Special act for Warren county: constitutionality.
Murray v. Lehman, 61 M. 283.

1876, Page 239.
Special circuit court district in Warren county. Docket fee.
American Burial Case Co. v. Shaughnessy, 59 M. 398.

1876, Page 241.
Circuit court. Warren county. Special term. Notice.
Mastronada v. Warren County, 60 M. 86.

1876, Page 249.
Revenue agent: expiration of term.
State v. Bias, 65 M. 510, 4 So. 785.

1876, Page 252.
Makes same period of limitation apply to open and stated accounts.
Floyd v. Pearce, 57 M. 140.

Limitation of three years applies only to express contracts.
Musgrove v. Jackson, 59 M. 390.

Right to sue on open account or account stated, barred after lapse of three years.
Newman v. Foster, 1 So. 505.

1876, Page 257.
Correction of assessment roll: time for presentation, &c.
Stovall v. Connor, 58 M. 138.

1876, Page 258, 259.
Tax title. Levy at wrong time.
Harris v. Stockett, 58 M. 825.

1876, Page 302.
Constitutional law. Registration of claims against county: limitation.
Watson v. Doherty, 56 M. 628.

1876, Page 345.
Wilkinson county. Tax sale for taxes abolished.
Havard v. Day, 62 M. 748.

Act of January 31, 1877.
Penitentiary: improvements. "Said amounts of hire due the state shall not be expended or appropriated for any purpose whatever except as herein described," did not create contract with lessees, &c.
Hamilton v. State, 8 So. 761.

1877, Page 2.
Tax title. Prima facie evidence.
Greene v. Williams, 58 M. 752.

Tax title. Lien of purchaser. Repeal of statute.
Capital State Bank v. Lewis, 64 M. 727, 2 So. 243.

1877, Page 6.
Tax title. Excessive levy. Tender.
Carter v. Hadley, 59 M. 130.

Repealed Code 1871, § 1718, giving lien on failure of tax title. Prospective in operation.
Capital State Bank v. Lewis, 64 M. 727, 2 So. 243.

1877, Page 16.
Invalid warrants. Injunction against collection of taxes.
Beck v. Allen, 58 M. 143.

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1877, Page 22.
Decreases levee tax provided by Laws 1866–1867, p. 237, &c. Semble, that act is unconstitutional.
Gibbs v. Green, 54 M. 592.
Bunch v. Wolerstein, 62 M. 56.

1877, Page 34, Section 3.
Swamp lands: limit of purchase. "Two hundred and forty acres."
Phillips v. Gastrell, 62 M. 362.

1877, Page 34.
Public lands: sale. Minimum value.
Moss Point Lumber Co. v. Harrison County, 89 M. 448, 42 So. 290, 873.

1877, Page 34, Section 3.
Compared with Code 1892, § 2564: "enter" and "purchase," &c. Fraudulent purchases. Inviolability of obligation of contracts.
Wisconsin Lumber Co. v. State, — M. —, 54 So. 247.

1877, Page 43.
District attorneys: term of office. Constitutional law.
Fant v. Gibbs, 54 M. 396.

1877, Page 64.
Requires pilots to half-mast flags, &c. Indictment for alleged violation: fatal defect.
Bloom v. State, 57 M. 752.

1877, Page 72.
Restricts exemption from taxation granted Mississippi Mills by Laws 1873, p. 212. Constitutionality.
Mississippi Mills v. Cook, 56 M. 40.
See Attala County v. Kelly, 68 M. 40, 8 So. 376.

1877, Page 77.
Assessment for taxes. Special act for Monroe county. Failure to return roll.
Pearce v. Perkins, 70 M. 276, 12 So. 205.

1877, Page 223, Section 4.
Vicksburg Building Association: rate of interest chargeable.
National Mut. B. & L. Assn. v. Pinkston, 79 M. 468, 30 So. 692, 31 So. 834.

1877, Page 224, Section 4.
Greenville Building and Saving Association: rate of interest chargeable.
National Mut. B. & L. Assn. v. Pinkston, 79 M. 468, 30 So. 692, 31 So. 834.

1878, Page 16.
Indictment against druggist for selling liquor without physician's prescription must allege sale in less quantity than gallon.
Blakely v. State, 57 M. 680.

1878, Page 23.
Tax title. Assessment. Failure of supervisors to act.
Davis v. Vanarsdale, 59 M. 367.

Tax title. Assessment. Directory statute.
Wolfe v. Murphy, 60 M. 1.
Mills v. Scott, 62 M. 525.
Wheeler &c. Mfg. Co. v. Ligon, 62 M. 560.
See State Revenue Agent v. Tonella, 70 M. 701, 14 So. 17.

Tax title. Affidavit of assessor to roll.
Chestnut v. Elliott, 61 M. 569.

Assessment of taxes: effect of appointment of delinquent assessor to complete.
Corburn v. Crittenden, 62 M. 125.

Assessment of land. Description.
Sims v. Warren, 67 M. 278, 10 So. 40.

1878, Page 37.
Tax title. Assessment. Pending roll.
Fletcher v. Trewalla, 60 M. 963.

1878, Page 38, Section 27.
Tax title: neither defect nor irregularity in, nor entire absence of, certificate to copy of assessment roll, fatal.
Gibbs v. Dortch, 62 M. 671.

1878, Page 39.
Assessment. New roll. Appointment of delinquent assessor.
Grayson v. Richardson, 65 M. 222, 3 So. 579.

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1878, Page 45, Section 40.
Tax title. List of lands sold: certificate of comparison.
Powers v. Penny, 59 M. 5.
Gibbs v. Dortch, 62 M. 671.
See Dingey v. Paxton, 60 M. 1038.

1878, Page 45.
Tax sale in lump of several separate tracts assessed at different sums and to different unknown owners, invalid.
Morris v. Myer, 87 M. 701, 40 So. 231.

1878, Page 47, Section 42.
Tax title: neither defect nor irregularity in, nor entire absence of, certificate to copy of assessment roll, fatal.
Gibbs v. Dortch, 62 M. 671.

Bill to cancel tax title, on ground that taxes for which sale was made were excessive, must show tender of taxes due.
Sutton v. Nevin, 2 Miss. Dec. 409.

1878, Page 50, Section 49.
Tax title. "Repurchase" price. Lien. Effect upon Laws 1876, p. 129, and Laws 1877, p. 2.
Greene v. Williams, 58 M. 752.

1878, Page 52.
Conveyance by auditor of public accounts. Official seal. Evidence.
Day v. Day, 59 M. 318.

1878, Page 52, Section 49.
Redemption of land sold to state for taxes.
Hart v. Picard, 75 M. 651.

1878, Page 53, Section 50.
Tax title. "Repurchase" price. Lien. Effect upon Laws 1876, p. 129, and Laws 1877, p. 2.
Greene v. Williams, 58 M. 752.

1878, Page 78.
Consolidated railroads: exemption from taxation.
Yazoo &c. R. Co. v. Adams, 81 M. 90, 32 So. 937.

1878, Page 82, Section 108.
Boards of supervisors: power to levy special tax.
Beck v. Allen, 58 M. 143.

1878, Page 114.
Repealed Code 1871, ch. 39, in so far as it authorized action to lease school land.
Jones v. Madison County, 72 M. 777, 18 So. 87.
See Lauderdale County v. East Miss. Mills, 18 So. 94.

1878, Page 123.
Common schools. Act unconstitutional.
Otken v. Lamkin, 56 M. 758.

1878, Page 147.
Panola county: court districts.
Lindsley v. Coahoma County, 69 M. 815, 11 So. 336.

1878, Page 164.
Convicts to be held at labor until payment of costs of prosecution. Constitutionality.
Ex parte Meyer, 57 M. 85.

County contractor entitled to custody of convict sentenced to fine, costs and imprisonment.
Matthews v. Walker, 57 M. 337.

Non-resident county contractor not required to work prisoners in county of conviction.
Ex parte Higgins, 57 M. 824.

Medical attention to prisoner: liability of contractor.
Thurmond v. Carter, 59 M. 127.

1878, Page 172.
Unlawful detainer. Reversioners. Curtesy.
Wolfe v. Angevine, 57 M. 767.

1878, Page 173.
Contested elections. Statutory remedy. Injunction.
Ex parte Wimberly, 57 M. 437.

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Contested election. County office. Summons. Jurisdiction. Alternative writ of prohibition.
Crisler v. Morrison, 57 M. 791.
See Hall v. Lyon, 59 M. 218.

Contested election. Appeal. Bond.
Pearson v. Wilson, 57 M. 848.

1878, Page 175.
Concealed weapon. Threat. Apprehension of attack.
Tipler v. State, 57 M. 685.

1878, Page 190, Chapter 67.
Pleading. Argumentativeness. Demurrer.
Sims v. Eiland, 57 M. 83.

Practice. Demurrer to replication. Judgment.
Northrop v. Flaig, 57 M. 754.

Special demurrer abolished.
Polkinghorne v. Hendricks, 61 M. 366.
See State v. Swinney, 60 M. 39.
Merchants' &c. Bank v. Calmes, 82 M. 603, 35 So. 161.

1878, Page 190, Chapter 68.
Amendatory, Code 1871, § 758. Claim against estate of deceased: evidence.
Jones v. Sherman, 56 M. 559,
Gordon v. McEachin, 57 M. 834.

1878, Page 193.
Attachment. Separate issues. Plea. Waiver. Circuit court. Jurisdiction.
Bates v. Crow, 57 M. 676. Repealed, Laws 1884, p. 76; revived, Code 1892, § 172.—Ed.

1878, Page 199.
Indictment. Return. "Filed."
Cook v. State, 57 M. 654.
Smith v. State, 58 M. 867.

Indictment. Return. Filing.
Cooper v. State, 59 M. 267.
Holland v. State, 60 M. 939.

1878, Page 200.
Verdict in criminal case, not to be reversed for errors which might have been, but which were not, taken advantage of in lower court. Constitutionality. Effect, &c.
Ex parte Phillips, 57 M. 357.
Spivey v. State, 58 M. 743.
See Simpson v. State, 56 M. 297.
Arbuckle v. State, 80 M. 15, 31 So. 437.

1878, Page 218.
Fixes sale price of internal improvement lands at fifty cents per acre: assault upon validity.
Godwin v. Davis, 74 M. 742, 21 So. 764.

1878, Page 233.
Natchez &c. R. Co.: exemption from taxation.
Natchez &c. R. Co. v. Lambert, 70 M. 779, 13 So. 33.

Exemption granted Natchez &c. R. Co. was repealed by Code 1880, §§ 597–608.
Yazoo &c. R. Co. v. Adams, 81 M. 90, 32 So. 937.

1878, Page 305.
Supervisors not proper parties to bring suit to enjoin fence commissioners from improperly locating and constructing fence around township.
Freeman v. Lee County, 66 M. 1, 5 So. 516.

Stock law district. Tax to build fence. Local statute. Code provisions.
Browning v. Mathews, 73 M. 343, 18 So. 658.

1878, Page 330.
Sale for taxes. Assessment roll. Precedent order of board of supervisors.
Wolfe v. Brown, 11 So. 879.

1878, Page 360.
Taxes. Special statute: repeal by general law.
Beck v. Allen, 58 M. 143.

Act of March 6, 1880.
Lessees of penitentiary: plea to action by state on bond.
Hamilton v. State, 8 So. 761.

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1880, Page 80.
Record of lands held by state for taxes: recitals prima facie correct.
Hart v. Picard, 75 M. 651, 23 So. 450.
Winton v. Day, 96 M. 1, 49 So. 264.

1880, Page 87.
Taxation. Levy. Limitation. Special statute. General law.
Beck v. Allen, 58 M. 143.
See Peterson v. Kittredge, 65 M. 33, 3 So. 65, 5 So. 824.

1880, Page 88.
Tax title: change in assessment roll.
Tierney v. Brown, 65 M. 563, 5 So. 104.

1880, Page 94.
State revenue agent cannot sue deputy sheriff for county money borrowed from sheriff.
Adams v. Harvey, 2 Miss. Dec. 319.

1880, Page 125.
Contested election. Appeal. Bond.
Pearson v. Wilson, 57 M. 848.

1880, Page 145.
Divides Panola county into court districts: registration of deeds.
Deaton v. Burchart, 59 M. 144.

Act of March 4, 1882.
Action by state on bond of lessees of penitentiary: demurrable plea.
Hamilton v. State, 8 So. 761.

1882, Page 8.
Taxes. Levy. Limitation.
Miller v. McGehee, 60 M. 903.

1882, Pages 10, 11, Chapters 6, 7.
Amendatory Code 1880, ch. 39. Sale of wine without license.
Whittington v. State, 62 M. 796.

1882, Page 10.
Selling liquor to minor.
O'Flinn v. State, 66 M. 7, 5 So. 390.

1882, Pages 19, 22.
Criminal law. Maltreatment of convicts. Indictment under repealed statute.
State v. Jenkins, 73 M. 523, 19 So. 206.

1882, Page 23.
County prisoners. Hiring out. Discharge of insolvents.
Monroe County v. McDaniel, 68 M. 203, 8 So. 645.

1882, Page 33.
Practicing medicine without license. Indictment.
Dee v. State, 68 M. 601, 9 So. 356.

1882, Page 47.
Existing statute, part of charter of railroad organizing under general laws: farm crossings.
Alabama &c. R. Co. v. Odeneal, 73 M. 34, 19 So. 202.

1882, Page 50.
No public policy making distinction between ownership of Mississippi lands by foreign, and by domestic corporations.
Taylor v. Alliance Trust Co., 71 M. 694, 15 So. 121.

1882, Page 77.
School fund. Limitation of taxation.
Foote v. Brown, 60 M. 155.

1882, Page 84.
Exemption from taxation: property used in manufactures.
Greenville Ice &c. Co. v. Greenville, 69 M. 86, 10 So. 574.
State v. Simmons, 70 M. 485, 12 So. 477.
Exemption from taxation of manufacturing corporation: capital stock. Constitutionality, &c.
Adams v. Tombigbee Mills, 78 M. 676, 29 So. 470.

1882, Page 109.
Effect of offer, by person charged with crime, of himself as witness in his own behalf.
Steele v. State, 76 M. 387, 24 So. 910.

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1882, Page 110.
Constitutional law. Appeal. Attorney's fees.
Chicago &c. R. Co. v. Moss, 60 M. 641.

1882, Page 112,
Partition of exempt property. Prospective in operation.
Hopper v. Hopper, 2 Miss. Dec. 641.

1882, Page 114.
Chancery clerk. Appointment as guardian. Bond.
Faust v. Murphy, 71 M. 120, 13 So. 862.

1882, Page 115.
Mechanic's lien. Laborer on railroad.
Herrin v. Warren, 61 M. 509.

1882, Page 139.
Attachment for rent. Claim of property.
Watkins v. Duvall, 69 M. 364, 13 So. 727.

Attachment for rent: sale of property pending determination of claim of third person.
Weis v. Basket, 71 M. 771, 15 So. 659.

1882, Page 140.
Prohibits dealing in "futures," &c.
Lemonius v. Mayer, 71 M. 514, 14 So. 33.
See Western Union Tel. Co. v. Littlejohn, 72 M. 1025, 18 So. 418.
White v. Eason, 15 So. 66.

Does not repeal Code 1880, § 990, rendering void, judgment on wager, &c.
Campbell v. New Orleans Nat. Bank, 74 M. 526, 21 So. 400.
See Clay v. Allen, 63 M. 426.

1882, Page 142.
Penalizes prize-fighting. Indictment.
Sullivan v. State, 67 M. 346, 7 So. 275.

1882, Page 166.
Privilege tax on insurance companies: repealed by Code 1892.
Vicksburg v. Sun Mut. Ins. Co., 72 M. 67, 16 So. 257.

1882, Page 187, Section 8.
Yazoo &c. R. Co.: exemption from taxation.
Yazoo &c. R. Co. v. Thomas, 65 M. 553, 5 So. 108.

1882, Page 202.
Bill of exceptions: filing stenographer's notes.
Saucier v. Amari, 63 M. 276.

1882, Page 232.
Stock law. Act construed.
Anderson v. Locke, 64 M. 283, 1 So. 251.

1882, Page 237.
Live stock not to run at large in designated portion of Monroe county, upon lands of any person except owner or lessee. Common law.
Canton &c. R. Co. v. French, 75 M. 939, 23 So. 357.

Authorizes exemption from stock law operation of designated parts of county: supervisors' contravening order void as to exempted territory.
Whitfield v. Tatum, 83 M. 153, 35 So. 447.

1882, Page 273.
Constitutional law. Eminent domain. Statute.
Cage v. Trager, 60 M. 563.

1882, Page 282.
Special statute of limitations for Union county to cure evils resulting from burning of courthouse.
Tucker v. Wilson, 68 M. 693, 9 So. 898.

1882, Page 309.
Constitutional law. Power to confer jurisdiction on inferior courts. Municipal charter.
Montross v. State, 61 M. 429.

1882, Page 826, Section 2.
Georgia Pac. R. Co.: charter confers right to "cross, occupy and use any public road," &c. "Highway." City street.
Hamline v. Southern R. Co., 76 M. 410, 25 So. 295.

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1882, Page 838.
Yazoo &c. R. Co.: charter.
Adams v. Yazoo &c. R. Co., 75 M. 275, 22 So. 824.
Yazoo &c. R. Co. v. Southern R. Co., 83 M. 746, 36 So. 74.

1882, Pages 842, 843, Section 5.
Charter of Yazoo &c. R. Co.: contemplates consolidation resulting in new company, and not mere merger.
Adams v. Yazoo &c. R. Co., 77 M. 194, 24 So. 200, 60 L. R. A. 33n.

1882, Page 920.
Charter of New Orleans &c. R. Co. Eminent domain. Assessment of damages by commissioners. Chancery jurisdiction. Constitutionality.
New Orleans &c. R. Co. v. Drake, 60 M. 621.
See Louisville &c. R. Co. v. Dickson, 63 M. 380.
Madden v. Louisville &c. R. Co., 66 M. 258, 6 So. 181.
Louisville &c. R. Co. v. Blythe, 69 M. 939, 11 So. 111, 30 Am. St. 599, 16 L. R. A. 251n.

1882, Page 932, Section 25.
Charter of New Orleans &c. R. Co.: contemplates only such consolidation as would result in new company.
Adams v. Yazoo &c. R. Co., 77 M. 194, 24 So. 200, 60 L. R. A. 33n.

1882, Page 1011.
Louisville &c. R. Co.: exemption from taxation.
Louisville &c. R. Co. v. Taylor, 68 M. 361, 8 So. 675.
Louisville &c. R. Co.: succession to property of New Orleans &c. R. Co.
Louisville &c. R. Co. v. Blythe, 69 M. 939, 11 So. 111.
Property formerly owned by Louisville &c. R. Co.: exemption from taxation.
Yazoo &c. R. Co. v. Adams, 81 M. 90, 32 So. 937.

1882, Page 1023.
Lease by Chicago &c. R. Co. of its railroad to Illinois Cent. R. Co.: rights of lessee.
Canton v. Canton Cotton Warehouse Co., 84 M. 268, 36 So. 266, 105 Am. St. 428, 65 L. R. A. 561.

Act of March 14, 1884.
Obstruction of navigation: subsequent legislative authority. Action for damages. Plea.
Smith v. Railroad Co., 62 M. 510.

1884, Chapter 168, Section 13.
Did not cure defects in assessments.
Mullins v. Shaw, 77 M. 900, 27 So. 602, 28 So. 958.

1884, Page 1.
Money of levee board, not "special fund" of state.
Board of Levee Commissioners v. Hemingway, 66 M. 289, 6 So. 235.

1884, Page 14.
Assessment of lands for 1883. Curative act.
Osburn v. Hide, 68 M. 45, 8 So. 514.
Return of assessment for 1883.
Brothers v. Beck, 75 M. 482, 22 So. 944.
See Mullins v. Shaw, 77 M. 900, 27 So. 602, 28 So. 958.

1884, Page 17.
County assessor: compensation.
Hughston v. Carroll County, 68 M. 660, 10 So. 51.

1884, Page 18.
Strikes out "pint" and inserts "gallon" in Code 1880, § 1112: effect.
Whittington v. State, 62 M. 796.

1884, Page 24.
Maltreatment of convicts. Statute repealed.
State v. Jenkins, 73 M. 523, 19 So. 206.

1884, Page 29.
Exemption from taxation. Legislative power. Constitutional law.
McCulloch v. Stone, 64 M. 378, 8 So. 236.
Natchez &c. R. Co.: restoration of exemption from taxation.
Natchez &c. R. Co. v. Lambert, 70 M. 779, 13 So. 33.
Taxation of railroads. Commutation tax. Outlying lands.
LeBlanc v. Illinois Cent. R. Co., 72 M. 669, 18 So. 381.

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1884, Pages 29–31.

Property formerly owned by Louisville &c. R. Co.: exemption from taxation.
Yazoo &c. R. Co. v. Adams, 81 M. 90, 32 So. 937.

1884, Page 31.

Railroad commission not unconstitutional.
Stone v. Yazoo &c. R. Co., 62 M. 607, 52 Am. Rep. 193.

Suit against railroad company for failure to erect depot.
State v. Alabama &c. R. Co., 67 M. 647, 7 So. 502.

1884, Page 42.

Devolves on railroad companies duty of maintaining cattle-guards where tracks intersect inclosures.
Fairchild v. New Orleans &c. R. Co., 62 M. 177.

First legislative action on subject of stock gaps and cattle-guards.
Southern R. Co. v. Murrell, 78 M. 446, 28 So. 824.

1884, Page 71.

Chancery practice. Judicial sale. Inadequacy of price.
Chaffe v. Aaron, 62 M. 29.
Mason v. Martin, 64 M. 572, 1 So. 756.

1884, Page 74.

Amendatory, Code 1880, § 2449. Garnishment: condition precedent to interpleader.
Porter v. West, 64 M. 548, 8 So. 207.

Attachment. Damages. Set-off.
Posey v. Maddox, 65 M. 193, 3 So. 460.

1884, Page 75, Chapter 62.

Amendatory of Code 1880, § 1510. Death of minor. Suit of damages.
Natchez &c. R. Co. v. Cook, 63 M. 38.
Amos v. Mobile &c. R. Co., 63 M. 509.

1884, Page 75.

Habeas corpus. Irregular proceedings. Commitment.
Ex parte Hamilton, 65 M. 98, 3 So. 68.
See Ex parte Hamilton, 65 M. 147, 3 So. 241.

1884, Page 76.

Attachment. Intervention by creditors of defendant. Remedial as to intervener, penal as to plaintiff. Prospective in operation.
Powers v. Wright, 62 M. 35.

Trial of attachment. Judgment for defendant. Appeal.
Lowenstein v. Powell, 68 M. 73, 8 So. 269.

Attachment. Intervention of creditors. Receiver.
Paine v. Holliday, 68 M. 298, 8 So. 676.

Attachment. Plea by intervening creditor. Collusion. Procedure.
Lowenstein v. Aaron, 69 M. 341, 12 So. 269.

Attachment. Punitive damages: certification of grounds therefor. Instructions for defendant imposing on him burden of showing "malice," not available to plaintiff as error. Finality of verdict. Constitutionality.
Mack v. Jacobs, 70 M. 429, 12 So. 444.

Attachment. Creditor of defendant: intervention. Plea in abatement. Effect of Code 1892, § 174.
First National Bank v. Solomon, 71 M. 889, 16 So. 302.

Damages in attachment. Enforcement in chancery of set-off against judgment.
Feld v. Coleman, 72 M. 545, 17 So. 378.

1884, Page 80.

Lien of landlord. Purchaser of agricultural products. Applies Code 1880, § 1362, to Code 1880, § 1301.
Cohn v. Smith, 64 M. 816, 2 So. 244.

1884, Page 84.

Authorizes seizure of personal property to satisfy purchase price. Remedial in character. Embraces causes of action existing at time of passage.
Excelsior Mfg. Co. v. Keyser, 62 M. 155.

Writ of seizure: intervention by judgment creditor who has levied on seized property.
Bernheim v. Andrews, 65 M. 28, 3 So. 75.

Amendatory, Code 1880, § 1255. Exempt property. Remedy of seller of personalty.
Frank &c. Co. v. Robinson, 65 M. 162, 3 So. 253.
See Graham v. Thornton, 9 So. 292.

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Debt for labor. Writ of seizure. Confusion of goods.
Ouilette v. Davis, 69 M. 762, 12 So. 27.

Suit for materials furnished. Writ of seizure. Filing account.
Bryant v. Harris, 70 M. 683, 12 So. 585.

1884, Page 140.

Yazoo-Mississippi Delta Levee board. Eminent domain. Compensation. Appeal to Supreme Court.
Levee Commissioners v. Harkleroads, 62 M. 807.

1884, Page 140, Section 2.

Grant by state in aid of levee board.
Owens v. Yazoo-Mississippi Delta Levee Board, 74 M. 269, 21 So. 12.

1884, Page 140.

Appeal to circuit court from appraisement of land taken for levee purposes: disqualification of juror.
Levee Commissioners v. Dillard, 76 M. 641, 25 So. 292.

1884, Page 142, Section 4.

Levee commissioners may relocate levee.
Ham v. Yazoo-Mississippi Delta, 83 M. 534, 35 So. 943.

1884, Page 147, Section 6.

Bond of treasurer of Yazoo-Mississippi Delta Levee Board: interest on moneys deposited.
Adams v. Williams, — M. —, 52 So. 865.

1884, Page 163.

Condemnation of land for levee purposes. Measure of damages.
Richardson v. Levee Board, 68 M. 539, 9 So. 351.

Damage caused by use of land of another for levee purposes: jurisdiction of circuit court of appeal from disallowance of claim by levee commissioners.
Richardson v. Board of Mississippi Levee Com'rs, 77 M. 518, 26 So. 963.

Amendatory, Laws 1865, p. 51. Lands, conveyed by mortgagor, for levee purposes. Suit for damages by vendee of foreclosure purchaser.
Miller v. Board of Levee Commissioners, 78 M. 201, 28 So. 834, 877.

1884, Page 166.

Eminent domain. Levee board. Rights of mortgagee. Notice.
Board of Levee Com'rs v. Wiborn, 74 M. 396, 20 So. 861.

1884, Page 182.

Tax title. Purchaser under decree in Green v. Gibbs. Quit-claim conveyance by auditor: payment of taxes condition precedent.
McCulloch v. Stone, 64 M. 378, 8 So. 236.

Quit-claim of state to purchaser under Green v. Gibbs.
Paxton v. Valley Land Co., 67 M. 96, 6 So. 628.
Murdock v. Chaffe, 67 M. 740, 7 So. 519.

Tax title. Purchaser under decree in Gibbs v. Green. Release of state's title.
Paxton v. Valley Land Co., 68 M. 739, 10 So. 77.

1884, Page 184.

Abolished levee district No. 1. Auditor's deed: payment of taxes in levee bonds.
Wynn v. Stone, 69 M. 80, 13 So. 669.
Shotwell v. Louisville &c. R. Co., 69 M. 541, 11 So. 455.

1884, Page 200.

Sale of liquors in municipality. Wholesale license.
Trost v. State, 64 M. 188, 1 So. 49.

1884, Page 205.

Regulates sale of liquors in Copiah county: prosecution for violation unmaintainable after repeal by election under Laws 1886, p. 35.
Wheeler v. State, 64 M. 462, 1 So. 632.

1884, Page 318.

Authorizes working of Madison county roads by contract. Not repealed by Code 1892.
Madison County v. Stewart, 74 M. 160, 20 So. 857.
Madison County v. Collier, 79 M. 220, 30 So. 610.
See Madison County v. Collier, 87 M. 204, 30 So. 610.

1884, Page 321.

Registration of Madison county bonds: affidavit. Constitutionality.
Priestly v. Watkins, 62 M. 798.

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1884, Page 327.
Highways. Road law. Special act. Constitutionality.
Monroe County v. State, 63 M. 135.

1884, Page 422.
Assessment of taxes. Charter of Vicksburg. Power of aldermen.
Alabama &c. R. Co. v. Brennan, 69 M. 103, 10 So. 451.

Amended, Laws 1886, p. 694. Charter of Vicksburg. Contract for electric lights. Advertisement for bids. Submission to popular vote.
Reid v. Trowbridge, 78 M. 542, 29 So. 167.

1884, Page 429, Section 11.
Vicksburg charter: amendment of February 17, 1904, Laws 1904, p. 168, ch. 116, constitutional.
Ex parte Dickson, 89 M. 778, 42 So. 233.

1884, Page 445.
Charter of Vicksburg: provision exempting from taxation bills and notes for taxable property within city, unconstitutional.
Adams v. Kuykendall, 83 M. 571, 35 So. 830.

1884, Page 751.
Municipal ordinance. Police power. Vending meats.
Porter v. Water Valley, 70 M. 560, 12 So. 828.

1884, Page 936.
Louisville &c. R. Co.: succession to property of New Orleans &c. R. Co.
Louisville &c. R. Co. v. Blythe, 69 M. 939, 11 So. 111.

1884, Page 971.
Transfer of penitentiary lease. Bond.
Hamilton v. State, 67 M. 217, 7 So. 282.
Hamilton v. State, 8 So. 761.

Act of March 16, 1886.
Does not ratify and validate assignment of penitentiary lease of December 20, 1885.
Hamilton v. State, 8 So. 761.

1886, Page 12.
Privilege tax on boarding house.
Murphy v. State, 66 M. 46, 5 So. 626.

Amends Code 1880, § 585. Strikes provision as to non-exempting effect upon bank's realty, of payment of privilege tax.
Vicksburg Bank v. Worrell, 67 M. 47, 7 So. 219.

Did not repeal Code 1880, § 498. Privilege tax on banks: exemption from other taxes, &c.
Bank of Oxford v. Oxford, 70 M. 504, 12 So. 203.

1886, Page 32.
Privilege tax: failure to pay. Constitutionality and repeal of act.
Phenix Ins. Co. v. Pollard, 63 M. 641.

Privilege tax. Change in firm. Amnesty act.
Harness v. Williams, 64 M. 600, 1 So. 759.

1886, Page 35, Chapter 13.
Bank granted repealable charter during life of Code 1857 cannot charge ten per cent. "discount."
Columbus Ins. &c. Co. v. First Nat. Bank, 73 M. 96, 15 So. 138.

Rate of interest. Usury. Building and loan associations.
Sullivan v. Jackson B. & L. Ass'n, 70 M. 94, 12 So. 590.
Goodman v. Durant B. & L. Ass'n, 71 M. 310, 14 So. 146.

Contract with foreign building and loan association at rate in excess of ten per cent., usurious.
National Mut. B. & L. Ass'n v. Pinkston, 79 M. 468, 30 So. 692, 31 So. 834.

1886, Page 35, Chapter 14.
Local option act: constitutionality.
Schulherr v. Bordeaux, 64 M. 59, 8 So. 201.

Petition for local option election. Interest of supervisor. Finding as to "qualified" electors signing. Constitutionality of act.
Lemon v. Peyton, 64 M. 161, 8 So. 235.

Local option law: effect of election.
Hearn v. Brogan, 64 M. 334, 1 So. 246.

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Local option law. Repeal of former act.
Wheeler v. State, 64 M. 462, 1 So. 632.
See Kohlbrunner v. State, 67 M. 368, 7 So. 288.

Local option law. Former acts: how far repealed.
Winterton v. State, 65 M. 238, 3 So. 735.
Norton v. State, 65 M. 297, 3 So. 665.
Bryant v. State, 65 M. 435, 4 So. 343.
Brooks v. State, 65 M. 445, 4 So. 343.

No property in liquors sold contrary to law: when rule not applicable.
Howe v. Jolly, 68 M. 323, 8 So. 513.

Local option. Unlawful sale of liquors. Indictment.
McDonald v. State, 68 M. 728, 10 So. 55.

Sale of liquors. Local option. Alcohol. Malt liquors. Receiving orders. Result of election. Evidence.
Lemly v. State, 70 M. 241, 12 So. 22.
Boswell v. State, 70 M. 395, 12 So. 446.
West v. State, 70 M. 598, 12 So. 903.
Conrad v. State, 70 M. 733, 12 So. 851.

Sale of liquors. Local option act. Evidence of result of election.
Puckett v. State, 71 M. 192, 14 So. 452.

Persons entitled to appeal from grant of license.
Clark v. Pratt, 11 So. 631.

Local option law. Conviction of violation. Imposition of excessive penalty. Reversal.
Haynes v. State, 22 So. 871.
See Haynes v. State, 23 So. 182.

1886, Page 51.

Taxation for school purposes. Separate districts.
Bourdeaux v. Meridian Land &c. Co., 67 M. 304, 7 So. 286.

Qualifications of county superintendents of education.
Wynn v. State, 67 M. 312, 7 So. 353.

Separate school districts. Special tax. Taxation of banks.
Huntley v. Bank of Winona, 69 M. 663, 13 So. 832.

School teacher's license. Examination.
Hill v. Swinney, 72 M. 248, 16 So. 497.

1886, Page 64.

Separate school districts. Outside pupils. Tuition.
State v. Hamilton, 69 M. 116, 10 So. 67.

1886, Page 85.

Vulgar and indecent language: amendment of affidavit on appeal to circuit court.
Garman v. State, 66 M. 196, 5 So. 385.

1886, Page 91.

Person suffering no pecuniary loss from tardy delivery of prepaid telegram may sue for penalty.
Western Union Tel. Co. v. Allen, 66 M. 549, 6 So. 461.
See Western Union Tel. Co. v. Jones. 69 M. 658, 13 So. 471, 30 Am. St. 579.

Action against telegraph company for damages: res adjudicata.
Wilkins v. Western Union Tel. Co., 68 M. 6, 8 So. 678.

1886, Page 93, Chapter 37.

Changes character and legal effect of contract evidenced by bill of lading. Prospective in operation.
Hazard v. Illinois Cent. R. Co., 67 M. 32, 7 So. 280.

1886, Page 93, Chapter 38.

Telegraph and telephone company: award on condemnation of right-of-way over railroad.
Postal Telegraph-Cable Co. v. Alabama &c. R. Co., 68 M. 314, 8 So. 375.

Telegraph company: condemnation of right-of-way. New inquest.
Louisville &c. R. Co. v. Postal Telegraph-Cable Co., 68 M. 806, 10 So. 74.

Telegraph company: ordinance exacting rent for use of city streets, void.
Hodges v. Western Union Tel. Co., 72 M. 910, 18 So. 84.

Repealed by Code 1892, §§ 854–858, 4291. Telephone company cannot exercise power of eminent domain.
Alabama &c. R. Co. v. Cumberland Tel. &c. Co., 88 M. 438, 41 So. 258.

1886, Page 100.

Taxation. Constitutionality.
Portwood v. Baskett, 64 M. 213, 1 So. 105.

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Eminent domain: denial of due compensation.
Levee Commissioners v. Dancy, 65 M. 335, 3 So. 568.

1886, Page 158.
Sale of native wines.
Kohlbrunner v. State, 67 M. 368, 7 So. 288.

1886, Page 298, Chapter 180.
Hinds county: compensation of assessor.
Stone v. Caspar, 2 So. 74.

1886, Page 446, Section 42.
Empowers authorities of Bay St. Louis to light streets of city for public benefit.
Gulf Coast Ice &c. Co. v. Bowers, 80 M. 570, 32 So. 113.

1886, Page 589, Chapter 325.
Contract of municipality with water company: estoppel.
Meridian Waterworks Co. v. Meridian, 85 M. 515, 37 So. 927.

1886, Page 694.
Amendatory, Laws 1884, p. 422. Charter of Vicksburg. Contract for electric lights. Advertisement for bids. Submission to popular vote.
Reid v. Trowbridge, 78 M. 542, 29 So. 167.

1886, Page 772.
"For relief of J. K. Allen." Non-operative as statutory pardon or to validate wife's subsequent deed, void for duress.
Leflore County v. Allen, 80 M. 298, 31 So. 815.

1886, Page 820.
Exemption from road duty granted members of Scranton fire company, withdrawn by Const. 1890, § 90.
Chidsey v. Scranton, 70 M. 449, 12 So. 545.

1888, Page 8.
Taxation of banks.
Attala County v. Kelly, 68 M. 40, 8 So. 376.

1888, Page 9.
Telegraph companies. Privilege tax. Constitutionality. Interstate commerce.
Postal Telegraph-Cable Co. v. Adams, 71 M. 555, 14 So. 36.
Affirmed: Postal Telegraph-Cable Co. v. Adams, 155 U. S. 311.

1888, Page 14.
Privilege tax. Public buyer of cotton seed.
Jones v. State, 69 M. 406, 13 So. 728.

1888, Pages 15, 16.
Privilege tax on banks: exemption from other taxes.
Bank of Oxford v. Oxford, 70 M. 504, 12 So. 203.
See Vicksburg Bank v. Worrell, 67 M. 47, 7 So. 219.
Vicksburg Bank v. Adams, 74 M. 179, 21 So. 401.
Hawkins v. Mangum, 78 M. 97, 28 So. 872.

1888, Page 19.
County tax levy: limit. Teachers' warrants.
Cowart v. Foxworth, 67 M. 322, 7 So. 350.

1888, Page 24.
Assessment of lands not in incorporated town.
Union Investment Co. v. Harrison County, 67 M. 614, 7 So. 509.

Madison act: constitutionality.
Hawkins v. Mangum, 78 M. 97, 28 So. 872.
See Scarborough v. Elmer, 87 M. 508, 40 So. 69.

1888, Page 40.
Prima facie validity of tax deed.
Paxton v. Valley Land Co., 67 M. 96, 6 So. 628.

Tax title. Curative act. Release of state's title to purchasers under decree in Gibbs v. Green.
Paxton v. Valley Land Co., 68 M. 739, 10 So. 77.
Patterson v. Durfey, 68 M. 779, 9 So. 354.
See Creegan v. Hyman, 93 M. 481, 46 So. 952.

Quieting tax title in Yazoo delta. Conveyance by auditor.
Shotwell v. Louisville &c. R. Co., 69 M. 541, 11 So. 455.
Jones v. Merrill, 69 M. 747, 11 So. 23.

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Tax title. Curative statute. Prime facie evidence.
National Bank of the Republic v. Louisville &c. R. Co., 72 M. 447, 17 So. 7.

Tax titles. Adverse possession. Occupancy of part of tract. Twelve months' limitation.
Louisville &c. R. Co. v. Buford, 73 M. 494, 19 So. 584.

Tax title. Right of redemption by owner of land sold, within one year after reaching majority, unaffected by bar.
Boddie v. Pardee, 74 M. 13, 20 So. 1.

Taxation. Lands outside levee.
Owens v. Yazoo &c. R. Co., 74 M. 821, 21 So. 244.

Lands quit-claimed by state, subject to assessment for taxes and to sale for nonpayment of same.
Means v. Haley, 86 M. 557, 38 So. 506.

1888, Page 40, Section 4.
Provides for quieting title to certain lands in Yazoo Delta. Not unconstitutional in providing unreasonably short period of limitation.
Cameron v. Louisville &c. R. Co., 69 M. 78, 10 So. 554.

1888, Page 44, Section 3.
Did not repeal Laws 1888, p. 48, requiring intrastate railroads to furnish separate accommodations for white and colored races.
Louisville &c. R. Co. v. State, 66 M. 662, 6 So. 203, 14 Am. St. 599, 5 L. R. A. 132.

1888, Page 44.
Suit against railroad company for failure to erect depot.
State v. Alabama &c. R. Co., 67 M. 647, 7 So. 502.

1888, Page 48.
Requires intrastate railroads to furnish separate accommodations for white and colored races. Constitutionality.
Louisville &c. R. Co. v. State, 66 M. 662, 6 So. 203.
Affirmed: Louisville &c. R. Co. v. State, 133 U. S. 587.

1888, Page 49.
Property formerly owned by Louisville &c. R. Co.: exemption from taxation.
Yazoo &c. R. Co. v. Adams, 81 M. 90, 32 So. 937.

1888, Page 56.
Selection of county superintendents.
Wynn v. State, 67 M. 312, 7 So. 353.

1888, Page 62.
Constitutional law. Legislative power to abolish judicial districts, &c.
Price v. Anderson, 65 M. 410, 4 So. 96.

1888, Page 74, Chapter 43.
Marion county: court districts. Amended, Laws 1890, p. 91, ch. 77.
Lindsley v. Coahoma County, 69 M. 815, 11 So. 336.

1888, Page 82.
Practice. Suits ex contractu. Trial at return term.
Oglesby v. Stribbling, 67 M. 666, 7 So. 463.

1888, Page 89, Chapter 53.
Seduction. First appearance of Code 1892, § 1298. Indictment under latter: defect cured by verdict. Ingredients of offense.
Norton v. State, 72 M. 128, 16 So. 264, 18 So. 916.

1888, Page 89, Chapter 54.
Concealed weapons. Amendatory, Code 1880, § 2985. Ex post facto as to person indicted under latter.
Lindzey v. State, 65 M. 542, 5 So. 99.
See Hodnett v. State, 66 M. 26, 5 So. 518.

Carrying concealed weapons. Construction of statute.
Earhart v. State, 67 M. 325, 7 So. 347.

1888, Page 118.
Stock law fence. "Landowner." Railroad right-of-way. Taxation.
Adams v. Kansas City &c. R. Co., 74 M. 331, 21 So. 11.

1888, Page 170.
Sale of liquors. Local act for Copiah county.
King v. State, 66 M. 502, 6 So. 188.

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1888, Page 173, Chapter 148.
Appoints, and confers extraordinary powers upon, trustees of Hazlehurst public schools. Violative of Const. 1869, art. 8, § 1.
Ellis v. Greaves, 82 M. 36, 34 So. 81.

1888, Page 206, Chapter 167.
Biloxi: special charter does not confer power to tax personal property.
Adams v. Ducate, 86 M. 276, 38 So. 497.

1888, Page 206, Sections 27, 28.
Biloxi. Right to remove encroachment upon sidewalk, street or alley. "Public" character of street, question of fact. Evidence.
Nixon v. Biloxi, 5 So. 621.

1888, Page 235, Section 3.
Jackson water company. Twenty-year contract. Words "from year to year" interpreted.
Light &c. Co. v. Jackson, 73 M. 598, 19 So. 771.
See Reid v. Trowbridge, 78 M. 542, 29 So. 167.

1888, Page 287, Section 4.
City of Meridian. Delinquent taxes. Seizure and sale of personal property. "Damages."
Hodges v. Coffee, 13 So. 878.

1888, Page 463, Chapter 378.
Yazoo county: valid existing assessment under this act not abandoned by passage of act, unconstitutional and void.
Butts v. Ricks, 82 M. 533, 34 So. 354.

1888, Page 468.
Vicksburg. Contract for electric lights. Advertisement for bids. Submission to popular vote.
Reid v. Trowbridge, 78 M. 542, 29 So. 167.

1888, Page 602.
Charter of Light &c. Co. Contract with city of Jackson under Laws 1888, p. 235, § 3.
Light &c. Co. v. Jackson, 73 M. 598, 19 So. 771.

1888, Page 626.
Prohibits sale of liquors "at or within three miles of Providence College," &c. Place, of essence of offense: fatally defective indictment.
Ragan v. State, 67 M. 332, 7 So. 280.

1890, Page 6.
Taxation of banks.
Attala County v. Kelly, 68 M. 40, 8 So. 376.
See Bank of Oxford v. Oxford, 70 M. 504, 12 So. 203.
Recognizes exemption from taxation of Natchez &c. R. Co.
Natchez &c. R. Co. v. Lambert, 70 M. 779, 13 So. 33.

1890, Pages 8, 9.
Prohibits municipalities from levying or collecting tax on banks or solvent credits greater than seventy-five per cent. of state tax. Constitutionally.
Adams v. Bank of Oxford, 78 M. 532, 29 So. 402.

1890, Page 9.
Tax upon banks: limitation of power of municipalities.
Huntley v. Bank of Winona, 69 M. 663, 13 So. 832.
Limit of municipal tax upon banks: statement to assessor.
Alexander v. Thomas, 70 M. 517, 12 So. 708.

1890, Page 11.
Revenue agent. Suit for privilege tax on retailer. Assessment necessary. Statute not retroactive.
State v. Adler, 68 M. 487, 9 So. 645.
Privilege tax on retailers of liquors. Civil liability. Action by revenue agent.
Thibodeaux v. State, 69 M. 683, 13 So. 352.
Privilege tax on liquor dealers. Repeal. Abatement of action by revenue agent.
State v. Order of Elks, 69 M. 895, 13 So. 255.
Action for privilege tax. Revenue agent.
State v. Fragiacomo, 71 M. 417, 15 So. 798.

1890, Page 13.
Property formerly owned by Louisville &c. R. Co.: exemption from taxation.
Yazoo &c. R. Co. v. Adams, 81 M. 90, 32 So. 937.

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1890, Page 16.
Tax title. Re-advertisement and sale of lands.
Marble v. Fife, 69 M. 596, 13 So. 842.

1890, Page 16, Chapter 5.
Does not cancel unlisted tax sales to state unless lands were omitted by and with advice of attorney-general as required by Laws 1880, p. 88, ch. 9, § 2.
Winton v. Day, 96 M. 1, 49 So. 264.

1890, Page 19.
Equalization act: has no application to case where there was no assessment.
Hawkins v. Mangum, 78 M. 97, 28 So. 872.

1890, Page 25.
State revenue agent: authority to sue. Declaration.
State v. Taylor, 68 M. 730, 9 So. 894.
State v. Adler, 68 M. 487, 9 So. 645.
State revenue agent. Action for privilege tax. Default of tax collector. Costs.
State v. Thibodeaux, 69 M. 92, 10 So. 58.
State revenue agent: right to sue. Act repealed by Code 1892.
State v. Hill, 70 M. 106, 11 So. 789.
See Yazoo &c. R. Co. v. West, 78 M. 789, 29 So. 475.

1890, Page 33, Chapter 11.
Invalidity of location of swamp lands in Attala county under Tunica county scrip.
Shelton v. Thompson, — M. —, 53 So. 538.

1890, Page 35.
County assessor: additional compensation for past services.
Hughston v. Carroll County, 68 M. 660, 10 So. 51.

1890, Page 35, Chapter 15.
Assessors. Allowance "amounting to five cents for each poll," &c. Constitutionality of act.
Hill v. Warren County, 8 So. 257.

1890, Page 53.
Call for constitutional convention: ratification of constitution enacted unnecessary.
Sproule v. Fredericks, 69 M. 898, 11 So. 472.
See Dixon v. State, 74 M. 271, 20 So. 839.

1890, Page 66.
Amendatory, Code 1880, § 1753. Enrolled judgment. Execution to another county.
Smith v. Mixon, 73 M. 581, 19 So. 295.

1890, Page 67.
Assignee of rent note may distrain for amount thereof.
Coker v. Britt, 78 M. 583, 29 So. 833.

1890, Page 69.
Enticing away laborer. Indictment. Cropper.
Ward v. State, 70 M. 245, 12 So. 249.
Employment of laborer under contract: damages.
Armistead v. Chatters, 71 M. 509, 15 So. 39.

1890, Page 71.
Intoxicating liquors. "To sell" do not include mere receipt of order, &c.
West v. State, 70 M. 598, 12 So. 903.

1890, Page 74.
Taxes paid to levee board: compensation of collector.
Yazoo &c. R. Co. v. Love, 69 M. 109, 12 So. 266.

1890, Page 79, Chapter 69.
Amendatory, Code 1892, § 3039. Amendment of municipal charters, &c. Constitutionality of act.
Yazoo City v. Lightcap, 82 M. 148, 33 So. 949.

1890, Page 83.
School teacher's license. Examination.
Hill v. Swinney, 72 M. 248, 16 So. 497.

1890, Page 86.
Public schools. Text-books: contract with publishers. Mandamus.
Effingham &c. Co. v. Hamilton, 68 M. 523, 10 So. 39.

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1890, Page 91, Chapter 77.
Amendatory of Laws 1888, p. 74, ch. 43, dividing Marion county into court districts.
Lindsley v. Coahoma County, 69 M. 815, 11 So. 336.

1890, Page 94.
Hiring out county prisoners in certain counties.
Monroe County v. McDaniel, 68 M. 203, 8 So. 645.

1890, Page 106.
Disuse of passenger depot: removal of site.
State v. Alabama &c. R. Co., 68 M. 653, 9 So. 469.

Depot agents, conservators of peace: liability of railroad company for unlawful arrest.
King v. Illinois Cent. R. Co., 69 M. 245, 10 So. 42.
Illinois Cent. R. Co. v. King, 69 M. 852, 13 So. 824.

1890, Page 107, Section 4.
Does not empower railroad commission to require railroad company to maintain detached freight and passenger depots in same municipality.
State v. Yazoo &c. R. Co., 87 M. 679, 40 So. 263.

1890, Page 124.
Special revenue act for Bolivar county. Registration of warrants.
Jones v. Melchoir, 71 M. 115, 13 So. 857.

1890, Page 170.
Stock law: excludes town of Houston from territory embraced by provisions.
Stovall v. Tabb, 8 So. 644.

1890, Page 230, Chapter 146.
Supervisors of Carroll county authorized to institute certain suits, based on railroad stock subscriptions. Demurrable declaration.
Carroll County v. Georgia &c. R. Co., 11 So. 471.

1890, Page 376.
Brookhaven: amendment to charter. Bonds for school purposes. Constitutionality of act.
Chrisman v. Brookhaven, 70 M. 477, 12 So. 458.

1890, Page 384, Chapter 250.
Regulates working of public roads in Madison county. Not repealed by Code 1892. Claim of supervisor for compensation under § 8 barred after expiration of six years (Code 1892, § 2737).
Madison County v. Collier, 87 M. 204, 30 So. 610, substituted for Madison County v. Collier, 79 M. 220, 30 So. 610, withdrawn by court.

1890, Page 386, Chapter 250, Section 8.
Authorizes salary to supervisors of Madison county. Not repealed by Code 1892. Unaffected by Const. 1890.
Adams v. Dendy, 82 M. 135, 33 So. 843.

1890, Page 675.
Louisville &c. R. Co.: exemption from taxation of property formerly belonging to Natchez &c. R. Co.
Natchez &c. R. Co. v. Lambert, 70 M. 779, 13 So. 33.

1890, Page 675, Chapter 502.
Authorized Natchez &c. R. Co. to sell franchises and property by vote of majority of stockholders.
Hinds County v. Natchez &c. R. Co., 85 M. 599, 38 So. 189, 107 Am. St. 305.

1890, Page 690.
Charter of Rosedale &c. R. Co. Municipal bonds.
Clark v. Rosedale, 70 M. 542, 12 So. 600.

Act of March 9, 1892.
Penalizes maltreatment of convicts by county contractor, &c. Indictment. Instructions.
Horton v. State, 13 So. 886.

1892, Page 28.
Sale under void assessment: curative act prospective in operation.
Carlisle v. Goode, 71 M. 453, 15 So. 119.

1892, Page 31.
Relief from penalties for non-payment of privilege tax.
Bank v. Oxford, 70 M. 504, 12 So. 203.

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Failure to pay privilege tax. Amnesty act.
McIver v. Clarke, 71 M. 444, 14 So. 257.

1892, Page 42.
Exempts proceeds of life insurance policies, &c. Constitutionality.
Rice v. Smith, 72 M. 42, 16 So. 417.

1892, Page 60.
Puts into immediate effect Code 1892, ch. 126. Abatement of actions by revenue agent.
State v. Order of Elks, 69 M. 895, 13 So. 255.

Adopts Code 1892. Constitutionality.
Hunt v. Wright, 70 M. 298, 11 So. 608.

1892, Page 362.
Coahoma county: division into two judicial districts constitutional.
Lindsley v. Coahoma County, 69 M. 815, 11 So. 336.

Coahoma county: approval of assessment roll.
Yazoo Delta Investment Co. v. Suddoth, 70 M. 416, 12 So. 246.

Coahoma county. Attachment: change of venue.
Wessinger v. Mauser &c. Imp. Co., 75 M. 64, 21 So. 757.

1892, Page 365, Section 2.
Middle line of Mississippi river, western boundary of first judicial district of Coahoma county.
Cook v. State, 81 M. 146, 32 So. 312.

1892, Page 392, Chapter 116.
Divided Perry county into two judicial districts and provided that no person should be liable to jury duty outside district of residence. Constitutionality.
Burt v. State, 86 M. 280, 38 So. 233.

1892, Page 838.
Yazoo &c. R. Co.: exemption from taxation.
Yazoo &c. R. Co. v. Adams, 76 M. 545, 25 So. 366.

1894, Page 25, Section 3.
Municipal taxation. Banks and solvent credits. Act unconstitutional.
Adams v. Mississippi State Bank, 75 M. 701, 23 So. 395.

1894, Page 27.
Revenue agent. Railroad commission. Assessment of escaped property.
Yazoo &c. R. Co. v. Adams, 73 M. 648, 19 So. 91.

1894, Page 28.
Assessor: additional compensation. Discretion of supervisors.
Williams v. Sharkey County, 74 M. 122, 20 So. 860.
See Bogan v. Holder, 76 M. 597, 24 So. 695.

1894, Page 29.
State revenue agent. Assessment for back taxes. Notice. Appeal. Bond.
Adams v. Kuhn, 72 M. 276, 16 So. 598.
State v. Brennan, 72 M. 894, 18 So. 482.
Adams v. Kuykendall, 83 M. 571, 35 So. 830.
See Adams v. Rigby, 16 So. 599.

State revenue agent's compensation.
Adams v. Bolivar County, 75 M. 154, 21 So. 608.

Ownership of railroad stock by counties: legislative control.
Adams v. Natchez &c. R. Co., 76 M. 714, 25 So. 667.

Back assessment of railroads by state railroad commission without appeal. Constitutionality of act.
Yazoo &c. R. Co. v. Adams, 77 M. 764, 25 So. 355.

State revenue agent: authority to mandate mayor and board of aldermen.
Adams v. Greenville, 77 M. 881, 27 So. 990.

Taxation. State revenue agent. Right of action. Constitutionality of act.
Yazoo &c. R. Co. v. West, 78 M. 789, 29 So. 475.

Right of state revenue agent to sue for appropriation by municipality in aid of corporation.
Adams v. Jackson Electric &c. Co., 78 M. 887, 30 So. 58.

State revenue agent, proper party to sue on compromised judgment on dramshop keeper's bond.
Adams v. Cox, 80 M. 561, 32 So. 117.

Taxation. Back assessments. State revenue agent.
Adams v. Luce, 87 M. 220, 39 So. 418.

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1894, Page 29, Section 2.

Thirty days' notice condition precedent to revenue agent's suit on bond of county treasurer for moneys stolen from latter.

Adams v. Arnold, 76 M. 655, 24 So. 868.

Empowers revenue agent to sue for all "penalties and forfeitures."

Clark v. Adams, 80 M. 219, 31 So. 746.

1894, Page 29, Sections 2–4.

Refer to ad valorem taxation only: state revenue agent cannot cause railroads to be back classified for purpose of privilege taxation.

Gulf &c. R. Co. v. Adams, 85 M. 772, 38 So. 348.

1894, Page 30, Section 3.

State revenue agent. Assessment.

Morris Ice Co. v. Adams, 75 M. 410, 22 So. 944.

1894, Page 33.

Presence of three members of executive committee of state board of health necessary to performance by such committee of official duty.

Wilson v. Alabama &c. R. Co., 77 M. 714, 28 So. 567.

1894, Page 33, Chapter 38.

Salary of health officer. Act repealed by Laws 1896, p. 79, ch. 68, § 3.

Perkins v. Panola County, 32 So. 316.

1894, Page 44, Chapter 52.

General assignment under Code 1892, ch. 8, does not defeat landlord's rights.

Rice v. Harris, 74 M. 422, 24 So. 880.

Does not subject property of third persons on leased premises to liability for rent.

Brunswick-Balke-Collender Co. v. Murphy, 89 M. 264, 42 So. 288.

1894, Page 48, Chapter 58.

Amendatory, Code 1892, § 2056. Stock law. Part of county.

Gore v. Doolittle, 77 M. 620, 27 So. 997.

Garner v. Webster County, 79 M. 565, 31 So. 210.

See Shaw v. Woffard, 82 M. 143, 34 So. 329.

1894, Page 49, Chapter 61.

Foreign trading corporation. "Doing business." "Agent."

Saxony Mills v. Wagner &c. Co., 94 M. 233, 47 So. 899, 23 L. R. A. (N. S.) 834n.

1894, Page 50.

Amendatory, Code 1892, § 3433. Declaration against, and summons for, foreign corporation, need not show that named person was its agent to receive service of process.

Georgia Home Ins. Co. v. Holmes, 75 M. 390, 23 So. 183.

1894, Page 51.

Amended, Laws 1896, p. 68. Valued policy law. Three-fourths clause. Estoppel.

Scottish &c. Ins. Co. v. Enslie, 78 M. 157, 28 So. 822.

Amended, Laws 1896, p. 68. Valued policy law. Recovery by insured. Separate policies, etc.

Hartford Fire Ins. Co. v. Shlenker, 80 M. 667, 32 So. 155.

1894, Page 52.

Foreign surety company suable only in county in which it has agent upon whom process may be served.

American Surety Co. v. Holly Springs, 77 M. 428.

1894, Page 65, Chapter 75.

Provides for establishment of penitentiary farm, &c. Does not repeal Code 1892, § 3201. Discretion of board of control.

State v. Henry, 87 M. 125, 40 So. 152.

1894, Page 67, Chapter 76.

Repeals Code 1892, ch. 23. County convicts: unauthorized imprisonment in jail.

Reabold v. State, 73 M. 236, 18 So. 929.

Johnson v. State, 26 So. 967.

1894, Page 67, Chapter 76, Sections 29, 30.

Amended, Laws 1896, p. 146. County convict contractor. Receipts, &c., as evidence. Death. Liability of sureties and legal representative.

State v. Oliver, 78 M. 5, 27 So. 988.

1894, Page 67, Chapter 76, Section 22.

Convict: conditional pardon. Constitutionality of section.

Ex parte Dig, 86 M. 597, 38 So. 730.

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1894, Page 74.
Amendatory, Code 1892, § 802. Justice of peace. Convicts worked on public roads. Liability of county for fines and costs.
Murch v. Warren County, 73 M. 356, 18 So. 540.

1894, Page 77, Chapter 78.
Levee tax on cotton seed oil mills, &c., not repealed by Laws 1898, p. 14, ch. 5.
Tate v. Board of Levee Com'rs, 84 M. 388, 36 So. 395.

1894, Page 78.
Privilege tax for levee purposes. Constitutionality. Keeper of licensed dramshop between river and levee.
Board of Levee Commissioners v. Houston, 81 M. 619, 33 So. 491.

1894, Page 92, Chapter 82.
Levee commissioners for Yazoo-Mississippi delta. Telephone line. Forfeiture of franchise.
Dorr v. Yazoo-Miss. Delta, 28 So. 938.

1894, Page 95.
Practice. Lands taken for levee purposes. Exclusive remedy.
Owens v. Levee Commissioners, 74 M. 269, 21 So. 12.

1896, Page 30, Section 7.
State bonds. Retirement. Option. Exercise. Constitutional law. Legislative or executive power.
Colbert v. State, 86 M. 769, 39 So. 65.

1896, Page 39, Chapter 35.
Excepts hoppenweis, hop tea, and white hops from operation of Code 1892, ch. 37.
Harland v. Adams, 76 M. 308, 24 So. 262.
See Armour v. Meridian, 24 So. 533.

1896, Page 54, Section 13.
Repealed Code 1892, § 3336, imposing annual state tax on commercial agencies.
Bradstreet Co. v. Jackson, 81 M. 233, 32 So. 999.

1896, Page 56.
Privilege tax. Amnesty act.
McMahan v. American Bldg. &c. Ass'n, 75 M. 965, 23 So. 431.

1896, Page 60.
Amendatory, Code 1892, § 2588. Provision for refund by state of purchase price of land, on failure of title thereto, applies only to sales by land commissioner.
Holder v. Wineman, 76 M. 824, 25 So. 481.

1896, Page 68.
Did not repeal as to fire insurance companies Code 1892, § 4437.
American Fire Ins. Co. v. State, 75 M. 24, 22 So. 99.

Valued policy law. Concurrent policies: extent of liability.
Western Assur. Co. v. Phelps, 77 M. 625, 27 So. 745.

Amendatory, Laws 1894, p. 51. Valued policy law. Three-fourths clause. Estoppel.
Scottish &c. Ins. Co. v. Enslie, 78 M. 157, 28 So. 822.

Amendatory, Laws 1894, p. 51. Valued policy law. Recovery by insured. Separate policies, &c.
Hartford Fire Ins. Co. v. Shlenker, 80 M. 667, 32 So. 155.

1896, Page 75.
Amendatory, Code 1892, § 3564. "Double damages." Informal pleading in justice's court. Recovery in accordance with proof.
Hallum v. Mobile &c. R. Co., 24 So. 909.

1896, Page 76.
Amendatory, Code 1892, § 3546. Speed of railroad trains in municipalities. Contributory negligence.
Collins v. Illinois Cent. R. Co., 77 M. 855, 27 So. 837.
Farquhar v. Alabama &c. R. Co., 78 M. 193, 28 So. 850.

Amendatory, Code 1892, § 3546. Railroad trans: speed in municipalities. Proximate cause.
Clisby v. Mobile &c. R. Co., 78 M. 937, 29 So. 913.

1896, Page 79, Chapter 68, Section 3.
Repealed, Laws 1894, p. 33, ch. 38. Salary of health officer.
Perkins v. Panola County, 32 So. 316.

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1896, Page 91.

Bills of exceptions. Stenographer's notes. Agreement of attorneys.
State v. Spengler, 74 M. 129, 20 So. 879, 21 So. 4.
Sanders v. State, 74 M. 531, 21 So. 299,

Stenographer's notes. Instructions. Necessity of objections in trial court. Appeal.
Alexander v. Flood, 77 M. 925, 28 So. 787.

1896, Page 93, Chapter 84.

Provides manner of procuring list of jurors: substantial compliance.
Cook v. State, 90 M. 137, 43 So. 618.

1896, Page 95, Section 4.

Drawing of grand jurors: fatal error.
Shepherd v. State, 89 M. 147, 42 So. 544.

1896, Page 97.

Amendatory, Code 1892, § 3559. Defective appliances. Injury to engineer. Contributory negligence.
Illinois Cent. R. Co. v. Guess, 74 M. 170, 21 So. 50.

1896, Page 97, Chapter 87.

Amendatory, Code 1892, § 3559. Confers upon employes of corporations generally rights and remedies enjoyed by employes of railroads. Constitutionality, &c.
Brooks v. Mississippi Cotton Oil Co., 76 M. 874, 25 So. 479.
Ballard v. Mississippi Cotton Oil Co., 81 M. 507, 34 So. 533.
Yazoo &c. R. Co. v. Schraag, 84 M. 125, 36 So. 193.

1896, Page 104.

Attachment for debt not due may be issued, executed and returned by clerk of circuit court as in other attachments.
Meridian Fertilizer Factory v. Edwards, 77 M. 697, 27 So. 645.

1896, Page 105.

Appointment of substituted trustee must appear of record before valid sale can be made by him.
White v. Jenkins, 79 M. 57, 28 So. 570.
Shipp v. New South B. & L. Ass'n, 81 M. 17, 32 So. 904.
Provine v. Thornton, 92 M. 395, 46 So. 950.
Polk v. Dale, 93 M. 664, 47 So. 386.

Deed of trust. Sale contemporaneous with recording of instrument appointing substituted trustee.
Brown v. British-American Mortg. Co., 86 M. 388, 38 So. 312.

Mortgage. Trustee to sell: appointment not filed for record until after actual sale.
Searles v. Kelley &c. Co., 88 M. 228, 40 So. 484, 8 L. R. A. (N. S.) 491.

1896, Page 106, Chapter 98.

Amendatory, Code 1892, § 2462. Lien appearing, on face of record, to be barred by limitation: extension under Code 1892, § 2753.
Klaus v. Moore, 77 M. 701, 27 So. 612.

1896, Page 108.

Amendatory, Code 1892, § 1792. Suit upon justice's judgment. Destruction of record: evidence.
Wise v. Thread, 84 M. 200, 36 So. 244.

1896, Page 109, Chapter 103.

Deed of trust: designation of unlawful place of sale.
Polk v. Dale, 93 M. 664, 47 So. 386.

1896, Page 110.

Amendatory, Code 1892, § 1124. Indictment not charging that defendant was interested in loss or gain of table, fatally defective.
Brazele v. State, 86 M. 286, 38 So. 314.

1896, Page 129, Chapter 124, Section 3.

Embraces all sales by sheriff in discharge of any of his official duties whether as tax collector or sheriff.
Cramer v. Sides, 87 M. 241, 39 So. 693.

1896, Page 146.

Amendatory, Laws 1894, p. 67, §§ 29, 30. County convict contractor. Receipts, &c., as evidence. Death. Liability of sureties and legal representative.
State v. Oliver, 78 M. 5, 27 So. 988.

1896, Page 152.

Amendatory, Code 1892, § 3892. Validity of judgment ordering laying out of public road.
Illinois Cent. R. Co. v. Swam, 83 M. 631, 36 So. 147.

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1896, Page 169–170, Sections 7–10.
Requires levee, and state and county taxes to be collected in same manner and at same time.
Yazoo &c. R. Co. v. West, 78 M. 789, 29 So. 475.

1896, Page 172, Chapter 156, Section 16.
Must be construed with Laws 1904, p. 126, ch. 90, § 5. Levee tax on "lint cotton."
Levee Commissioners v. Refuge Cotton Oil Co., 91 M. 480, 44 So. 828.

1896, Page 175.
Appraisement of land taken for levee purposes: disqualification of juror on appeal to circuit court.
Levee Commissioners v. Dillard, 76 M. 641, 25 So. 292.

1897, Page 17, Chapter 16.
Brookhaven. Division of county road tax on municipal property.
Lincoln County v. Brookhaven, 90 M. 5, 41 So. 449.

1897, Page 21, Chapter 17.
Amendatory, Code 1892, § 2056. Irregular stock law district. Boundaries, arbitrary and natural.
Gore v. Doolittle, 77 M. 620, 27 So. 997.
Garner v. Webster County, 79 M. 565, 31 So. 210.
See Shaw v. Woffard, 82 M. 143, 34 So. 329.

1897, Page 22, Chapter 19.
Eminent domain proceedings by commissioners for Yazoo and Mississippi Delta. Owner of fee. Award of damages. Appeal. Verdict. Claim for deduction.
Board of Levee Com'rs v. Nelms, 82 M. 416, 34 So. 149.

1898, Page 14, Chapter 5.
Does not relieve cottonseed oil mills, &c., of levee tax imposed by Laws 1894, p. 77, ch. 78, from privilege taxes.
Tate v. Board of Levee Commissioners, 84 M. 388, 36 So. 395.

1898, Page 14, Section 25.
Privilege tax. Cottonseed oil mill. "Capital."
Hazlehurst Oil Mill &c. Co. v. Decell, 33 So. 412.
See Senatobia Oil Co. v. Poag, 86 M. 457, 38 So. 741.

1898, Pages 14, 15, Sections 25, 26.
"Cottonseed buyer." Contract of sale: non-payment of privilege tax as defense.
Gloster Oil Works v. Buckeye Cotton Oil Co., 87 M. 618, 40 So. 225.

1898, Page 17.
Privilege tax. "Cider."
State v. Crawley, 75 M. 919, 23 So. 625.
Repealed Laws 1896, p. 39, ch. 35, excepting hop tea from operation of Code 1892, ch. 37.
Armour v. Meridian, 24 So. 533.

1898, Pages 18–30, Chapter 5.
Privilege tax. Insurance agent. Void premium note.
White v. Post, 91 M. 685, 45 So. 366.

1898, Page 23, Chapter 5, Section 66.
Railroad commission cannot back classify railroads for purpose of privilege taxation.
Gulf &c. R. Co. v. Adams, 85 M. 772, 38 So. 348.
Imposes on each railroad company claiming exemption from state supervision, under maximum and minimum provisions of charter as to rates, additional privilege tax. Constitutionality.
Gulf &c. R. Co. v. Adams, 90 M. 559, 45 So. 91.

1898, Page 41.
Act to appropriate money for support and maintenance of industrial institute, &c.: void veto of part. Adjournment of legislature.
State v. Holder, 76 M. 158, 23 So. 643.

1898, Page 52.
Tax collector: exaction of prepayment of fees.
Baker v. Cox, 79 M. 306, 30 So. 641.

1898, Page 59.
Amendatory, Code 1892, § 301. Abstracts of title. Board of supervisors. Fees to chancery clerk. Constitutionality of act.
Yazoo &c. R. Co. v. Edwards, 78 M. 950, 29 So. 770.

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1898, Page 77.
Directs deduction from salary of district attorney absent from circuit court, &c. Constitutionality.
Cole v. Humphries, 78 M. 163, 28 So. 808.

1898, Page 78.
Directs deductions from salaries of judges and chancellors, of amounts paid substitutes. Constitutionality.
Holder v. Sykes, 77 M. 64, 24 So. 261.

1898, Page 82.
Action for damages caused by wrongful killing of illegitimate daughter unmaintainable by another illegitimate daughter of same mother.
Illinois Cent. R. Co. v. Johnson, 77 M. 727, 28 So. 753.

Mother cannot maintain action for damages caused by wrongful killing of illegitimate son.
Alabama &c. R. Co. v. Williams, 78 M. 209, 28 So. 853, 84 Am. St. 624, 51 L. R. A. 836.

1898, Page 82, Chapter 65.
Negligence. Actions for injuries causing death. Legislative development of Lord Campbell's act. Not impliedly repealed by Laws 1898, p. 84, ch. 66.
Bussey v. Gulf &c. R. Co., 79 M. 597, 31 So. 212.

Modifies Code 1892, § 663. Action by mother for death of minor child. Instruction erroneous on facts. Measure of damages.
Cumberland Tel. &c. Co. v. Anderson, 89 M. 732, 41 So. 263.

Person in whom rests cause of action must sue within one year from date of death.
Pickens v. Illinois Cent. R. Co., 92 M. 210, 45 So. 868.

1898, Page 84, Chapter 66.
Preserves undisturbed rights and remedies granted to employes of corporations generally by Laws 1896, p. 97, ch. 87. Constitutionality, &c.
Brooks v. Mississippi Cotton Oil Co., 76 M. 874, 25 So. 479.
Ballard v. Mississippi Cotton Oil Co., 81 M. 507, 34 So. 533.
Yazoo &c. R. Co. v. Schraag, 84 M. 125, 36 So. 193.
Bradford Construction Co. v. Heflin, 88 M. 314, 42 So. 174.

1898, Page 84.
Amendatory, Code 1892, § 3559. Engineer of switch engine not superior agent nor officer as regards yardmaster employed by same railroad company.
Farquhar v. Alabama &c. R. Co., 78 M. 193, 28 So. 850.

1898, Page 84, Chapter 66.
Legislative development of Const. 1890, § 193. Does not impliedly repeal Laws 1898, p. 82, ch. 65.
Bussey v. Gulf &c. R. Co., 79 M. 597, 31 So. 212.

1898, Page 85.
Has no application where injury resulted from unprecedented weather.
Yazoo City Transp. Co. v. Smith, 78 M. 140, 28 So. 807.

1898, Page 87.
White-capping. Indictment.
Breeland v. State, 79 M. 527, 31 So. 104.

1898, Page 90.
Amendatory, Code 1892, § 2921. Incorporation of town. Petition for charter. Governor's duty and power. Constitutionality of act.
Jackson v. Whiting, 84 M. 163, 36 So. 611.

1898, Page 95.
Amendatory, Code 1892, § 3560. Consolidation, &c., of parallel or competing railroads. Constitutionality.
Yazoo &c. R. Co. v. Southern R. Co. in Mississippi, 83 M. 746, 36 So. 74.
See State v. Mobile &c. R. Co., 86 M. 172, 38 So. 732, 122 Am. St. 277.

1898, Page 97, Chapter 82.
Railroad commission: car service associations subject to supervision.
Yazoo &c. R. Co. v. Searles, 85 M. 520, 37 So. 939.

State railroad commission may make rules as to reciprocal demurrage.
Yazoo &c. R. Co. v. Keystone Lumber Co., 90 M. 391, 43 So. 605.

1898, Page 97, Chapter 83.
Attempted constitutional amendment proposing to make judiciary elective, violative of Const. 1890, § 273.
State v. Powell, 77 M. 543, 27 So. 927, 48 L. R. A. 652.

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1898, Page 102, Chapter 90.
Oysters. Board of supervisors. Ordinance. Dredging by steam appliances. Fourteen-foot waters.
Eaton v. State, 80 M. 588, 32 So. 2.

1900, Page 44, Chapter 43, Section 8.
Limited in scope to sawmill operators. Timber buyer: privilege tax.
Bell v. Kerr, 80 M. 177, 31 So. 708.
Imposes privilege tax on land timber mill companies. Constitutionality.
Adams v. Mississippi Lumber Co., 84 M. 23, 36 So. 68.

1900, Page 50, Chapter 48.
Exemption from taxation of factories, &c. Constitutionality of act.
Adams v. Winona Cotton Mills, 92 M. 743, 46 So. 401.

1900, Page 52, Chapter 50.
Property used for religious purposes: exemption from taxation.
McHenry Baptist Church v. McNeal, 86 M. 22, 38 So. 195.

1900, Page 63, Chapter 56.
Penitentiary farm. Discretion of board of control.
State v. Henry, 87 M. 125, 40 So. 152.
See Henry v. State, 87 M. 1, 39 So. 856.

1900, Page 73, Chapter 65.
Public lands. Failure of title. Venue. Code 1892, § 2588, repealed.
State v. Mississippi Cotton Oil Co., 79 M. 203, 30 So. 609.

1900, Page 79.
Amendment of municipal charter: day for tax sale.
O'Flinn v. McInnis, 80 M. 125, 31 So. 584.
See Brown v. Sharp, 31 M. 712.

1900, Page 79, Chapter 69.
Amendatory, Code 1892, § 3039. Authorizes amendment of municipal charters, &c. Constitutionality.
Yazoo City v. Lightcap, 82 M. 148, 33 So. 949.

1900, Page 125.
Trusts and combines. Quo warranto. Venue.
State v. Mississippi Cotton Oil Co., 79 M. 203, 30 So. 609.
Trusts and combines. Car service association.
Yazoo &c. R. Co. v. Searles, 85 M. 520, 37 So. 939.
See Cumberland Tel. &c. Co. v. State, — M. —, 54 So. 670.
Trusts and combines. Constitutionality of act: severable provisions. Information in nature of quo warranto.
State v. Jackson Cotton Oil Co., 95 M. 6, 48 So. 300.

1900, Page 127, Section 5.
Forbids one corporation owning capital stock of another.
Woodberry v. McClurg, 78 M. 831, 29 So. 514.
See Yazoo &c. R. Co. v. Southern R. Co., 83 M. 746, 36 So. 74.
Watts Mercantile Co. v. Buchanan, 92 M. 540, 46 So. 66.

1900, Page 129.
Amendatory of Code 1892, § 1551. Exempt property. Descent and distribution. Widow's right. Partition. Rent, &c.
Martin v. Martin, 84 M. 553, 36 So. 523.
Stevens v. Wilbourn, 88 M. 514, 41 So. 66.

1900, Page 130.
Applies only to third persons in position to be prejudiced by secret conveyance.
Groce v. Phœnix Ins. Co., 94 M. 201, 48 So. 298, 22 L. R. A. (N. S.) 732n.

1900, Page 136.
Amendatory, Code 1892, § 927. Highly penal. Extraordinary state of case required to justify pro confesso and final decree.
Equitable Life Assur. Soc. v. Clark, 80 M. 471, 31 So. 964.

1900, Page 140.
Defendant in criminal prosecution is entitled to strict construction: conviction in instant case, erroneous.
Hendricks v. State, 79 M. 368, 30 So. 708.
Enticing servants: fatally defective affidavit.
Triplet v. State, 80 M. 379, 31 So. 743.

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Enticing servants. Suit under Code 1892, § 1068. Effect on recovery of damages, of amendatory act.
Nations v. Lovejoy, 80 M. 401, 31 So. 811.

Second contract to labor before expiration of first: venue of offense.
King v. State, 83 M. 375, 35 So. 691.

Acts of cropper not constituting offense.
Ex parte Harris, 85 M. 4, 37 So. 505.

Action for damages for enticing tenant. Evidence. Damages.
Wagner v. Ellis, 85 M. 422, 37 So. 959.

Language will not be extended by construction to contract to labor made for minor by his natural guardian.
State v. Richardson, 86 M. 439, 38 So. 497.

Action for damages for enticing tenant. Question of law. Justification of abandonment of contract.
Petty v. Leggett, 38 So. 549.

Enticing laborer. Prosecution. Instructions. Evidence sufficient to justify conviction.
Gregory v. State, 42 So. 168.

Enticing tenant: offense.
Sneed v. Gilman, 44 So. 830.

1900, Page 141, Chapter 103.
Hurling missile into train: offense.
State v. Ray, 87 M. 183, 39 So. 521.

1900, Page 141, Chapter 104, Section 3.
Unlawful keeping and sale of liquors by "occupant" of building. Issue and proof: fatal variance.
Levy v. State, 89 M. 394, 42 So. 875.

1900, Page 141, Chapter 104.
Parol evidence. United States internal revenue license: notice to produce.
Clark v. Adams, 80 M. 219, 31 So. 746.

1900, Page 141, Section 3.
Connivance at unlawful sale of intoxicants: presumptive evidence. Autrefois acquit.
Carroll v. State, 80 M. 349, 31 So. 742.

1900, Page 142.
Intoxicating liquors. Seizure. Unconstitutionality in not providing for notice, cannot be alleged by claimant appearing and contesting right to property.
Quin v. State, 82 M. 75, 33 So. 839.

1900, Page 153, Chapter 119, Section 10.
Road contractor cannot be prosecuted for non-repair of road which he has had neither time nor opportunity to put in good condition. Indictment.
Cain v. State, 81 M. 420, 33 So. 222.

Misdemeanor intended to be created probably that specifically described by Code 1892, § 1143.
Elmore v. State, 81 M. 422, 33 So. 225.

1900, Page 153, Chapter 119.
Failure of road contractor to work roads: indictment.
State v. Burkett, 83 M. 301, 35 So. 689.

Municipality: when streets are worked "at expense of municipal treasury."
McComb City v. Pike County, 86 M. 647, 38 So. 721.
See McComb City v. Pike County, 91 M. 736, 45 So. 871.

Working public roads by contract: validity of contract.
Quin v. Pike County, 94 M. 356, 48 So. 235.

1900, Pages 154, 155, Sections 6, 7.
Meaning obscure.
Lincoln County v. Brookhaven, 90 M. 5, 41 So. 449.
See McComb v. Pike County, 86 M. 647, 38 So. 721.

1900, Page 164.
Stock law. Creation of district less in area than township.
Shaw v. Woffard, 82 M. 143, 34 So. 329.

1900, Page 164, Chapter 124.
Amendatory, Laws 1897, p. 21. ch. 17. Amended, Code 1906, § 2235. Supervisors of county without stock law cannot tack sections of land in its boundaries to stock law district in adjoining county.
Dickerson v. Tishomingo County, 92 M. 223, 45 So. 21.

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1900, Page 173, Chapter 134.
Purports to amend charter of Meridian. Constitutionality.
Monette v. State, 91 M. 662, 44 So. 989.

1902, Page 54, Chapter 57.
Penitentiary farm. Discretion of board of control.
State v. Henry, 87 M. 125, 40 So. 152.
See Henry v. State, 87 M. 1, 39 So. 856.

1902, Page 62, Chapter 59.
Insurance companies. Foreign association. Prosecution for violation. Affidavit. Evidence.
Fikes v. State, 87 M. 251, 39 So. 783.

1902, Page 66, Chapter 59, Section 14.
Policies of insurance issued in foreign state on lives in this state are to be construed according to our laws.
Fidelity Mut. Life Ins. Co. v. Miazza, 93 M. 18, 46 So. 817.

1902, Page 105, Chapter 66.
Primary election. Executive committee. Mandamus. Recanvass of returns. Defeated candidate. Declaration of nomination, adjudication of legality of votes cast.
State v. Abbay, 82 M. 559, 35 So. 153.

1902, Page 132, Section 1.
Right of levee commissioners to levy tax on all privileges exercised within levee district.
Royal Ins. Co. v. Board of Levee Commissioners, 95 M. 168, 48 So. 183.

1902, Pages 133, 134, Sections 4, 10.
Levee commissioners. Privilege tax. Trading car. Non-payment. Penalty. Collection.
S. Zemurray & Co. v, Bouldin, 87 M. 583, 40 So. 15.

1902, Page 137, Chapter 83, Section 3.
Bonds issued under this act: board's right to use proceeds for building new levee.
Ham v. Yazoo-Mississippi Delta, 83 M. 534, 35 So. 943.

1902, Page 141, Chapter 89.
"Authorization" of Yazoo &c. R. Co. to purchase and operate part of tracks of Southern R. Co. in Mississippi, unconstitutional.
Yazoo &c. R. Co. v. Southern R. Co. in Mississippi, 83 M. 746, 36 So. 74.

1902, Page 154, Chapter 103.
Amendatory, Code 1892, §§ 2912a, 2913. Municipality. Annexation of unincorporated adjacent territory. Priority of initial step. Reasonableness of extension.
Jackson v. Whiting, 84 M. 163, 36 So. 611.

1902, Page 172, Chapter 123.
Authorizes election to determine question of removal of county seat of Perry county. Constitutionality.
Hinton v. Perry County, 84 M. 536, 36 So. 565.

1902, Page 184, Chapter 135.
Divided Tallahatchie county into two circuit and chancery court districts. Operation. Conduct of governmental functions of county.
Reed v. Heard, 97 M. 743, 53 So. 400.

1904, Page 47, Chapter 57.
Act for relief of J. W. Carter is constitutional and became law under Const. 1890, § 72.
Henry v. Carter, 88 M. 21, 40 So. 995.
See Carter v. Henry, 87 M. 411, 39 So. 690.

1904, Page 57, Chapter 75.
Contract in business delinquent as to privilege tax: constitutionality of amnesty act.
North British &c. Ins. Co. v. Edwards, 85 M. 322, 37 So. 748.

1904, Page 58, Chapter 76.
Imposes privilege tax on each individual, &c., doing money-lending business on personal securities. Constitutionality.
Hyland v. Sharp, 88 M. 567, 41 So. 264.
See Rodge v. Kelly, 88 M. 209, 40 So. 552, 117 Am. St. 733, 11 L. R. A. (N. S.) 635.

1904, Page 62, Chapter 76, Section 18.
Privilege tax. Coca-cola. Wholesale grocer.
Carney v. Hamilton, 89 M. 747, 42 So. 378.

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1904, Page 65, Chapter 76, Section 27.
Privilege tax. Cottonseed oil mill. "Capital."
Senatobia Oil Co. v. Poag, 86 M. 457, 38 So. 741.
See Hazlehurst Oil Mill &c. Co. v. Decell, 33 So. 412.
Crenshaw Oil Co. v. Johnson, 94 M. 773.

1904, Page 69, Section 49.
Insurance agencies and agents. Privilege tax. Unrepugnant to Const. 1890, § 112.
Clarksdale Ins. Agency v. Cole, 87 M. 637, 40 So. 228.

1904, Page 79, Chapter 76, Section 93.
Trading cars. Privilege tax. Payment. License. Rights of licensee.
Zemurray v. Bouldin, 87 M. 583, 40 So. 15.

1904, Page 125, Chapter 89.
Warehouse receipt: rights of bona fide holder.
Star Compress &c. Co. v. Meridian Cotton Co., 87 M. 228, 39 So. 417.

1904, Page 126, Chapter 90, Section 5.
Must be construed with Laws 1896, p. 172, ch. 156, § 16. Levee tax. "Cotton." "Seed cotton."
Levee Commissioners v. Refuge Cotton Oil Co., 91 M. 480, 44 So. 828.

1904, Page 140, Chapter 99.
Controlling purpose, to secure real separation on street cars of white and colored races. "Adjustable screens." Right of conductor to move passenger. Punitive damages.
Southern Light & Traction Co. v. Compton, 86 M. 269, 38 So. 629.

Street railways. Separate accommodations for races. Action for ejection and arrest. Admissibility of evidence as to company's custom.
Waldauer v. Vicksburg &c. R. Co., 88 M. 200, 40 So. 751.

1904, Page 168, Chapter 116.
Amendatory Vicksburg charter. Provided only for new presiding officer for existing court. Proper legislation.
Ex parte Dickson, 89 M. 778, 42 So. 233.

1906, Page 118, Chapter 132 (Code 1906, Chapter 39).
Drainage district. Petition. Payment of interest on bonds annually, valid. Act is not invalidated by Const. 1890, § 90, but is part of public laws of state.
Haley v. Drainage Com'rs, — M. —, 55 So. 353.

1906, Page 185, Chapter 167.
Division of county into two court districts. Election. Canvass of returns and declaration of result. Jurisdiction of chancery court.
Native Lumber Co. v. Harrison County. 89 M. 171, 42 So. 665.
See McHenry v. State, 91 M. 562, 44 So. 831, 16 L. R. A. (N. S.) 1062n.

1906, Page 197, Chapter 168.
Divides Jasper county into two judicial districts. Expense of erection of court-house and jail, &c. Sections 20 and 21 neither "ultra vires" nor violative of Const. 1890, § 112.
Turner v. Cochran, 89 M. 206, 42 So. 876.

1908, Page 56, Chapter 72.
Limits levy under Code 1906, § 324.
Wells v. McNeill, 93 M. 407, 48 So. 184.

1908, Page 59, Section 7.
Privilege tax. Fire insurance companies. Not void under Const. 1890, § 234.
Royal Ins. Co. v. Board of Levee Commissioners, 95 M. 168, 48 So. 183.

1908, Page 59, Chapter 73, Section 7.
Purports to amend Code 1906, § 3832. Constitutionality.
Board of Levee Com'rs of Yazoo-Mississippi Delta v. Royal Ins. Co., 96 M. 832, 51 So. 2.

1908, Page 77, Chapter 96.
State depositories. Constitutionality of act.
State v. Edwards, 93 M. 704, 46 So. 964.

1908, Page 81, Chapter 97.
Depositories for Yazoo-Mississippi Delta Levee Board. Constitutionality, &c., of act.
Bobo v. Board of Levee Com'rs, 92 M. 792, 46 So. 819.

1908, Page 90, Chapter 100.
Bulk sales law: constitutionality, &c.
Moore v. Rowe, 97 M. 775, 53 So. 626.

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1908, Page 92, Chapter 102.
Provides for establishment of county agricultural high school for white youth, &c. Constitutionality.
McFarland v. Goins, 96 M. 67, 50 So. 493.

1908, Page 98, Chapter 107, Section 14.
Has nothing to do with sale of cotton seed meal. Does not repeal Code 1906, § 1317.
Alcorn Cotton Oil Co. v. State, — M. —, 54 So. 881.

1908, Page 104, Chapter 109.
Directs confinement of convict until payment of fine and costs. Constitutionality. Did not repeal in toto Laws 1908, p. 185, ch. 168.
Ex parte McInnis, — M. —, 54 So. 260.

1908, Page 105, Section 3.
Convict unable to labor, &c. Discharge by board of supervisors. Constitutionality of act.
State v. Kirby, 96 M. 629, 51 So. 811.

1908, Page 115, Chapter 114, Section 1797; Page 117, Chapter 115, Section 1747.
Prosecution for unlawfully keeping for sale intoxicating liquors: evidence.
Price v. Gulfport, 97 M. 477, 52 So. 486.

1908, Page 116, Chapter 114, Section 1.
Amendatory, Code 1906, § 1797. Penalizes possession of intoxicating liquors for purpose of unlawful sale or gift. Affidavit.
Gulfport v. Martin, 96 M. 131, 50 So. 502.

1908, Page 116, Chapter 114, Section 1797; Page 116, Chapter 116, Section 1746.
Intoxicating liquors. Municipal ordinance.
Hurley v. Corinth, 97 M. 396, 52 So. 695.

1908, Page 117, Chapter 115.
Amendatory of Code 1906, § 1747. Unlawful sale of intoxicating liquors: conviction on undenied charge may be had on presumptive proof alone.
Gillespie v. State, 96 M. 856, 51 So. 811, 926.

1908, Page 124, Chapter 119.
Amendatory, Code 1906, § 5002. "Unfair competition."
Retail Lumber Dealers' Assn. v. State, 95 M. 337, 48 So. 1021.
Amendatory, Code 1906, § 5002. Trusts and combines. Telephone corporation: contract.
Cumberland Telephone &c. Co. v. State, — M. —, 54 So. 670.

1908, Page 130, Chapter 121.
Relinquishes title or claim of state to certain lands sold prior to 1875 for delinquent taxes, &c. Constitutionality.
Winton v. Day, 96 M. 1, 49 So. 264.

1908, Page 131, Chapter 122.
Foreign public service corporation, in business in this state. Removal of cause to federal court. Enforcement. Constitutionality of act.
State v. Louisville &c. R. Co., 97 M. 35, 51 So. 918, 53 So. 454.

1908, Page 132, Chapter 123.
Foreign corporation. "Doing business." "Agent," for purpose of process. Act prospective in operation.
Saxony Mills v. Wagner, 94 M. 233, 47 So. 899, 23 L. R. A. (N. S.) 834n.

1908, Page 183, Chapter 167.
Amendatory of Code 1906, § 721. Sheriff holding proceeds of execution in favor of widow may file interpleader to settle conflicting claims.
Kelly v. Howard, — M. —, 54 So. 10.

1908, Page 185, Chapter 168.
Provides that "no convict shall be held in custody for a fine and imprisonment longer than two years." Not repealed in toto by Laws 1908, p. 104, ch. 109.
Ex parte McInnis, — M. —, 54 So. 260.

1908, Page 196, Chapter 187.
Amendatory, Code 1906, § 3312. One municipality cannot absorb another, &c.
Gandsi v. Seminary, 95 M. 315, 48 So. 908.

1908, Page 204, Chapter 194.
Extends protection of Const. 1890, § 193, to new class of employes. Prospective in operation.
Givens v. Southern Ry., 94 M. 830, 49 So. 180, 22 L. R. A. (N. S.) 971.

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1908, Page 205, Chapter 196, Section 1.
Amendatory, Code 1906, § 4070. Penalty for failure of carrier to settle claim, &c. Constitutionality of act.
Mobile &c. R. Co. v. Brandon, — M. —, 53 So. 957.

1908, Page 269, Chapter 227, Section 3.
Cotton weigher cannot enjoin employment of private weigher.
Miller v. Winston County Union Warehouse Co., 94 M. 348, 47 So. 501.

1910, Page 72, Chapter 99.
Authorizes issuance of bonds for expenses of state government. "Par." "Par value."
Smith v. State, — M. —, 56 So. 179.

1910, Page 93.
Addition to Code 1906, § 797a. Failure to deliver stenographer's notes to attorney representing appellee. Motion to strike out.
Evans v. Ham, — M. —, 54 So. 250.

1910, Page 94.
Addition to Code 1906, § 797d. Motion to strike out stenographer's notes.
Evans v. Ham, — M. —, 54 So. 250.
See Lumber Mineral Co. v. King, — M. —, 54 So. 250.

1910, Page 105, Chapter 119; Page 109, Chapter 120.
Mississippi Normal College: issuance of bonds by municipality to procure location, &c. Constitutionality of acts.
Turner v. Hattiesburg, — M. —, 53 So. 681.

1910, Page 125, Chapter 135.
Questions of negligence and contributory negligence for determination of jury. Diminution of damages. Constitutionality, &c., of act.
Natchez &c. R. Co. v. Crawford, — M. —, 55 So. 596.

1910, Page 140, Chapter 149.
Construction of highways, &c. Constitutionality of act. Validity of proceedings of supervisors in attempting to issue bonds, &c.
Thomas v. Lee County, — M. —, 53 So. 585.

1910, Page 145, Chapter 150.
Allows roads to be worked by county board through commissioner. Constitutionality of act.
Weston v. Hancock County, — M. —, 54 So. 307.

1910, Page 222.
Amendatory, Code 1906, § 5005. Trust. Purchase of stock. Corporation and individual, contracting parties.
Cumberland Telephone &c. Co. v. State, — M. —, 54 So. 670.

1910, Page 278, Chapter 321.
Authorizes creation of Walthall county, &c. Commissioners of election. Duty. Authority. Mandamus. Disposition of cause on appeal.
State v. Pigott, — M. —, 54 So. 257.

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